THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO: CV2018-00834

IN THE MATTER OF THE WILLS AND PROBATE ORDINANCE, CHAPTER 8 NUMBER 2 S 17 OF THE LAWS OF TRINIDAD AND TOBAGO

IN THE MATTER OF THE ESTATE OD CLAIRE WILCOX ALSO CALLED CLAIRE DA COSTA OF 25 BADEN POWELL STREET, WOODBROOK, DECEASED.

IN THE MATTER OF AN APPLICATION BY DONA DA COSTA MARTINEZ TO BE APPOINTED ADMINISTRATRIX AD LITEM AND AD COLLIGENDA BONA OF THE ESTATE OF CLAIRE WILCOX OTHERWISE CLAIRE DA COSTA, DECEASED.

AND

DONA DA COSTA MARTINEZ

APPLICANT

CLAIM NO: CV2018-01490

BETWEEN

IN THE MATTER OF THE ESTATE OF CLAIRE WILCOX OTHERWISE CLAIRE DA COSTA BY HER ADMINISTRATOR AD LITEM AND AD COLLIGENDA BONA DONA DA COSTA MARTINEZ

CLAIMANT

AND

THEODORE RYAN

DEFENDANT

Before the Honourable Madame Justice Quinlan-Williams

Date of Delivery of Decision: 12th September, 2019

Appearances: Mr. Richard M. Thomas instructed by Ms. Angelique S. Olowe for the Applicant/Claimant

Mr. Brian Busby instructed by Ms. Jozanne Quamina for the Defendant

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DECISION ON THE DEFENDANT'S NOTICES OF APPLICATION DATED THE 18TH JUNE 2018 AND 21ST JUNE 2018

Background

1. Claire Wilcox otherwise referred to as Claire Da Costa (hereinafter referred to as "Claire") died intestate on the 12th June 2011. Letters of Administration was granted to her mother Cecelia Da Costa on the 3rd July 2015, appointing her as the Legal Personal Representative of Claire's estate. Cecelia Da Costa on the 6th October 2017 departed this life, also intestate. Before Cecelia Da Costa's death, she appointed Dona Da Costa (hereinafter referred to as "Dona") as her lawful attorney by virtue of Power of Attorney DE20160288282817 D001 dated the 6th December 2016. To date, no grant De Bonis Non has been obtained as it relates to Claire's estate; neither has there been an application for Letters of Administration in the estate of Cecelia Da Costa.

2. The applicant/claimant and defendant in these related matters are no strangers to this court. Preceding the instant matters currently engaging the court's attention, was a related claim intituled CV2016-04476 Cecelia Da Costa (In her capacity as Legal Personal Representative of the Estate of Claire Wilcox also known as Claire Da Costa (deceased) By Her Lawful Attorney Dona Da Costa Martinez by virtue of Power of Attorney DE20160288282817 D001 dated the 6th day of December 2016) v Theodore Ryan.

3. In that claim, on the 24th November 2017, Dona filed an application with an affidavit to be appointed the Administrator Ad Litem of the estate of Claire pursuant to section 37 of the Wills and Probate Ordinance Chapter 8 No. 2; and a supplemental affidavit dated the 11th December 2017 to be substituted as a party pursuant to Part 19.5(1) of the Civil Proceedings Rules ("CPR"). However, the said application was denied by the court which resulted in the dismissal of claim CV2016-04476 in its entirety on the 8th March 2018.

4. Consequently, on the 12th March 2018 Dona filed ex parte, an entirely new application CV2018-00834, with a certificate of urgency to be appointed Administrator Ad Litem and Ad Colligenda Bona of Claire's estate pursuant to section 37 of the Wills and Probate Ordinance Chapter 8 No. 2. By the Order dated the 23rd March 2018, Dona was appointed Administrator Ad Litem and Ad Colligenda Bona of Claire's estate. Additionally, an injunction against the defendant was granted whereby the property known and described as Lot No. 25 Baden Powell Street, Woodbrook, Port of Spain (hereinafter referred to as "the subject property") was not to be sold, disturbed or altered in anyway until the determination of these proceedings.

5. As a result of the order appointing Dona as the Administrator Ad Litem and Ad Colligenda Bona of Claire's estate, she commenced fresh proceedings CV2018-01490 by way of claim form and statement of case on the 27th April 2018 against the defendant wherein she claimed the following reliefs:
    a. A Declaration that the deceased, Claire Wilcox otherwise Claire Da Costa engaged in partnership business with the Defendant in T.R. Services Limited and 'Simple Escapes" for the purposed of profit.

b. A Declaration that the deceased and the Defendant acquired real property together through which the Partnership business was conducted at ALL AND SINGLUAR that certain piece or parcel of land situate at Woodbrook, in the City of Port of Spain, in the island of Trinidad, Known as Lot No. 25 Baden Powell Street measuring Four Hundred and Thirty-Four Point Nineteen Square Metres (434.19M2) and abutting on the North upon Baden Powell Street on the South upon other lands of the Port of Spain Corporation and the East upon Lot No. 23 Baden Powell Street and on the West upon Lot No. 27 Baden Powell Street Together with the buildings thereon and the appurtenances thereto belonging, the same created by Deed of Lease in Deed dated 30th day of July 1996 and Registered as No. 14498 of 1996 and in which the partnership business was conducted.

c. A Declaration that the deceased is entitled to a half share of the partnership assets including but not limited to a half share No. 25 Baden Powell Street, Woodbrook and in the and whatever profits have been accrued to date and more particularly since the date of her death on 12th June 2011 pursuant to Section 45 of the Partnership Act.

d. An Accounting for the profits made under T R Services Limited accrued at the date of death of the Deceased 12th June 2011.

e. Repayment of personal loans advanced to the Defendant by the Deceased to the estate of the Deceased.

f. An Accounting of the Colonial Life Insurance Company (Trinidad) Limited investments plan E7PA, under contract no. R 000 222219-issue date of contract 12th day of April 2008 accrued at the date of the death of the Deceased 12th June 2011.

g. A final settlement of accounts as between the Defendant and the estate of the Deceased to such share of the profits made since the date of death of the Deceased, from the 12th day of June 2011 or as assessed by the Court as to what partnership assets is attributable to the estate of the Deceased.

h. Interest at the rate of 6% a year on the amount of the Deceased share of the partnership assets.

i. Alternatively, that the Memorandum of Agreement dated the 22nd day of December 2000 and made between the Claire Da Costa Wilcox (Deceased) and the Defendant be given full effect.

j. Such further and/or other relief as to the Court may seem just and/or expedient.

k. Costs.

6. On the 18th June 2018 in claim CV2018-01490, Theodore Ryan filed a Notice of Application applying *inter alia* for the claim form and statement of case in the matter to be struck out; and in the alternative, that time for the defendant to file a defence be extended to 28 clear days from the determination of the application.

7. Furthermore, on the 21st June 2018 Theodore Ryan filed another Notice of Application, in Dona's ex parte application CV2018-00834, whereby he sought *inter alia* to be added as a respondent to Dona's ex parte application; that the order dated the 23rd March 2018 appointing Dona as Administrator Ad Litem and Ad Colligenda Bona of Claire's estate be set aside and the related ex parte application filed on the 12th March 2018 be struck out and/or dismissed.

8. The defendant contends that the order in CV2018-00834 dated the 23rd March 2018 appointing Dona as Administrator Ad Litem and Ad Colligenda Bona of Claire's estate ought to be set aside. It is his case that the application relating to that order, was the same application that was made in CV2016-04476 (save for the addition of the words "And Ad Colligenda Bona" in the later application in CV2018-00834). In CV2016-04476 the defendant Theodore Ryan, took the preliminary objection that the claim was void as Dona did not have the locus standi to commence that action. After the court's consideration of written and oral submissions on both sides, the court agreed with the defendant's objection and Dona's application and claim were dismissed on the 8th March 2018.

9. The defendant therefore asserts that the right course of action that Dona ought to have adopted, was to appeal the order dismissing the application and claim as opposed to instituting new proceedings. As a result, Dona's filing of the ex parte application in CV2018-00834 which is in substance the same application that was made in CV2016-04476, is deemed res judicata as the issues were previously decided and is consequently an abuse of process.

10. Furthermore, the defendant stated that court had no power pursuant to section 37 of the Wills and Probate Ordinance Chapter 8 No. 2 to have granted the injunction against him and to appoint Dona as the Administrator Ad Litem and Ad Colligenda Bona of Claire's estate. Dona's failure to obtain Letters of Administration in the estate of Cecelia Da Costa (the deceased Legal Personal Representative for the estate of Claire), and/or a grant De Bonis Non in the estate of Claire renders the claim void ab initio as there is no legally constituted claimant.

11. The defendant affirms that a claim can only be initiated by the personal representative of the deceased's estate, where a person dies intestate as is the case here, upon the receipt of these associated grants which Dona has so failed to obtain. As a result, Dona has no locus standi to bring the claim CV2018-01490 against him because section 37 of the Wills and Probate Ordinance Chapter 8 No. 2 does not permit Dona in law, to commence legal proceedings.

Issues

12. The issues for the court's determination are:
    a. Whether Dona's applications in CV2016-04476 and CV2018-00834 are materially the same amounting to res judicata and an abuse of process, thereby rendering the court's order dated the 23rd March 2018 void; if not
    b. Whether the court had the power under section 37 of the Wills and Probate Ordinance Chapter 8 No. 2 to appoint Dona as Administrator Ad Litem and/or Ad Colligenda Bona in the application CV2018-00834 and whether Theodore Ryan ought to have been joined as a party; and
    c. Whether the filing of the new claim CV2018-01490 is res judicata amounting to an abuse of process and ought to be struck out and if not, whether the claim is properly constituted.

Law and Analysis

a. Whether the applications in CV2016-04476 and CV2018-00834 are materially the same amounting to res judicata and an abuse of process

13. Claim CV2016-04476 was commenced by way of claim form filed on the 13th December 2016 and statement of case filed on the 22nd May 2017. The claim was brought in the name of Cecelia Da Costa as the legal personal representative of Claire's estate by Cecelia's lawful attorney

Dona Da Costa pursuant to the power of attorney DE201602882817D001 dated the 6th December 2016. After Cecelia Da Costa's death on the 6th October 2017, Dona filed a Notice of Application on the 24th November 2017 to be appointed Administrator Ad Litem of Claire's estate pursuant to section 37 of the Wills and Probate Ordinance Chapter 8 No. 2. However, the said application was dismissed on the 8th March 2018 which caused the entire claim to be dismissed for want of capacity of the claimant.

14. Following the dismissal, Dona filed another application ex parte, on the 12th March 2018 in CV2018-00834; this time to be appointed Administrator Ad Litem and Ad Colligenda Bona of the estate of Claire, again pursuant to section 37 of the Wills and Probate Ordinance Chapter 8 No. 2.

15. The defendant claims that upon a perusal of the two applications, they are exactly the same. The only difference between them, which he submits makes no difference in law, is that in the second application in CV2018-00834, the words "And Ad Colligenda Bona" are added after the words "Administratrix Ad Litem". Therefore, he asserts that the addition of these words in the second application does not distinguish it from the first application which was already ventilated by the court in CV2016-04476 engaging quite a bit of the court's time and resources.

16. In CV2016-04476 a statement of case was filed on the 22nd May 2017; a defence was filed on the 20th June 2017; and an amended defence and counterclaim was filed on the 20th July 2017. On the 24th November 2017, Dona applied for injunctive relief which was granted on the 28th November 2017 after the court heard oral submissions from both sides. In relation to Dona's application to be appointed Administrator Ad Litem, very extensive written submissions were filed by both sides including: written submissions on behalf of the defendant filed on the

17th November 2017; written submissions by the claimant on the 8th January 2018; written submissions in reply by the defendant on the 24th January 2018 and supplemental submissions in reply by the defendant on the 5th March 2018. Furthermore, on the 8th March 2018 the court heard oral submissions before dismissing Dona's application to be appointed Administrator Ad Litem and dismissing CV2016-04476 in its entirety.

17. Based on the foregoing, it is the defendant's case that in light of the extensive consideration that was previously given to her first application, she ought not to have filed the second application in CV2018-00834 asking the court to again appoint her Administrator Ad Litem and now Ad Colligenda Bona (which in his opinion ought to have been included in the first application). By so doing, the defendant asserts that Dona launched a collateral attack against the orders of the court in CV2016-04476 by attempting to re-litigate the same issues which were raised or could have been raised in those proceedings. Instead, the remedy she should have availed herself of was to employ the appeal process, thereby challenging the said order which dismissed her application and claim. As a result, the option she chose to utilize amounts to an abuse of process.

18. The topic of abuse of process was dealt with extensively in the case of *Johnson -v- Gore Wood & Co*. [2000] UKHL 65 where Lord Bingham of Cornhill quoted Wigram VC in the case of *Henderson -v- Henderson*[1] who opined on the governing principles of res judicata amounting to an abuse of process:

> "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

[1] [1843–60] All ER Rep 378 at 381–382

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."

19. The defendant in reliance on Lord Bingham's statement in *Johnson* [supra] stated that an abuse of process is wider than the re-opening of an issue already decided by the court in earlier proceedings (res judicata in its narrow sense):

> "Thus the abuse in question need not involve the reopening of a matter already decided in proceedings between the same parties, as where a party is estopped in law from seeking to re-litigate a cause of action or an issue already decided in earlier proceedings, but (as Somervell LJ put it in Greenhalgh v Mallard [1947] 2 All ER 255 at 257) 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.'"

20. The defendant also asserted that the principles of abuse of process, res judicata and issue estoppel apply even when the parties or their privies are the same and who attempt to litigate in another action, issues which have been fully investigated and decided on in a former action[2]. For clarity sake he relied on Jowitt's Dictionary of English Law, Second Edition in defining the terms "res judicata":

> "A final judgment already decided between the same parties or their privies on the same question by a legally constituted court having jurisdiction is conclusive between the parties, and the issue cannot be raised again."

[2] *Bragg -v- Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1982] 2 Lloyds Rep. 132 at 137

21. And “privies” which is defined as:

> “those who are partakers or have an interest in any action or thing, or any relation to another. They are said to be of six kinds: privies in blood, such as the heir to an ancestor, or between coparceners; privies in representation, as executors or administrators to their deceased testator or intestate; privies in estate, as a grantor or grantee, lessor and lessee, assignor and assignee, etc.; privies in respect of contract, such privities being personal privities extending only to the persons of the lessor and lessee, or the parties to the contract or assignees upon a fresh contract or novation with the assignee; privies in respect of estate and contract together, as where the lessee assigns his interest, but the contract between lessor and lessee continues, the lessor not having accepted the assignee in substitution; and privies in law, as the lord by escheat, a tenant by curtesy, or in dower, the incumbent of a benefice, a husband suing or defending in right of his wife etc.”

22. It is also an abuse of process to file a new claim to launch what is in effect a collateral attack on an earlier decision made by the court. Apart from the travesty of justice in causing the plaintiffs to re-litigate matters which have been investigated and decided in their favor in the natural forum, it runs the risk of inconsistent verdicts being reached. Public policy requires that there be the end of litigation and that a litigant should not be vexed more than once in the same cause[3].

23. A similar sentiment was reflected in the Court of Appeal decision of *Barrow -v- Bankside Agency Ltd* [1996] I WLR 257 at 260:

> “The rule in *Henderson v. Henderson* (1843) 3 Hare 100 is very well known. It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action

[3] *House of Spring Gardens Ltd -v- Waite* [1990] 2 All ER 990

estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed."

24. In such cases, the test to be applied by the courts in the determination of whether the circumstances amounted to an abuse of process was laid down by Lord Bingham in *Johnson* [supra]

> "…a broad, merits-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. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not… While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

25. The local courts have also addressed the issue of abuse of process whereby litigants have chosen not to use the appellate process but to litigate the matter afresh. Kokaram J in his judgment of CV2012-04235 *David Walcott -v- Scotiabank of Trinidad and Tobago Limited* at paragraph 3:

> "Here the Claimant has made a conscious choice not to appeal the earlier decision dismissing his claim as an abuse of process, when it was open to him to do so, but rather to litigate the identical matter afresh. This is to encourage the circumvention of an appellate process which in itself enshrines and protects the litigant's right to access to justice. It makes a mockery of the appellate process if litigants when faced with an unfavourable decision on a procedural issue or which results in its dismissal to simply re-file the claim. It brings the administration of justice into disrepute…Such litigation must be smothered in its infancy, as to permit such re-litigation is wholly inconsistent with the

> overriding objective of dealing with cases justly having regard to the principles of equality, proportionality and economy. It is no excuse that the subject matter of this claim has not been adjudicated upon previously. The fact is the Claimant had ample opportunity to pursue his claims in previous proceedings and it is vexatious and an abuse for him to do so now in these fresh proceedings."

26. At paragraph 17 Kokaram J opined on the ambits of an abuse of process and the test the court will adopt when faced with such a case:

> "The *Henderson v Henderson* abuse of process is recognized as a wider form of res judicata and equally applies to claims that have not been litigated on the merits previously and following the change in culture in the court's approach to case management, it is no longer acceptable to seek to litigate, in subsequent proceedings, issues already raised but not adjudicated upon in earlier proceedings which had themselves been struck out on grounds of delay or abuse of process. In deciding whether to permit the second action to proceed, the court will bear in mind the overriding objective and will consider whether the claimant's wish to 'have a second bite at the cherry' outweighed the need to allot the court's limited resources to other cases. See Caribbean Civil Court Practice 2011, D. Mambro Note 23.27."

27. And at paragraph 22 in applying the test Kokaram J stated:

> "In specific answer therefore to the Claimant's concern that his claim has not yet been heard on the merits, the backdrop of this action reveals that not only had the Claimant the opportunity to litigate his claim on the merits in the first action but that the identical claim had already been struck out as an abuse in the second action and he cannot now with a fresh action mount a collateral attack on that judgment."

28. In addition, the defendant relied on the Civil Proceedings Rules 1998 (as amended). Part 26 empowers the court to strike out, dismiss or stay proceedings that are an abuse of process. Part 1 mandates that the court deals with cases justly by employing a balancing exercise to ensure that an appropriate share of the court's resources is allotted to each case.

29. In response, Dona averred that the defendant's opposition to her appointment has no legal basis as she is entitled to a share in Claire's estate and is properly before the court to commence any action against the dissipation or spoilage of the said estate. She further stated that the instant matter does not cross the threshold to be considered res judicature or an abuse of process also relying on Wigram VC's quote in the *Henderson* [supra] case who opined on the governing principles surrounding res judicature and an abuse of process.

30. In applying the quote to the instant matter Dona averred firstly that in the two applications in dispute, it was never the same claimant or applicant bringing proceedings against him. In the first set of proceedings CV2016-04476, Dona asserts that it was her mother Cecelia Da Costa, the legal personal representative of Claire's estate who brought the first application. The lawful attorney was only acting as the agent, only, of the legal personal representative for the purpose of instituting the claim. In the instant related proceedings, Dona affirms that she now comes, in accordance with the law, in her own right and name. Therefore, the parties are not the same.

31. In support of her case, Dona sought to rely on the case of *C(A Minor) -v- Hackney London Borough Council* CA 10 (1996) 1WLR 789. In that case C's mother was awarded damages against the respondent council for injuries to her health for their failure as landlords to repair the council house. Subsequently, C suing by her stepfather as next friend, brought an action against the council in respect of C's own personal injury and obtained judgment in default of a defence. The council applied to set aside the judgment and to strike out C's claim on the basis that the principle of res judicata in its wider sense applied to C's claim. The judge granted the council's application and C appealed. It was held that the judge was not entitled to find that C's dependence on her mother created a sufficient nexus between them that they

should be regarded effectively as the same party. Since C had not been a party to the earlier proceedings, the doctrine of res judicata, even in its widest sense, had no application.

32. However, the defendant stated that this Court of Appeal decision could not be relied on to diminish the principles established by the House of Lords decision of *Johnson* [supra]. Lord Bingham who gave the leading judgment in *Johnson* [supra] referred to *C(A Minor)* [supra] highlighting that that case turned on its own peculiar facts and though Simon Brown LJ allowed the appeal, issued a stern warning that:

> "…this judgment should not be taken as any encouragement to lawyers or their clients to follow the course in fact adopted here. As the judge rightly recognised, in circumstances such as these, it is plainly in the public interest to have a single action in which the claims of all affected members of the household are included, rather than a multiplicity of actions."

33. Secondly, Dona states that in CV2016-04476 the defendant argued as a preliminary point that the matter was a nullity and succeeded in doing so. The substantive points of the claim brought by Cecelia Da Costa was never heard, tried nor adjudicated upon by the court. Therefore, Dona submitted that the collateral or incidental issue could not be the basis for res judicata or an abuse of process in the matter.

34. However, defendant rebutted Dona's submission by relying on the authorities CV2012-04235 *David Walcott -v- Scotiabank Trinidad and Tobago Limited* and Civil Appeal No. P238 of 2013 *The Attorney General of Trinidad and Tobago -v- Trevor Mahabir* which illustrated that although the substantive points or issues of the claim were never heard or tried, were both dismissed as an abuse of process.

35. I will now proceed to examine the applications in CV2016-04476 and CV2018-00834 in the determination of the conundrum as to whether

they are indeed the same application which are to be decided upon twice by the court resulting in res judicata as claimed by the defendant.

36. Attached to the Notice of Application CV2016-04476 filed on the 24th November 2017 which asks the court to appoint Dona as Administrator Ad Litem of Claire's estate is Dona's affidavit filed on the said date, and her supplemental affidavit filed on the 11th December 2017.

37. Following the death of the legal personal representative, the lawful attorney sought leave to be substituted.

38. Dona's supplemental affidavit details that she received permission from her other siblings to apply to administer Claire's estate and to be appointed Administrator Ad Litem. Additionally, in her desire to continue the proceedings of CV2016-04476, she relied on the application of Part 19.5(1) which allows for the court to add, substitute or remove a party on or without an application, along with Parts 21.1, 21.2, 21.4 and 21.7 as follows:

> "21.1 (1) This rule applies to any proceedings, other than proceedings falling within rule 21.4 where five or more persons have the same or a similar interest in the proceedings.
> (2) The court may appoint—
> (a) one or more of those persons; or
> (b) a body having a sufficient interest in the proceedings, to represent all or some of the persons with the same or similar interest.
> (3) A representative under this rule may be either a claimant or a defendant.
>
> 21.2 (1) An application for an order appointing a representative party may be made at any time, including a time before proceedings have been started.
> (2) An application for such an order may be made by—
> (a) any party;
> (b) any person or body who wishes to be appointed as a representative party; or
> (c) any person who is likely to be a party to proceedings.
> (3) An application for such an order—
> (a) must be supported by evidence; and

(b) must identify every person to be represented, either—

(i) individually; or

(ii) by description, if it is not practicable to identify a person individually.

(4) An application to appoint a representative defendant must be on notice to the claimant.

(5) An application to appoint a representative claimant may be made without notice.

(6) The court may direct that notice of an application be given to such other persons as it thinks fit.

(7) If the court orders that a person not already a party shall be a representative defendant, it must make an order adding him as a defendant.

21.4 (1) This rule applies only to proceedings about—

(a) the estate of someone who is dead;

(b) property subject to a trust; or

(c) the construction of a written instrument.

(2) The court may appoint one or more persons to represent any person or class of persons (including an unborn person or persons) who is or may be interested in or affected by the proceedings (whether at present or for any future, contingent or unascertained interest) where—

(a) the person, or the class or some member of it, cannot be ascertained or cannot readily be ascertained;

(b) the person, or the class or some member of it, though ascertained cannot be found; or

(c) it is expedient to do so for any other reason.

(3) An application for an order to appoint a representative party under this rule may be made by—

(a) any party; or

(b) any person who wishes to be appointed as a representative party.

(4) A representative appointed under this rule may be either a claimant or a defendant.

(5) Where there is a representative claimant or representative defendant, a decision of the court is binding on everyone he represents.

21.7 (1) Where in any proceedings it appears that a dead person was interested in the proceedings then, if the dead person has no personal representatives, the court may make an order appointing someone to represent his estate for the purpose of the proceedings.

(2) A person may be appointed as a representative if he—

(a) can fairly and competently conduct proceedings on behalf of the estate of the deceased person; and
(b) has no interest adverse to that of the estate of the deceased person.

(3) The court may make such an order on or without an application.

(4) Until the court has appointed someone to represent the dead person's estate, the claimant may take no step in the proceedings apart from applying for an order to have a representative appointed under this rule.

(5) A decision in proceedings where the court has appointed a representative under this rule binds the estate to the same extent as if the person appointed were an executor or administrator of the deceased person's estate."

39. The court takes note that Dona's Notice of Application filed on the 12th March 2018 in CV2018-00834, also seeks the permission to be appointed Administrator Ad Litem and Ad Colligenda Bona pursuant to the said section 37 of the Wills and Probate Ordinance Chapter 8 No. 2. Within the grounds of her application she acknowledges that CV2016-04476 was dismissed on a preliminary point but since then, the defendant took steps to upset the status quo of the subject property, by endeavoring to oust Dona and her husband, residents of the said property. Within her supplemental affidavit filed on the 22nd March 2018, Dona evidenced that although the subject property was held jointly between Claire and the defendant, it was nevertheless partnership property and she feared that the defendant was about to dissipate the property forming part of Claire's estate and as such was desirous of protecting same. Again she also made mention of the fact that all the siblings of Claire consented to her application, and the application is required so that she can competently conduct proceedings on Claire's behalf.

40. Not even a cursory view of the applications would give the appearance as the defendant asserts, that they are the same applications to represent Claire's estate by virtue of section 37 of the Wills and Probate Ordinance Chapter 8 No. 2. The defendant fails to appreciate that the

application in CV2016-04476 was not to appoint to Dona as Administrator Ad Litem. The application was to appoint Dona in her representative role as the Lawful Attorney of Cecelia. It was Cecelia to be appointed as Administrator Ad Litem and Cecelia's duties and responsibilities were to be performed by her fiduciary Dona. Therefore, CV2016-04476 was never decided as the claim failed on a preliminary point as to Dona's locus standi in her representative role as Cecelia's the Lawful Attorney.

41. Cecelia Da Costa empowered Dona by virtue of the Power of Attorney to represent her. However, Cecelia Da Costa died before the proceedings were determined and it is trite law that the moment the donor of a power of attorney dies any power granted ceases to have effect[4].

42. Following Cecelia's death, Dona filed the application in CV2016-04476 asking the court to not only be appointed Administrator Ad Litem but also to be substituted as a party in those proceedings, in the capacity of legal personal representative, supported by the aforementioned provisions of the CPR. It appears that the supplemental affidavit was filed with the request to be substituted as a party because the defendant took the preliminary issue as to whether the Dona even had the requisite locus standi to appear before the court in light of Cecelia Da Costa's death.

43. It was for this reason the court ordered that it be addressed by submissions on the points: whether an executor can assign his rights, powers and duties; whether the power of attorney empowered Dona to bring these proceedings; and whether the matter stood disposed with the death of the claimant/legal personal representative.

[4] Powers of Attorney, Trevor Aldridge, 9th edition pages 84-85

Therefore, before factors surrounding the application to appoint Dona as Administrator Ad Litem pursuant to section 37 could even be considered, the court had to work out whether the claim was now even valid and/or rightly constituted based on the capacity in which the claim was brought.

44. Consequently, the application in CV2016-04476 and the entirety of the claim by extension, was not dismissed because of the issues relating to Dona being appointed pursuant to section 37 which were yet to be decided. The court dismissed the claim on the 8th March 2018 because Dona, as the Lawful Attorney of Cecelia, did not have locus standi to institute the claim after Cecelia's death.

45. Since it was determined that an executor or legal personal representative could not assign its office because it is one of personal trust[5], the court could not add or substitute Dona as a party, in the capacity of legal personal representative by virtue of the power of attorney, in those proceedings. The power of attorney only allowed Cecelia Da Costa to delegate her personal powers through the employment of an agent[6], in these circumstances Dona. Therefore, when Cecelia Da Costa died on the 6th October 2017, the power of attorney delegating Dona to represent her in the proceedings ceased to exist.

46. As a result, the application to appoint Dona as Administrator Ad Litem was never considered by the court because of this preliminary issue.

47. On the 12th March 2018 Dona chose to file a new application in CV2018-00834 to be appointed Administrator Ad Litem and Ad Colligenda Bona.

[5] In the Estate of Skinner [1958] 1 WLR 1043; Parry and Clark on the Law of Succession 11th edition at page 389

[6] Powers of Attorney Manual on the Law and Practice at pages 1 and 5; Trustee Ordinance 1950 Chapter 8:03 (This is on List of Omitted Acts) – Repealed by Act No. 21 of 1981. Said repeal not yet in operation

No doubt this new filing was consequential on the court's decision in CV2016-04476.

48. *Johnson* [supra] and the cases that applied the principles decided therein and *David Walcott* [supra] are not intended to benefit one party in an unjust manner. Such outcomes would not be in keeping with the law and Part 1 of the CPR. There are circumstances, including these, where the dismissal of a claim, not properly before the court and where the merits of the claim have not been considered or decided should not prevent the correct party from having access to justice.

49. The court is of the view that although the two applications appear to be the same, the parties are different and the first was never considered by the court and was dismissed for reasons not relating to the application. Further there are issues relating to the estate which have continued from the time that the first application was heard and dismissed. There are matters relating to the estate which are new and ongoing. In those circumstances this court cannot say that the applications are the same and that the estate and the beneficiaries are not entitled to access to justice. Therefore, in the circumstances the issues of res judicata and abuse of process do not arise.

b. The court's power under section 37 of the Wills and Probate Ordinance Chapter 8 No. 2 to appoint Dona as Administrator Ad Litem and/or Ad Colligenda Bona in the application CV2018-00834 and whether the defendant ought to have been joined as a party.

50. Dona submitted that since she did not possess a grant of representation in Claire's estate, but wished to bring an action to prevent the dissipation or spoilage of the estate (as a benefit to the estate), it was imperative for her to first initiate an action in her own name seeking an order appointing her for that purpose. This is because

she was desirous of commencing further proceedings in a representative capacity[7]. Without the necessary grant, the latter expected proceedings would have been deemed a nullity which could not be cured by a subsequent grant or appointment[8]. Hence, she made the application to be appointed Administrator Ad Litem and Ad Colligenda Bona in CV2018-00834. After she was so appointed she then proceeded to the commencement of the representative action CV2018-01490.

51. Additionally, she submitted that the only way for a beneficiary to protect an estate without the benefit of a grant of De Bonis Non as was the case, was for a representative to approach the court for a limited grant to do so. In support of her position she relied on the judgment of the Honourable Mr. Justice Robin Mohammed in CV2015-01702 *Estel Roberts -v- Dwayne Roberts and Joelene Marcelin-Roberts* where he made the distinction between the grant ad litem and grant ad colligenda bona and the requirements for such at paragraph 46:

> "[46] The grant ad litem enables a representative of the estate to sue on behalf of the estate or defend a suit where the estate has been sued prior to a full grant being obtained, whereas, the grant ad colligenda bona or preservation grant enables the representative with the power, particularly in circumstances where the estate of the deceased is in danger of spoliation, to collect and preserve the deceased's estate pending the making of a full grant. The circumstances in which either of these limited grants may be given are provided for at rule 25 to 27 of the Non-Contentious Business Rules, First Schedule of the Wills and Probate Act, which provides that-
>
> > "25. Limited administrations are not to be granted unless every person entitled to the general grant has consented or renounced, or has been cited and failed to appear, except under the direction of the Court.

[7] CV2013-04516 *Paul Sankar and others -v- Veronica Nanan and Sugania Raghoo* at paragraph 20
[8] CV2013-04516 *Paul Sankar and others -v- Veronica Nanan and Sugania Raghoo* at paragraph 27

> 26. Applications under subsection (1) of section 35 of the Act shall be made upon motion to the Court, and the Court may require notice to be given to persons having prior right to a grant or to such other persons as it may think fit. A grant under this subsection may be limited as regards time or portion of the estate or otherwise as the Court may think fit.
>
> 27. No person entitled to a general grant in respect of the estate of a deceased person will be permitted to take a limited grant except under the direction of the Court."

52. That being the case, Dona submitted that in line with the authorities, since she and the other sibling beneficiaries envisaged the dissipation or spoilage of Claire's estate by the defendant, they made the decision to allow Dona to represent them in a representative manner (evidenced by their written consent), in order to institute proceedings against Theodore Ryan to protect the property of Claire's estate.

53. The defendant submitted that Dona's appointment as Administrator Ad Litem and Ad Colligenda Bona by virtue of Section 37 of the Wills and Probate Ordinance Chapter 8 No. 2 in CV2018-00834 is null and void and of no effect because such appointment is ultra vires to the section. Section 37 provides:

> "37. (1) Pending the hearing of any action, petition, summons, or other proceeding, whether in the nature of contentious or common form business, it shall be lawful for the Court, on the application of the Administrator General or of any party interested, on its being shown that the estate of any person deceased is in danger of spoliation or that for any other reason steps require to be taken for the custody or preservation of any property forming part of such estate, to appoint an interim receiver or grant an interim injunction or order the sale of any perishable property to be made by any person, and otherwise to intervene for the protection of the estate of the deceased in such manner and on such terms as to security and otherwise as to the Court shall seem fit: Provided that any application under this section may be made in the first instance ex parte on affidavit."

54. He stated that the purpose of section 37 is to allow the court to make certain orders pending the hearing of a court matter filed in relation to contentious or common form business as it relates to an estate. Therefore, the court's power to make any order is limited only to matters concerning contentious or common form business. Section 70 of the Wills and Probate Act Chapter 9:03 defines contentious business as:

> "70. All procedure for obtaining proof of a Will in solemn form and all proceedings in any application subsequent to appearance being entered in answer to the warning of a caveat, and all applications for revocation or amendment of any probate or administration on any ground, and all proceedings by or against executors or administrators or by or against the Administrator General under the probate jurisdiction of the Court, shall be deemed contentious business."

55. Section 2 of the Wills and Probate Act Chapter 9:03 defines common form business as:

> "the business of obtaining probate and administration where there is no contention as to the right thereto, including the granting of probates and administrations in contentious cases when the contest is terminated, and all business of a non-contentious nature to be taken in the Court in matters of testacy and intestacy not being proceedings in any suit, and also the business of lodging caveats against the grant of probate or administration"

56. Based on the wording of section 37 and the definitions therein, the defendant's case is that the section addresses matters and disputes concerning proof of wills in general and matters concerning persons who claim to be entitled to a share in the estate or who claim to be entitled to the administration of the estate. Furthermore, section 37 speaks to the appointment of an interim receiver and is silent on the appointment of an Administrator Ad Litem and Ad Colligenda Bona. For these reasons the defendant asserts that Dona's application, the second under section 37, was ill-conceived.

57. He further relied on the learnings of Parry and Clark The Law of Succession[9] under the rubric "Representation in legal proceedings" which states:

> "If there is no personal representative of the deceased and it is necessary for the estate to be represented in legal proceedings, a grant of administration limited to an action (or ad litem) may be made under section 116 of the Supreme Court Act 1981. Such a grant is limited to brining, defending or being a party to a particular legal proceedings. Thus an intending plaintiff, who wished to bring an action for damages against the deceased's estate in respect of the deceased's negligence in a motor accident, may apply for a grant to be made to the plaintiff's nominee limited to defending the action."

58. Based on the learnings and section 37, as Dona is not the personal representative of Claire's estate, but nevertheless was desirous of representing the interests of Claire's estate in legal proceedings as is the case, the defendant agrees that Dona had to be appointed Administrator Ad Litem. However, the defendant avers that section 37 of our Wills and Probate Ordinance Chapter 8 No. 2 is not even remotely similar to section 116 of the UK Senior Courts Act 1981[10]; but section 25[11] of Trinidad and Tobago's Wills and Probate Act Chapter

[9] Eight Edition at page 178

[10] 116 Power of court to pass over prior claims to grant.
(1)If by reason of any special circumstances it appears to the High Court to be necessary or expedient to appoint as administrator some person other than the person who, but for this section, would in accordance with probate rules have been entitled to the grant, the court may in its discretion appoint as administrator such person as it thinks expedient.
(2)Any grant of administration under this section may be limited in any way the court thinks fit.

[11] 25. Where any person shall die intestate or without having appointed any executor, or shall have appointed an executor but such appointment shall fail, or the executor named by the Will shall be under the age of twenty-one years, or shall be absent from Trinidad and Tobago and shall not have proved the Will, or where any person shall die out of Trinidad and Tobago but leaving any estate within Trinidad and Tobago; administration in respect of such estate shall be granted to the person entitled thereto: Provided that if, by reason of the insolvency of the estate of the deceased or of any other special circumstances, it appears to the Court to be necessary or expedient to appoint as administrator some person other than the person who, but for this provision, would by law have been entitled to the grant of administration, the Court may in its discretion, notwithstanding anything in this Act, appoint as administrator such person as it thinks expedient, and any administration granted under this provision may be limited in any way the Court thinks fit.

9:03 is equivalent. As a result Dona's appointment ought to have been made pursuant to section 25. Consequently, the court could not have derived any power from section 37 to give Dona the legal capacity to bring any proceedings against him.

59. Upon the examination of section 37 of the Wills and Probate Ordinance Chapter 8 No. 2, the court is not in agreement with the contentions of the defendant. The court's interpretation as to its power to make an order relating to any action, petition or summons is not limited to contentious business or common form business. Section 37 has explicitly created a disjunctive list of four distinct modes of hearing: any action, any petition, any summons or any other proceedings". As the list is disjunctive any one or more will satisfy the requirement of "a hearing" within the meaning of section 37. To make sense of the phrase "whether in the nature of contentious or common form business", it would appear that it must relate to the noun or mode of hearing from the disjunctive list, that appears closest to it. In this case the closest mode of hearing to the qualifying phrase is "other proceedings". Thinking logically, if the qualifying phrase were to apply as the defendant suggest, the section would have been limited to contentious business or common form business only.

60. What is limited is other proceedings- "or other proceeding, whether in the nature of contentious or common form business". It would be peculiar for the Act to expressly state the word "any"[12] before the words action, petition, summons and then limit it to contentious or common form business. Accordingly, the wording of the section empowers the court to grant an order despite the nature or kind of matter once an application is made showing that the estate of any

[12] One or some indiscriminately of whatever kind. Merriam-Webster Dictionary 2019 https://www.merriam-webster.com/dictionary/any

deceased person is in danger of spoilage or to preserve property forming part of the estate.

61. Furthermore, the inclusion of the word "other"[13] before the word "proceeding", shows that proceeding is different and distinct from the words already mentioned, in this case, any action, petition or summons. For the defendant's interpretation to be correct, the court's opinion is that the words "any" and "other" would have had to been absent for the section to read, "Pending the hearing of an action, petition, summons or proceeding whether in the nature of contentious or common form business…".

62. Accordingly, for section 37 to apply, it was not necessary for the claims CV2018-00834 and CV2018-01490 to revolve around matters and disputes concerning proof of wills in general and matters concerning persons who claim to be entitled to a share in the estate or who claim to be entitled to the administration of the estate, as contented by the defendant. The wording of section 37 was wide enough to capture Dona's application in CV2018-00834 to be appointed Administrator Ad Litem and Ad Colligenda Bona, in a matter not concerned with contentious or common form business.

63. A reading further into section 37, will quickly show the illogicality of the defendant's submission. Section 37 goes on to read:

> "…on its being shown that the estate of any person deceased is in danger of spoliation or that for any other reason steps require to be taken for the custody or preservation of any property forming part of such estate, to appoint an interim receiver or grant an interim injunction or order the sale of any perishable property to be made by any person, and otherwise to intervene for the protection of the estate of the deceased in such manner and on such terms as to security and otherwise as to the Court

[13] Being the one or ones distinct from that or those first mentioned or implied. Merriam-Webster Dictionary 2019 https://www.merriam-webster.com/dictionary/other

shall seem fit: Provided that any application under this section may be made in the first instance ex parte on affidavit."

It is clear that the issues of spoliation and taking required steps for the custody or preservation of any property forming part of an estate would not arise within the statutory meaning of common form business.

64. The defendant further contended that section 37 did not give the court the power to appoint Dona as the Administrator Ad Litem and Ad Colligenda Bona of Claire's estate but provided only for the appointment of an interim receiver. He also submitted that he ought to have been joined as a party to the ex parte application. This is because contained in the wording of the section, that the application is made in "the first instance", clearly signals that the intention is that the matter will come up in court so that persons affected by any orders made ex parte would have an opportunity to challenge the order and have any injunction granted discharged.

65. Section 37 does more than provide for the appointment of a receiver. We know that because the section says so. The section empowers the court to appoint an interim receiver or grant an interim injunction or order the sale of any perishable property to be made by any person, and otherwise to intervene for the protection of the estate of the deceased in such manner and on such terms as to security and otherwise as to the Court shall deem fit. Again here, the section creates a list of options, which by their very nature, are disjunctive, any one can stand on its own.

66. In Dona's ex parte Notice of Application filed on the 12th March 2018 in CV2018-00834, she requested to be appointed the Administrator Ad Litem and Ad Colligenda Bona of Claire's estate. Within the grounds of her application supported by an affidavit and supplemental affidavit,

she highlighted the fact that the claim CV2016-04476 was dismissed and since then, the defendant had taken steps to upset the status quo of the subject property forming part of Claire's estate. In her supplemental affidavit filed on the 22nd March 2018 she adduced evidence that demonstrated that the subject property was owned by Claire and the defendant as joint tenants.

67. It is Dona's belief that Claire's estate is in danger of being dissipated by the defendant. As such, the reason for Dona's application and subsequent appointment is to preserve and protect the assets of the estate.

68. The findings of the court are that the defendant's interpretation of the section is again misconceived. The order dated the 23rd March 2018 was granted because the court was satisfied that all requisite elements of the application were made out. Dona illustrated to the court the danger of spoliation to the subject property by the defendant. She also opined that the danger caused her to form to opinion the subject property was in need of preservation pursuant to section 37. The court otherwise intervened for the protection of the estate of the deceased in a manner and on such terms as the Court deemed fit within the meaning of section 37.

69. For reasons outlined, the court did not err or overstep its jurisdiction by granting the order appointing Dona as Adminstrative Ad Litem and Ad Colligenda Bona. It was the court's view that in order to protect the subject property, it was necessary to appoint Dona so that the issue surrounding same could be ventilated in claim CV2018-01490 ensuring that neither joint owner (which included Claire's estate) was prejudiced by the actions of the other.

70. Additionally, the court was permitted to grant an interim injunction in the alternative. This is why in the court's order appointing Dona, also included the injunction restricting not only the defendant but anyone with power, from selling or altering the subject property thereby preserving its status quo.

71. As it relates to the defendant being added as a party to the application, the court disagrees with this submission. Section 37 specifically stated that an ex parte application may be made and Dona made an ex parte application. Reading section 37 in its context, such other persons to be heard on a section 37 application, it appears to the court, would be the Administrator General or any party interested in showing that the estate of any person deceased is in danger of spoliation or the like. It cannot be intended that on Section 37 application, a person alleged to be causing spoilage to the estate of a deceased person, should be heard on whether the court appoints an Administrator Ad Litem and Ad Colligenda Bona.

72. For these reasons the court is satisfied that the court had the power under section 37 of the Wills and Probate Ordinance Chapter 8 No. 2 to appoint Dona as Administrator Ad Litem and Ad Colligenda Bona, on an ex parte application, as she fulfilled the requirements of the said section.

73. The defendant averred that Dona should have applied for a grant de Bonis Non or an application pursuant to section 25 of the Wills and Probate Act Chap 9:01. With respect to a grant de Bonis Non such a grant of administration is made in respect of a deceased's unadministered estate. A grant de Bonis Non is limited as to the unadministered property to which the grant extends. Dona is not concerned with the completion of administration of specific property. Such an application may be necessary in the future.

74. Regarding section 25 of the Wills and Probate Act, this section established a general right of administration for a person entitled to a deceased's estate. That right of administration extends to varying circumstances enumerated in section 25 and it includes the right of a person to the estate where the deceased died intestate. The general right of administration under section 25 does not apply to the specifics here and Dona need not have made any application under section 25.

c. Whether the filing of the new claim CV2018-01490 is an abuse of process and whether the claim is properly constituted

75. The defendant's case is that the filing of this new claim CV2018-01490 is an abuse of process because it is materially the same claim previously filed as CV2016-04476 that was dismissed by the court on the 8th March 2018. The defendant contends that instead of appealing the order of the court Dona filed a new application and claim that are exactly the same as the ones previously dismissed. In so doing, she launched a collateral attack against the decision of the court. As a result, the defendant submitted that the claim form and statement of case herein ought to be struck out.

76. The claimant's case on the other hand is that the application and the entirety of her first claim CV2016-04476 was dismissed as a result of a procedural irregularity i.e. Cecelia, the legal personal representative of Claire's estate, assigned her fiduciary duty to Dona. Upon Cecelia's death such assignment ceased to exist. The claimant contends that the dismissal of her claim did not bring the matter to an end and was not an eternal bar against the refiling of the matter.

77. The claimant avers that the instant claim is brought for the benefit of the Claire's estate and before its institution she had to ensure that she had the locus standi to bring such an action. Therefore, the claimant asserts that she followed the procedural step of obtaining the order appointing her as Administrator Ad Litem and Ad Colligena Bona before commencing the claim CV2018-01490. A failure to apply and obtain the necessary order appointing her Administrator Ad Litem and Ad Colligena Bona would result in the claim being struck out. This was highlighted by the learned Honourable Mr. Justice Kokaram in the case of CV2013-00267 *Jamie Dolan -v- Rene Katwaroo*:

> "15. The order appointing her the Administrator ad Litem cannot "relate back" to the date of the commencement of the claim. See Ingall v Moran [1944] KB 160 and Walcott v Alleyne HCT 92 of 1988 per Hamel Smith J and Alexandrine Austin and others v Gene Hart [1983] 2 AC 640. In Austin, Lord Templeman approved of the ratio of the Ingall line of cases that where there is no entitlement to sue at the date of commencement of the proceedings it is a nullity. In Austin there was an entitlement in the claimant to sue as a dependent under the fatal Accident Ordinance and the issue of the premature issue of the writ was not a nullity but an irregularity. Where there is no prejudice caused to the defendant such an irregularity will not be treated as nullifying the whole proceedings.
>
> 16. In this case however the claim is being brought for the benefit of the estate of the deceased however there is no capacity to so commence those proceedings at the date of the claim. The purpose of a grant of administrator pendente lite is to limit the authority of the representation to the commencement of proceedings on behalf of the estate. The duties of an administrator pendente lite commence from the order of appointment. See Williams on Executors and administrators para 390.
>
> 17. In Halsbury Laws of England at para 817:
> "Grant limited to an action.
> Administration may be granted limited to an action with a view to beginning or carrying on proceedings whether on behalf of the estate or against it. The administrator under such a grant sufficiently represents the estate for the purpose of the proceedings, where it is merely desired to bind the estate of a person who, if alive, would have been a necessary party."

18. In Meyappa Chetty v. Supramanian Chetty [1916] 1 AC 603 at pg. 608 said: “An administrator, on the other hand, derives title solely under his grant, and cannot, therefore, institute an action as administrator before he gets his grant”.

19. In Millburn-Snell and others v Evans [2012] 1 WLR 41 Ingall was found to be still good law. In that case Lord Neuberger MR went even further to state at paragraph 16 that: “I regard it as clear law, at least since Ingall that an action commenced by a claimant purportedly as an administrator, when the claimant does not have that capacity, is a nullity. That principle was recognised and applied by this court in Hilton v. Sutton Steam Laundry [1946] KB 65 (per Lord Greene MR, at 71) and Burns v. Campbell [1952] 1 KB 15 (per Denning LJ, at 17, and Hodson LJ, at 18). In Finnegan v. Cementation Co. Ltd [1953] 1 QB 688, Jenkins LJ… at 700…”

20. In Millburn, the claimants’ claim to pursue their father’s share in a business he owned with the defendant was struck out at first instance and the appeal dismissed for want of capacity of the claimants to bring the claim as they had neither sought nor obtained a Grant of Letters of Administration of his estate. In that case, it was held that whereas an executor derived his title to sue from the will and not from the Grant of Probate, he could validly sue before obtaining a grant. Contrastingly, an administrator derived his title to sue solely from the Grant of Letters of Administration and so a claim brought on behalf of an intestate’s estate by a claimant without a grant was an incurable nullity.

…

22. As I have observed earlier the claim is predicated on an action on behalf of the estate of the deceased. The Claimant having obtained the order appointing her the Administratrix ad Litem, ought to have commenced its proceedings against the Defendant. She simply did not have the capacity at the date of commencing this claim to sue on behalf of the estate.

23. Accordingly the claim as it stands is unsustainable and ought to be struck out, the Court having no jurisdiction to entertain this claim. However that is not the end of the matter.

24. The Court did grant an order upon the Claimant’s application to appoint it the Administratix ad Litem. That order stands. I see no reason why that order cannot stand and it is now for the Claimant to re file her claim in that capacity.”

78. As a result, the claimant contends that the refiling of the claim is not an abuse of process and a broad merits-based approach must be taken when deciding whether the claim is an abuse of process. In so doing she relied on the case of *Johnson* [supra] where it was held:

> "…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. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-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."

79. Furthermore, the claimant stated that the repeat of an earlier case does not necessarily give rise to an abuse of process and the court must be cautious before striking out what may be a valid claim. Auld LJ in the case of *Bradford and Bingley Building Society -v- Seddon and Hancock; Walsh and Rhodes (Trading as Hancocks (a firm)* CA 11 Mar 1999 stated:

> "In my judgment, mere 're'litigation, in circumstances not giving rise to cause of action or issue estoppel, does not necessarily give rise to abuse of process. Equally, the maintenance of a second claim, which could have been part of an earlier one, or which conflicts with an earlier one, should not, per se, be regarded as an abuse of process. Rules of such rigidity would be to deny its very concept and purpose. As Kerr LJ and Sir David Cairns emphasised in Bragg's case [1982] 2 Lloyd's Rep 132 at 137 and 138–139 respectively, the courts should not attempt to define or categorise fully what may amount to an abuse of process; see also per Stuart-Smith LJ in Ashmore v British Coal Corp [1990] 2 All ER 981 at 988, [1990] 2 QB 338 at 352. Bingham MR underlined this in Barrow v Bankside Members Agency Ltd [1996] 1 All ER 981 at 986, [1996] 1 WLR 257 at 263, stating that the doctrine should not be 'circumscribed by unnecessarily restrictive rules' since its purpose was the prevention of abuse and it should not endanger the maintenance of genuine claims; see also [1996] 1 All ER 981 at 989, [1996] 1 WLR 257 at 266 per Saville LJ.

> Some additional element is required, such as a collateral attack on a previous decision (see eg Hunter v Chief Constable of West Midlands [1981] 3 All ER 727, [1982] AC 529, Bragg's case [1982] 2 Lloyd's Rep 132 at 137 and 139 per Kerr LJ and Sir David Cairns respectively and Ashmore v British Coal Corp), some dishonesty (see eg Bragg's case at 139 per Stephenson LJ and Morris v Wentworth-Stanley [1999] 2 WLR 470 at 480 and 481 per Potter LJ) or successive actions amounting to unjust harassment (see eg Manson v Vooght (1998) Times, 20 November per May LJ)."

80. The defendant in response averred that the proceedings CV2016-04476 was not dismissed as a mere procedural irregularity but it was a nullity that could not be cured by any amendment[14] as there was no properly constituted claimant. The defendant further relied on the case of *Thwaites -v- Port of Spain Corporation Electricity Board* HC 37/1945 where Mathieu-Perez J stated at page 27:

> "The question that arises is, 'Is the Board a legal entity entitles to sue and liable to be sued or is the Corporation the body to sue and to be sued in cases like this?' The Board is clearly not a natural person and in my view it is not a corporate body- it is an unincorporated body through which the Corporation acts. That being so unless there is express or implied authority in the Ordinance under review for permitting it, the Board cannot sue or be sued in its name as a body…
> It was further argued on behalf of the plaintiff that should I come to the conclusion indicated above I should allow the original writ to be amended so as to have the proper defendants before the Court and this enable the plaintiff's claim to be litigated. No amendment in my view should be allowed. The Board, the defendants on record, and the individual members thereof, are separate and distinct from the Corporation, who are in my view the proper party to have been sued, and any attempted amendment would be not an amendment but in effect substitution of one party for another and I must refuse to make any such order."

81. The court agrees with the defendant that CV2016-04476 was not a procedural irregularity but a nullity. The court on the 8th March 2018

[14] *An Application by Bob Sooknanan for Judicial Review: Between Bob Sooknanan and the Conservator of Forests, The Minister of Agriculture, Lands Fisheries and Food Production* Civil Appeal No. 109 of 1986 per Narine JA at page 5

dismissed the claimant's application to be appointed Administrator Ad Litem and the entirety of the claim based on the preliminary point that the claim was not properly constituted. When Cecelia died the fiduciary duties of her position as legal personal representative of Claire's estate ceased to exist as well as the agency arrangement she put in place to manage her duties as legal personal representative rendering the claim improperly constituted. Dona then filed an entirely new application to be appointed Administrator Ad Litem and Ad Colligena Bona and an entirely new action against the defendant.

82. The court disagrees with defendant's argument that the current claim CV2018-01490 is still not properly constituted. Dona filed a new application CV2018-00834 to be appointed Administrator Ad Litem and Ad Colligena Bona of Claire's estate. This new application was filed to obtain the order appointing her Administrator Ad Litem and Ad Colligena Bona so that any further claim instituted in that capacity would be valid and not subsequently struck out.

83. The claimant relied on the learning set out in the case of *Jamie Dolan* [supra] which necessitates the filing of an application to be appointed Administrator Ad Litem and Ad Colligena Bona before commencing proceedings. Although that case and the one at bar is not factually similar in that *Jamie Dolan* [supra] dealt with two procedural appeals and not to an abuse of process as the defendant contends, the learning cited therein is applicable. The claimant had to have the locus standi to commence proceedings against the defendant which is why she pursued the application in CV2018-00834 to be appointed Administrator Ad Litem and Ad Colligena Bona of Claire's estate. If she instituted proceedings before being so appointed the claim would have been a nullity which is what she relied on the case to prove.

84. As already discussed, the court was empowered under section 37 of the Wills and Probate Ordinance Chapter 8 No. 2 to appoint Dona Administrator Ad Litem and Ad Colligena Bona of Claire's estate by virtue of her application in CV2018-00834. Therefore, her appointment is not a nullity and the claim is properly instituted before the court.

85. The defendant stated that in any event CV2018-01490 is an abuse of process because it is materially the same claim previously brought as CV2016-04476. He submitted that the claimant cannot file a new claim seeking to bring back the same thing that was dismissed in an earlier matter even if it was not dismissed on the merits. To support his contentions the defendant relied on the cases of *David Walcott* [supra] and *Trevor Mahabir* [supra].

86. The case of *David Walcott* [supra] dealt with three claims. In that case there were two previous High Court actions. The claimant decided to withdraw the first action but before the pleadings were closed, the claimant launched his second action. The Honourable Madame Justice Joan Charles dismissed the claim form and statement of case in the second action as being frivolous, vexatious and an abuse of process. Instead of filing an appeal against the judgment of Charles J who dismissed the second action for an abuse of process, significantly, the claimant chose to file a third claim advancing the identical arguments which were struck out as an abuse of process. The claimant repeatedly advanced in his submissions his right and entitlement to re-litigate his claim as it was never determined on the merits. However, in citing the words of May LJ in *Manson -v- Vooght* [1999] BPIR 376 who explained that there had to be special circumstances for the succeeding claim not to be an abuse of process, the Honourable Mr. Justice Kokaram dismissed the claim as an abuse of process since no special circumstance arose and the claimant's view was that an appeal was a waste of time.

87. In the case of *Trevor Mahabir* [supra] the Court of Appeal had to determine after having withdrawn earlier proceedings (for the failure to file witness statements) whether the respondent was entitled to pursue the present claim which was based on the same facts and claimed the same reliefs as in the earlier proceedings; or whether in the circumstances of the case, to proceed with the present claim would amount to an abuse of process. Mendonca JA in applying the merits-based judgment as set out in *Johnson* [supra] conceded that although the earlier proceedings had not been adjudicated upon, significant resources were already allotted as the proceedings had gone far, withdrawn on the day fixed for trial. However, he stated that by withdrawing the earlier proceedings the respondent did two things both of which he should not get the benefit of in the appeal. The first was that he used the process of the court to gain an unfair advantage by seeking to avoid the sanctions imposed for the failure to file witness statements; and secondly, the respondent side-tracked the court's order to file witness statements, failure to do so within the stipulated time resulted in the non-admittance of viva voce evidence in respect of that witness. As a result, the court disallowed the claim on the ground that it was an abuse of process.

88. In line with the aforementioned authorities on the abuse of process, the court must now undertake a broad merits-based approach balancing the public and private interests, taking into account all the circumstances of the case focusing attention on the question whether in all the circumstances the claimant is misusing or abusing the process of the court by seeking to pursue the second claim. In other words, examining the case to determine whether there are special circumstances to allow the succeeding claim. In addition, the court must give effect to the overriding objective to deal with cases justly

pursuant to Rule 1.1 of the CPR ensuring that there is not a disproportionate use of the court's resources by the claimant[15].

89. The claimant has filed the instant claim which is materially similar to CV2016-04476 in terms of the reliefs sought. The allegations are also similar but not identical since the claimant has pleaded that since the dismissal of CV2016-04476, the defendant has engaged in additional acts to prevent the beneficiaries from their entitlements. Therefore, the court does not agree that prima facie the instant claim appears to be an abuse of process re-litigating the same facts as the first claim. Even with the similarities, however, as Lord Bingham[16] pointed out in the case of *Johnson* [supra] the circumstances in which abuse of process can arise are very varied and it would be unwise to place such cases into fixed categories. Therefore, the special circumstances of the case must be examined.

90. The court is of the view that there are special circumstances in this case that absolves it from amounting to an abuse of process. In CV2016-04476 Dona lost her power to continue to act as her mother's Lawful Attorney in proceedings when her mother Cecelia passed. As a result the claim was not properly constituted and was subsequently dismissed for want of capacity of the claimant.

91. The court notes that the cases of *David Walcott* [supra] and *Trevor Mahabir* [supra] are somewhat similar as they were dismissed as an abuse of process and not on the merits of the case as the defendant contends. However, there were no special circumstances in those cases to rebut the presumption of abuse of process in succeeding claims. In *David Walcott* [supra] the second claim was already held to be an abuse of process, so unsurprisingly the court determined that his third claim

[15] *Trevor Mahabir* [supra] per Mendonca JA at paragraph 23
[16] Quoting Lord Diplock in *Hunter -v- Chief Constable of the West Midlands Police* [1982] AC 529 at 536

was a collateral attack tantamount to an abuse of process. In that case an appeal was a plausible route if the claimant did not agree with the judge's finding that the filing of the second action as an abuse of process. In the instant claim, the law was explicitly clear that Dona lost the capacity to continue CV2016-04476 when Cecelia, the donor of the power of attorney died. As a result, there were no grounds for appeal. Furthermore, in *Trevor Mahabir* [supra] Mendonca JA highlighted the dishonesty in the respondent as he tried to avoid the consequences of not filing his witness statements pursuant to the court's order.

92. There is no evidence of any additional element such as dishonesty, unjust harassment or a collateral attack on a previous decision pursuant to *Bradford and Bingley Building Society* [supra] in the instant case by the claimant. The reason for filing the instant claim is because she lost the locus standi to bring the claim when Cecelia died. Therefore, it was necessary for her to first obtain the order appointing her Administrator Ad Litem and Ad Colligena Bona and after doing so, file the instant claim in that capacity. The court sees nothing unfair or unjust in her actions towards the defendant. As pointed out in the authorities, the cases involving abuse of process are widely varied and as such rules of rigidity ought not to apply.

93. The court is not of the view that Dona is misusing or abusing the process of the court by bringing this action. She is using the process of the court to protect and preserve the assets of Claire's estate from spoilage by the defendant. The court can find no abuse in her actions. Furthermore, it is not conceded that substantial resources were already allocated as the case has not advanced before the first case management conference. The parties did file extensive submissions but the court's resources expended by the claimant were not disproportionate in the circumstances and the claimant ought to be

permitted to continue her claim as same does not amount to an abuse of process.

Disposition

94. It is hereby ordered that:

a. The defendant's notice of application filed on the 18th June 2018 in claim CV2018-01490, applying *inter alia* for the claim form and statement of case in the matter to be struck out, be and is hereby dismissed;

b. The time for the defendant to file a defence be extended to 28 clear days from the determination of the application;

c. The defendant's notice of application filed on the 21st June 2018 in Dona's ex parte application CV2018-00834, whereby he sought *inter alia* to be added as a respondent to Dona's ex parte application; that the order dated the 23rd March 2018 appointing Dona as Administrator Ad Litem and Ad Colligenda Bona of Claire's estate be set aside and the related ex parte application filed on the 12th March 2018 be struck out and/or dismissed, be and is hereby dismissed; and

d. The applicant/defendant shall pay the respondent's/claimant's costs of the applications filed on 18th June 2018 and 21st June 2018 to be agreed between the parties. In default of agreement, the costs is to be assessed by a Master of the Civil Division

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Justice Avason Quinlan-Williams

JRC: Romela Ramberran