THE COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION
2017/CLE/GEN/00389

BETWEEN

TRIAL FARMS INVESTMENTS LIMITED
KIRAKIS INVESTMENTS LIMITED
OPULENT SERVICES LIMITED

Plaintiff's

AND

PITTSTOWN POINT LANDINGS LIMITED

Defendant

Before: The Honourable Madam Justice G. Diane Stewart

Appearances: Mr. Rouschard Martin for the Plaintiff
Mr. N. Leroy Smith, Theomanique Nottage and Lesley Brown

Hearing Date: February 8 and March 25, 2019

Judgment: 15th January, 2020

JUDGMENT

1. By summons filed May 29, 2017 (**the Defendant's Summons**), the Defendant, Pittstown Point Landings Limited – ("**Pittstown**") applies pursuant to Order 18 Rule 19(1) (a), (b) and/or (d) of the Rules of the Supreme Court and under the inherent jurisdiction of the court that the Plaintiffs specially endorsed Writ of Summons filed on 27 March 2017 be struck out on the grounds that it is frivolous or vexatious and/or an abuse of the process of the court and further that the action be dismissed, on the grounds, inter alia, that the Plaintiffs' current claims:

a. **lacked merit and/or are demonstrably false**

b. **arise from the same or substantially the same facts as arose in the certain Supreme Court proceedings styled as "Pittstown Point Landings Limited v Kirakis Investments Limited and Opulent Services Limited" – 2005/CLE/gen/qui/1392 and "Trial Farm Investments Limited v Pittstown Point Landings Limited – 2008/CLE/gen/00337;**

c. **were finally adjudicated upon by a Court of competent jurisdiction in the aforementioned proceedings; and/or**

d. are barred by the doctrine of res judicata and/or the rule in Henderson v. Henderson.

2. This application is supported by the affidavit of Cameron W McRae filed on 11 May 2018, ("McRae affidavit") the affidavit of Theominique Nottage filed on 13 February 2018 ("Nottage affidavit") and the affidavit of Godfrey Perpall filed on 8 February 2019 ("Perpall affidavit").

3. The Plaintiffs by summons filed on 26 July 2018 (**the Plaintiffs' summons**) seek an order that:

(**i.**) **Pursuant to order 18 rule 19 [1] [a], [b] and [d] of the Rules of the Supreme Court, 1978 and/or under the inherent jurisdiction of the court, that the Defendants Defence filed on 4 May 2017 be struck out as not disclosing any reasonable cause of action or defence, and also as being scandalous, frivolous, vexatious and/or an abuse of the process of the court and that the summons to strike out the writ of Summons be dismissed, on the grounds that the Defendant has no locus standi, and**

a. The Defendant's current claims based on all of the lease and land exchange agreements between the parties in this action are, pursuant to section 3(1) of the International Persons Landholdings Act are INVALID and:-

b. As promulgated by the Act, the agreements are 'Null and Void, and without effect for all purposes of law'.

c. Pursuant to section 3(4) of the said Act, the Defendant failed to subsequently apply for, and thereby never obtained a deferred Permit from the Investment Board to validate the agreement; by which to make same valid.

(ii.) An order to declare that all of the Indenture of Leases signed between Pittstown and the other landowners which are embodied In clause (D) of the land exchange agreements signed between the Defendant Pittstown and Plaintiffs Kirakis Investments Limited and Opulent Services Limited comprises the portions of contiguous parcels for the extension of the Runway from lots 63 to lot 76 are invalid and are also 'Null and void, and without effect for all purpose of law'.

(iii.) An order directing the Director General of the Bahamas Civil Aviation Authority allow the Plaintiffs, their agents and associates, pursuant to section 37 of The Civil Aviation Act 2016, their rights under the law to inspect the Register and all the particulars contained therein for the Pittstown aerodrome at Crooked Island.

(iv.) An Order directing the Director General of the Bahamas Civil Aviation Authority to allow the Plaintiffs, pursuant to section 80 of the Civil Aviation Act 2016, their rights under the law to obtain a certified copy of the official of the February 2018 Inspection of all the parlars [sic] contained therein for the Pittstown airstrip at

Crooked Island.

(v.) An Order that with immediate effect the Defendant, their agents, servants and associates are to vacate the properties belonging to the Plaintiffs and to cease and desist any works being carried out upon the Plaintiffs land forthwith, and to remove all equipment and machinery, tools, vehicles, airplanes or other materials or supplies thereupon at once.

(vi.) An Order that Defendant is to pay the Plaintiffs for any damages done to the physical landscape of the properties as a result of the activities carried out by the Defendant and their agents and associates over the past 17 years during their exercises of clearing, paving, digging, excavating and removing of soil material and all trees and natural vegetation destroyed or removed from the Plaintiffs' land.

(vii.) An Order that the Defendant is to pay the Plaintiffs for the disturbance and removal of all survey markers which were placed on the Plaintiffs' properties, and is also to pay for the replacement of the new survey markers.

(viii.) An Order that the Defendant is to pay the Plaintiffs for depriving their right of full access and control of their properties, and for the trespass upon said lands by the Defendant and their agents and associates, and for providing to the general public full and unfettered access to traverse upon and over the Plaintiffs' land as a result of constructing an unapproved roadway across the Plaintiffs' land without such lawful right to do so, and without the Plaintiffs' lawful consent.

(ix.) Costs.

4. The Plaintiffs' summons is supported by the affidavit of Dennis Bethel sworn on May 26, 2018 and his supplemental affidavits of June 7, 2018, July 27, 2018 and August 13, 2018. **("The Bethel affidavits")**

5. The Plaintiffs filed a second summons on 13 August 2018 which repeated the claims made in the first summons.

FACTS

6. Pittstown, a company incorporated under the laws of the Bahamas is the owner and operator of an oceanfront resort facility known as the "Crooked Island Lodge" (the "Resort)] located in the Sea Horse Shores subdivision near Land Rail Point Crooked Island in The Bahamas. Pittstown negotiated and entered into several agreements with various owners of neighbouring properties in order to extend and develop a private runway owned by Pittstown and in order to develop the Resort's amenities.

7. These agreements included the following written agreements with the Plaintiffs':

1. A Lease Agreement dated 15 October 2001 (the "**Lot 68 Lease Agreement**") between Trial Farm Investments Limited and Pittstown;

2. A Land Exchange Agreement dated 4 October 2002 between Kirakis Investments Limited and Pittstown in respect of lots 63 and 65 in the Sea Horse Shores subdivision **("Lots 63 and 65 Agreement")**

3. The Land Exchange Agreement dated 4 October 2002 between Opulent Services Limited and Pittstown in respect of Lot 4 in the Sea Horse Shores subdivision (**The Lot 4 Agreement**).

8. Mr. Dennis Bethel is a director of each of the Plaintiffs, the sole owner of Trial Farms and Opulent and the owner of 33.3% of the shares in Kirakis.

9. Pittstown maintained that Kirakis and Opulent breached their obligations under both Exchange Agreements and refused to convey the lots to Pittstown.

10. Pittstown commenced an action in November 2005 **("the Senior Action")** against Kirakis and Opulent seeking specific performance of the Exchange Agreements.

11. Kirakis and Opulent in their Re-Amended Defence in the Senior Action denied the breaches and claimed that the Lot 68 Lease Agreement was invalid.

12. Trial Farms commenced an action in 2008 against Pittstown (the **Junior Action**):-

a) alleging that Pittstown had failed to comply with certain covenants contained in the Lot 68 Lease Agreement between Trial Farms and Pittstown and as a result thereof that lease was null and void.

b) seeking:-

(i) an injunction to restrain Pittstown from remaining on Lot 68 and continuing to construct a portion of the runway thereon,

(ii) a declaration that the Lot 68 Lease Agreement was null and void;

and

(iii) Costs.

13. Pittstown filed a Defence and Counter-Claim in June 2008 denying the claims of Trial Farm in the Junior Action.

14. In 2009, Justice Albury ordered that both the Senior and Junior actions be tried consecutively before the same judge with the Senior Action being tried first. Justice Stephen Isaacs gave further directions and set both actions down for trial before him. Evidence was led in both actions. Counsel for Pittstown in the Senior Action prepared a bundle of documents which was utilized in both actions. Counsel for Trial Farms in the Junior Action did not prepare any bundles for that action and relied on the bundles used in the Senior Action.

15. Both trials were completed before Justice Isaacs who delivered a conjoined judgment written in June 2011 in favour of Pittstown in both actions.

16. Justice Isaacs held at paragraph 48 through 52 of his judgment:-

> **48. "The real substance of this matter is disposed of in favour of Pittstown by the new evidence and the decision of the Court of Appeal in so far that CAD had clearly given approval for the extension of the runway, and the land exchange agreements are valid. The issue of the lease of lot 68 has also been decided in favour of Pittstown as seen above.**
>
> **49. In the result specific performance of the land exchange agreements is ordered and a lien on Kirakis' and Opulent lots is a Sea Horse Subdivision is issued to cover any damages or costs in these actions.**
>
> **50. The Counter Claim by Kirakis and Opulent is dismissed.**
>
> **51. The Junior Action by Trial Farms is dismissed.**
>
> **52. Costs of these actions are awarded to Pittstown to be taxed if not agreed."**

17. The new evidence referred to in paragraph 48 of the Isaacs judgment was the affidavit of Randy Butler dated the 6th December 2010 which exhibited a letter from Patrick Rolle, Director of the Bahamas Department of Civil Aviation dated 20th September 2010.

18. The Court of Appeal decision referred to was the **Oceania Height Limited v Willard Clarke Estates Limited (CA)**.

19. By a Notice of Appeal filed in July 2011 the three Plaintiffs appealed the judgment of Justice Isaacs in favour of Pittstown. Trial Farms was subsequently removed from this appeal the **(Kirakis and Opulent appeal)** and commenced its own appeal. (**Trial Farms Appeal.)**

20. The Kirakis and Opulent appeal was dismissed by the Court of Appeal in June 2013 for failure to post the required bond. These Appellants then applied to have their appeal reinstated. This application for reinstatement was heard and dismissed on 29 October 2014.

21. The Appellants then sought leave to apply to the Privy Council which application was heard and dismissed. They then applied directly to the Privy Council for special leave to appeal which was dismissed in November 2016.

22. The Trial Farms Appeal was dismissed by the Court of Appeal in June of 2013 for failure to pay the required bond. Trial Farms attempted to have the appeal reinstated but the application was refused in 2015. It also attempted to obtain leave to appeal to the Privy Council which application was refused by the Court of Appeal. Trial Farms then applied to the Privy Council for special leave to appeal and this application too was dismissed by the Privy Council in November of 2016.

21. Costs were taxed in the Junior Action in the amount of $111,091.45 in favour of Pittstown. Trial Farms has not paid the certified costs.

22. Pittstown filed a summons in the Junior Action seeking an order for the sale of Lot 68 to enforce the certified costs.

23. In the Senior Action Pittstown applied for leave to issue writs of sequestration against Kirakis, Opulence and Dennis Bethel on the basis that they had failed to comply with the judgment order of Justice Isaacs. Justice Isaacs in November 2016 (**the November 2016 order)** found that Kirakis, Opulent and Dennis Bethel were guilty of contempt for breaching the Senior Action judgment order by failing to comply with the same.

24. Trial Farm made an application in the Junior Action seeking a stay of the enforcement of the costs order and portending the filing of a new action. That application along with the Pittstown enforcement application were both heard in April 2017. Trial Farms then filed a summons in May 2017 seeking to adduce the new evidence of the writ filed in this action in support of the stay of the Junior Action.

THIS ACTION

25. The relief sought in this action is:-

1. **A declaration that pursuant to the 15th October, 2001 (clause 2(g)) Indenture of Lease the Plaintiff is in breach of contract and must indemnify the Plaintiff regarding the 16th July, 2015 Certificate of Taxation;**

2. **An Order that the Defendant, based on its breaches aforesaid, must pay the Plaintiffs costs and expenses arising out of the aforesaid particulars of loss and damage regarding the said Indenture Lease**

3. **An Order that the said Bill of Costs, Notice of Taxation, Statement of Parties, Certificate of taxation, Summons of the 16th November, 2016 and Affidavit (of 17th November, 2016) in support be struck out as constituting a breach of the said Indenture of Lease.**

4. **An Order that pursuant to clause (4) of the said Indenture of Lease, the Lease has been determined as a result of the Defendant's breach and therefore the Plaintiffs shall be granted full possession of the demised property.**

5. **An Order that the Judgment of the 10th June, 2011 in actions 2008/CLE/gen/01302 and 2008/CLE/gen/00337 shall be set aside as a result of discovery of new evidence in the form of the herein mentioned 1st September, 2010 report which concludes that the Defendant aerodrome/airport is in breach of the IACO international standards (thus illegally operation pursuant to the Civil Aviation Act 2026), not properly registered and is therefore in breach of clause 2(g) of the said Indenture of Lease.**

6. **Such other relief as the Court deems just;**

7. **Costs**

26. Pittstown filed a defence in May of 2017 denying the claims of the Plaintiff and filed this summons to strike out the action of the Plaintiffs.

SUBMISSIONS

27. Pittstown maintains that this action seeks to relitigate the issues which had been litigated in the previous Senior and Junior Actions and which have been the subject of a final adjudication in those actions. Pittstown maintains that there are three main issues in this new action. They are:-

i. The Indemnity Point
ii. The New Evidence Point
iii. The Non-Disclosure Point.

28. **The Indemnity Point**
Trial Farms maintains that the terms of clause 2 (G) of the Lot 68 Lease requires Pittstown to indemnify Trial Farms in respect of the costs which Trial Farms had been ordered to pay Pittstown in the Junior Action. Pittstown maintains that the question of who was obligated to pay costs to whom was specifically adjudicated between Trial Farms and Pittstown. The issue of inter alia costs was subsequently appealed both to the Court of Appeal and to the Privy Council where Trial Farm's counsel participated in each hearing and where Trial Farms lost on each appeal.

29. Clause 2(g) of the Lot 68 Lease agreement states:-

"The Lessee hereby covenants with the Owner as follows….

(g) To keep the Owner indemnified against all proceedings costs claims demands and expenses whatsoever in any way arising out of the exercise of the rights and liberties hereby granted."

30. Pittstown maintains that Trial Farm is attempting to evade its obligations to pay costs owed and ordered in the Junior Action by submitting that Pittstown is responsible for paying its own costs by virtue of their interpretation of clause 2 [g] of the Lot 68 Lease Agreement. Pittstown further maintains that to uphold this submission is to in fact nullify the costs order in the Junior Action. As the issue of costs had been finally settled by judicial decision this claim is barred by the doctrine of res judicata and constitutes an abuse of the process of the court. Pittstown further maintains that this issue is an attempt to reopen as new litigation, issues or facts which were the subject matter of the Junior Action and which could have been raised in that action by way of a claim for an indemnity. They further submit that the Plaintiffs interpretation of clause 2(g) is unsustainable at law and that courts have refused to construe provisions of similar clauses in the way being suggested by Trial Farms.

31. Counsel for the Plaintiffs maintains that the indemnity clause in the Lot 68 Lease Agreement obliges Pittstown to pay all costs arising out of any litigation with regard to the proposed leases regardless of to whom the costs are payable. He accepts that the court did award costs to Pittstown but upon Pittstown attempting to enforce the order made in its favour it breached Clause 2(g) as the Lease Agreement is still effective between the parties on the issue of costs. This interpretation he maintains is based on a literal interpretation of the clause.

32. **The New Evidence Point**

The Plaintiffs maintain that they have discovered new evidence in the form of a Civil Aviation Department internal memorandum dated 1st September 2010 from Ivan L. Cleare to Capt. Patrick Rolle (**the New Evidence**). They maintain that Pittstown should have been aware of this new evidence and should have disclosed the same to the Court in both the Senior and Junior Actions. The Plaintiffs further maintain that had this been disclosed the outcome of the Courts decision in that action would have been different.

33. Pittstown submit that the Plaintiffs seek to reopen the trial of the former actions by alleging that there exists the new evidence. Pittstown maintains that the mere discovery of new factual matter following the completion of earlier proceedings does not in and of itself allow such proceedings to be reopened. In order to reopen a matter the Applicant must meet the requirements of the threshold test confirmed in **Ackerman v. Thornhill (2017) EWHC 99.**

34. Pittstown maintains that there is no pleaded fraud or particularization of fraud or dishonesty to meet the threshold. The Minute Paper of the new evidence was an internal private communication between the Deputy Director and the Director of the Civil Aviation Department none of whom were parties in the former actions. The new evidence predates by three weeks the September 20th 2010 (CAD Letter) which Justice Isaacs specifically addressed in his judgment:

> "**32. After the trial Patrick Rolle, Director, Bahamas Civil Aviation addressed a letter dated 20 September 2010 to Cameron McPhee, which is exhibited to an Affidavit of Capt. Randy Butler (the Butler Affidavit) dated 6 December 2010.**
>
> **33. Paragraphs 10 through 12 of that Affidavit state as follows:**
>
> ***"10. However, at the trial of the Action (which took place between 19th July, 2010 to 21st July, 2010) officials from CAD appeared (pursuant to subpoenas filed by Messrs. Mackay & Moxey) and testified. In the course of that testimony, CAD personnel suggested that (on an interpretation of section 5 of the Airport Act) PPL might also require a separate approval in respect of the Airstrip extension.***
>
> ***11. CAD's statements at trial prompted ASCL to approach CAD once again to ascertain what further approvals PPL needed to secure.***
>
> ***12. In response to this inquiry, CAD subsequently issued a letter addressed to PPL dated 20th September, 2010 CAD's September 2010 Letter which stated that:***
>
> ***"4.1 …CAD has located a copy of a letter dated 25th July, 1975 (Ref: CAD/1642/40) signed by Mr. Donald Ingraham, former Director of CAD, which confirms that the Airstrip was registered by CAD in 1975. (A copy of the 25th July, 1975 letter is attached for your records.)***
>
> ***4.2 Based upon (i) correspondence between PPL and CAD over the past several years and (ii) a visit which***

CAD personnel paid to Pittstown Point in September 2010, CAD is well aware of the fact that the Airstrip had been extended such that it comprises a paved tarmac surface which is approximately 3500 x 40 linear feet.

4.3 Based upon our review of CAD's records, it appears that CAD did grant permission for PPL to alter the Airstrip by extending it from 2000 linear feet to its current length (i.e. 35000 linear feet.)

4.4 As the date of this letter, the Airstrip as extended to 3500 continues to be duly registered with/by CAD.

4.5 For the foregoing reasons, the answer to the Recent Question is that:

The Airstrip is compliant with the laws and regulations which presently govern Civil Aviation in The Bahamas. Accordingly, from a regulatory perspective, CAD does not require PPL to do anything further in connection with the Airstrip. This means that it is not necessary for PPL to apply for or pursue any additional or separate registration or approval in connection with (i) the Airstrip as extended to 3500 linear feet or (ii) any portion (new or old) of the Airstrip."

34. These paragraphs contain evidence that was obviously not available at the trial, the evidence has an important influence on the result of the case and it is credible, particularly having come from witnesses called by the Defendants. For these reasons the evidence is hereby admitted having satisfied the three conditions required for its admission. Having admitted the evidence contained in the Butler Affidavit, the issue as to the approval was required by Pittstown to extend the runway falls away.

35. It must be borne in mind that the runway is constructed over a part of Lot 68 and that Trial Farms has also argued that the lease has come to an end because Pittstown failed to comply with the construction timeline stipulated in the lease, or alternatively Lot 68 is not wide enough to operate a runway. The Butler Affidavit provides uncontroverted evidence that the airstrip is operational. The letter of Patrick Rolle Exhibited to the Butler Affidavit at paragraph 4.4 states;

"At the date of this letter, the Airstrip as extended to 3500 linear feet continues to be duly registered with/by CAD."

35. Pittstown further submits that as the Director of the Civil Aviation Department did not mention the Minute Paper during the former Actions Pittstown had no knowledge of the existence of the same until March 2018 when it appeared in the affidavit of Dennis Bethel filed on 17 March 2018.

36. The Plaintiffs maintain that it was critical to the decision of the judge to know that an application had been made to obtain a licence for the airstrip but that airstrip had failed an inspection. In essence they maintain that there were two contradicting documents emanating from the Civil Aviation Department. The failure to produce all of the information to the court prior to it making its decision was prejudicial to the Plaintiffs.

37. **The Non-Disclosure Point**
Trial Farms claims that Pittstown misled the Court in the Junior Action by:

(a) indicating to the court that "on or about 20 May, 2008" an application pursuant to section 9 of the International Persons Land handling Act had been made to the Investment Board to register the Indenture of Lease dated 15 October 2001, and
(b) failing to disclose
    i. a letter dated 4 June 2010 from The Bahamas Investment Authority inquiring whether pending litigation regarding the trial had been resolved and
    ii. a letter dated 5 June 2008 which addresses the "failure of Pittstown to register the lease."

38. The Plaintiffs submit that as Pittstown is a foreign company it requires Investment Board approval to hold the land pursuant to the lease agreements entered into with the plaintiffs. Failure to obtain this approval renders the lease void and as the Defendant never held a permit the lease is null and void. They further submit that the Authority refused the permit and rely on a letter dated 11 May 2018 from the Investment Board to support this submission. This letter does not refuse the permit as alleged by the Plaintiffs and there is no letter referred to the Court to substantiate this allegation.

39. The Plaintiffs allege in their Statement of Claim that Pittstown failed to disclose the registration of the 15th of October 2001 lease and failed to disclose the two Investment Board letters:-

(10.) "At the time of the trial, the Defendant indicated to the Court that an application had been made to the Investment Board to register the said Indenture of Lease dated 15 October, 2001. This statement was made with knowledge by the Defendant of a 4th June, 2010 letter from the Bahamas Investment Authority asking whether the pending litigation regarding the trial herein had been resolved. Such letter and related letters, as new evidence, concerned the First Plaintiff but they were not disclosed in the First Plaintiffs action.

(11.) That according to the Defendant's herein exhibited letter of the 5th June, 2008, the failure on its part to register the lease would have caused the court not to be able to make the determination which the Defendant was seeking. Further, the Court concluded that the subject lease was registered with the Investment Board pursuant to section (9) of the International Persons Landholdings Act "on or about the 20th May, 2008". The Court was misled in a material way and would not have been misled if the said letters were disclosed by the Defendant in the First Plaintiff's action."

40. Pittstown maintains that this argument was run by Trial Farm in the Junior Action unsuccessfully. Further Pittstown submitted which the court agreed that registration merely required lodging of the application and payment of the requisite fee. Trial Farm's own filings reflect that the Investment Board letters were disclosed to and in the possession of Trial Farm during the trial of the Junior Action and accordingly the allegation of nondisclosure is spurious.

41. Pittstown maintains that each of these claims by the Plaintiffs is unsustainable and or spurious as a matter of law and had been raised previously in the Junior Action unsuccessfully and should not be litigated again except by way of appeal. Pittstown submits that Order 18 Rule 19 gives the court jurisdiction to strike when:

> (a) there is no realistic possibility of the Plaintiff establishing a cause of action consistently with his pleading and the possible facts of the matter and they are known;
>
> (b) the evidence has no substantial foundation;
> (c) the claims are obviously unsustainable.

All involve the improper use of the court's machinery, where inter alia a party seeks to raise in subsequent proceedings matters which were all could have been litigated in earlier proceedings.

LAW

42. Order 18 Rule 19(1) provides:

"The Court may at any stage of proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement on the ground that —

(a) it discloses no reasonable cause of action or defence, as the case may be; or
(b) it is scandalous, frivolous or vexatious; or
(c) it may prejudice, embarrass or delay the fair trial of the action; or
(d) it is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

43. The law governing O18 R19 applications has long been established. Tightly woven in the development of this law is the unchanging principle that the power to strike pleadings is only to be exercised in plain and obvious cases.

44. What is plain and obvious has been the subject of many decisions, but again the underlying principle remains the same, that is where the action is one which cannot succeed and/or is an abuse of the process of the court. In **West Island Properties Limited v Sabre Investment Limited and others – [2012] 3 BHS J. No. 57** Allen P referred to **Drummond-Jackson v British Medical Association** where she stateds:-

> "**15 In the case of Drummond-Jackson v. British Medical Association [1970] 1 W.L.R. 688, Lord Pearson determined that a cause of action was reasonable where it had some chance of success when considering the allegations contained in the pleadings alone. That is, beginning at page 695, he said the following:**

"Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases.

...In my opinion the traditional and hitherto accepted view - that the power should only be used in plain and obvious cases - is correct according to the intention of the rule for several reasons. First, there is in paragraph (1)(a) of the rule the expression "reasonable cause of action," to which Lindley M.R. called attention in Hubbuck & Sons Ltd. v. Wilkinson, Heywood & Clark Ltd. [1899] 1 Q.B. 86, pp. 90 - 91. No exact paraphrase can be given, but I think "reasonable cause of action" means a cause of action with some prospect of success, when (as required by paragraph (2) of the rule) only the allegations in the pleading are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out. In Nagle v. Feilden [1966] 2 Q.B. 633 Danckwerts L.J. said, at p. 648:

> **'The summary remedy which has been applied to this action is one which is only to be applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process of the court.'**

Salmon L. J. said, at p. 651: 'It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable.' Secondly, subparagraph (a) in paragraph (1) of the rule takes some colour from its context in subparagraph (b) "scandalous, frivolous or vexatious," subparagraph (c) "prejudice, embarrass or delay the fair trial of the action" and subparagraph (d) "otherwise an abuse of the process of the court." The defect referred to in subparagraph (a) is a radical defect ranking with those referred to in the other subparagraphs. Thirdly, an application for the statement of claim to be struck out under this rule is made at a very early stage of the action when there is only the statement of claim without any other pleadings and without any evidence at all. The plaintiff should not be "driven from the judgment seat" at this very early stage unless it is quite plain that his alleged cause of action has no chance of success. The fourth reason is that the procedure, which is (if the action is in the Queen's Bench Division) by application to the master and on appeal to the judge in chambers, with no further appeal as of right to the Court of Appeal, is not appropriate for other than plain and obvious cases.

...That is the basis of rule and practice on which one has to approach the question whether the plaintiff's statement of claim in the present case discloses any reasonable cause of action. It is not permissible to anticipate the defence or defences - possibly some very strong ones - which the defendants may plead and be able to prove at the trial, nor anything which the plaintiff may plead in reply and seek to reply on at the trial."

30. Concerning Order 18; Rule 19(1)(d) R.S.C., both Bramwell B. and

Blackburn J. in the case of Castro v. Murray Law Rep. 10 Ex. 213; 218 and Dawkins v Prince Edward of Saxe-Weimer 1Q. B.D. 499; 502 respectively, understood the face that the court possessed a discretion to stop proceedings which are groundless and an abuse of the court's process. The discretion, as Mellor, J. in Dawkins v Prince Edward of Saxe-Weimer indicated, must be exercised carefully and with the objective of saving precious judicial time and that of the litigant…

57. Lindley, L.J. in the leading Court of Appeal case of the Attorney-General of the Duchy of Lancaster v. London and North Western Railway Company [1892] 3 Ch. 274, considered a similar order which allowed pleadings to be struck out and dismissed on the ground of being frivolous and vexatious. The learned judge at page 277 said that:

> **"It appears to me that the object of the rule is to stop cases which ought not to be launched-cases which are obviously frivolous and vexatious, or obviously unsustainable."**

45. The issue to be determined here is whether this action is an abuse of the process of the court or falls within any of the other grounds under O18 R19. On the face of the pleading there appears to be causes of action but it must be determined whether they are sustainable in law or whether they are an abuse of the process of the court.

46. Abuse of the process of the Court too has been judicially considered and determined in numerous cases. In **Hunter v Chief Constable (1982) AC529 and 536**, Lord Diplock defines the power to strike for abuse of the process.

> **"[abuse of process] concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of it procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied . . . It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."**

47. Examples of abuse of the process of the court have been judicially determined to include:-

(1) Attacking a final previous decision by way of a new action when the Plaintiff was a party to the same and had the opportunity to raise and contest the issue in the previous decision.
Hunter v Chief Constable of the West Midlands Police and others: Ward and others v Fiensilver (as a personal representative of the Estate of Bernard Olcott) 2014 3 BHSJ No.59

(2) Raising issues which should have and could have been raised in the earlier proceedings.

(3) Evidence being relied on which has no substantial foundation **[Don Hager Lawrence v Lord Norreys and others HL1890 210.]**

INDEMNITY POINT

48. The Plaintiff seeks to raise an issue with regard to the payment of costs awarded in the Junior Action in favour of Pittstown. They submit that the breach of clause 2(g) only occurred once Pittstown attempted to enforce their right to costs. This argument is an example of the second category of abuse of the process of the as court set out above. I do not accept the interpretation posited by the Plaintiffs as to the meaning of clause 2(g) of the Lease Agreement. To do so would make a nonsense of the order made by Justice Isaacs, but more importantly the interpretation posed by the Plaintiffs should have and could have been raised before Justice Isaacs. Their failure to do so is to their detriment; to do so now is an abuse.

49. Counsel for Pittstown helpfully and clearly sets out the law with regard to the doctrine of Res Judicata which evolves from the locus classicus **Henderson v Henderson** and which has been accepted in Court of Appeal in **West Island Properties Ltd. V Sabre Investments Limited and others [2012] 3BHSJ** and which I also accept.

50. In **Thomas v Attorney-General (No 2) (1988) 39 WIR 372** , a decision of the Judicial Board of Privy Council (on appeal from the Court of Appeal of Trinidad and Tobago), Lord Jauncey of Tullichettle explained that:

> **"…It is in the public interest that there should be finality to litigation and that no person should be subjected to action at the instance of the same individual more than once in relation to the same issue. The principle applies not only where the remedy sought and the grounds therefor are the same in the second action as in the first but also where, the subject matter of the two actions being the same, it is sought to raise in the second action matters of fact or law directly related to the subject matter which could have been but were not raised in the first action. The classic statement on the subject is contained in the following passage from the judgment of Sir James Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100 at page 115:**
>
> > **' … where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'**

51. In ***Hoystead v Taxation Commissioner*** **[1926] AC 155 at page 165, Lord Shaw of Dunfermline**, in delivering the opinion of the Board, said:

> **'Parties are not permitted to begin fresh litigation because of new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted.'**

52. In ***Greenhalgh v Mallard*** **[1947] 2 All ER 255 at page 257**, Somervell LJ said:

> **'I think that on the authorities to which I will refer it would be accurate to say that *res judicata* for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.'**

53. In ***Yat Tung Investment Co v Dao Heng Bank Ltd*** **[1975] AC 581 at page 590**, Lord Kilbrandon, in delivering the opinion of the Board, referred to the above quoted passage in the judgment of Wigram V-C and continued:

> **'The shutting out of a "subject of litigation" – a power which no court should exercise but after a scrupulous examination of all the circumstances – is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless "special circumstances" are reserved in case justice should be found to require the non-application of the rule.'**
>
> > **It is clear from these authorities that when a plaintiff seeks to litigate the same issue a second time relying on fresh propositions in law he can only do so if he can demonstrate that special circumstances exist for displacing the normal rules. It is against this background that the appellant's submissions must be examined."**

54. In **Port of Melbourn Authority v Anshun Pty Ltd. (1981) 36 AZR 3** where a similar issue of an indemnity clause in a hiring agreement was made the subject of a fresh action by a crane operator against an employer after the employer had been found liable for judgment and a portion of costs in the first action. The employer pleaded estoppel on the basis that it was a matter which should have been raised in the earlier action. The defence of estroppel was upheld by the Higher court where it was held:

> "**At common law the existence of any indemnity is a defence to an action in respect of the liability to which the indemnity relates (*Bullen and Leake 3rd ed, p 604; Cutler v Southern (1667)* 1 Wms Saund 113, 116; 85 ER 123, 125)…**
>
> > **Despite some suggestion to the contrary, there is no reason for thinking that the indemnity issue could not have been determined in the Soterales action. The fact that the indemnity was excluded if the injury was caused solely by the negligence of the Authority**

is a complication. But there was nothing to prevent determination of the indemnity issue after the determination of the plaintiffs claim against the two defendants involving, as it did, a finding of negligence against each defendant. Moreover, had the indemnity issue been raised and had it been determined in favour of the Authority, the apportionment issue would have disappeared from the case.

Indeed, by making a claim for contribution, the Authority asserted a right which was inconsistent with the right which it asserts in the present action. In the Soterales action it might have asserted a right to indemnity and in the alternative, a right to contribution. Instead, for reasons which have not been explained, the Authority confined itself to the claim for contribution.

The judgment which the Authority seeks to obtain in the present action is one which would contradict the judgment which has been entered in the Soterales action. The judgment in that action was that Anshun should recover contribution from the Authority to the extent of 90 per cent of Soterales's damages and costs and that the Authority should recover from Anshun contribution to the extent of 10 per cent of the damages and costs. The judgment which the Authority now seeks is one whereby the Authority recovers from Anshun the whole of Soterales' damages and costs. It is this inconsistency between the judgment obtained in the first action and the judgment sought to be obtained now that is of importance.

…

The likelihood that the omission to plead a defence will contribute to the existence of conflicting judgments is obviously an important factor to be taken into account in deciding whether the omission to plead can found an estoppel against the assertion of the same matter as a foundation for a cause of action in a second proceeding. By "conflicting" judgements we include judgments which are contradictory though they may not be pronounced on the same cause of action. It is enough that they appear to declare rights which are inconsistent in respect of the same transaction.

It is for this reason that we regard the judgment that the authority seeks. The Authority seeks to obtain as one which would conflict the existing judgment, though the new judgment would be based on a different cause of action, contractual indemnity.

Taking into consideration the relevant factors we conclude that the Full Court was right in holding that there was an estoppel. The matter now sought to be raised by the Authority was a defence to Anshun's claim in the first action. It was so closely connected with the subject matter of that action that it was to be expected that it would be relied upon as a defence to that claim and as a basis for the recovery by the Authority from the Anhun. The third party procedures were introduced to enable this to be

done. If successful, the indemnity case would have obviated an inquiry into contribution. If reserved for assertion in a later action, it would increase costs and give rise to a conflicting judgment.
The Authority did not adduce evidence at the trial to show why it failed to raise the indemnity issue on the first action. Apart from considerations such as the ability to overcome any prejudice to Anshun by orders for costs and the face that O'Bryan J refused to strike out the action summarily – matters mainly associated with the conduct of this action – the Authority's case is that the principle in *Henderson v Henderson* does not apply.

There is, however, one other factor which should be mentioned. It is that the defence of an indemnity required to be specially pleaded to common law. It was not covered by a general or particular traverse. Consequently the failure to plead it would not have founded an estoppel under the old law in its strictest formulation. But the evolutionary development of that rule evidenced by the decision in *Humphries v Humphries* may well have resulted in releases and indemnities being equated to traversable allegations for the purposes of estoppel. In any event the fact that the defence required to be specially pleaded at common law is not now a material consideration. It does not derogate from the conclusion that it was unreasonable for the Authority to refrain from raising its case of indemnity for disposition in the first action.

We would dismiss the appeal."

55. Murphy J of the High Court confirmed his agreement with the Full Court's decision:

"I prefer not to attempt to formulate an exhaustive theory of *res judicata* or issue estoppel in order to determine this case by application of such theory. These notions of *res judicata* and issue of estoppel are founded on the necessity, if there is to be an orderly administration of justice, of avoiding re-agitation of issues, and of preventing the raising of issues which could have been and should have been decided earlier in the litigation.

In this instance, the issue now sought to be raised was plainly open to be agitated in the previous litigation. The judgment in that case is inconsistent with the judgment now sought by the plaintiff. To preserve the orderly administration of justice the earlier judgment should be treated as conclusive on the question of indemnity. There is no discretion to allow the raising of that issue against the unwilling defendant; the attempt to do so I properly characterized as an abuse of process. The appeal should be dismissed."

56. The Indemnity point is one which should have and could have been raised in the Junior Action. To raise it now is an abuse of process and it runs the risk of contradicting the decision of Justice Isaacs by way of a collateral attack. It could have been appealed but was not.

57. Further the interpretation of Clause 2G posited by the Plaintiffs runs afoul of judicial pronouncement. In **Smith v South Wales Switchgear Co. Ltd [1978] WLR 165** the English House of Lords confirmed the holding of the Privy Council in **Canada Steamship Line Ltd. V The King [1952] AC 192**, the House of Lords held:-

> **"The second question in the appeal poses a much more difficult problem. It is whether clause 23 of the general conditions as revised in March 1970, upon a proper construction, requires the appellants to indemnify the respondents against the liability which they incurred to the pursuer by reason of their own negligence and breach of statutory duty. The matter is essentially one of the ascertaining the intention of the contracting parties from the language they have used, considered in the light of the circumstances which must be taken to have been within their knowledge. Certain guidelines of assistance in approaching this task were an exemption clause or a clause of indemnity is under consideration were, however, laid down in the Privy Council case of - Canada Steamship Lines Ltd. V The King [1952] A. C. 192. Lord Morton of Henryton, delivering the advice of the Board, expressed these as follows, at p.208:**
>
> > **"(1.) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called 'the proferens') from the consequence of the negligence of his own servants, effect must be given to that provision…**
> >
> > **(2.) If there is no express reference to negligence, the court must consider whether the words are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens…**
> >
> > **(3.) If the words used are wide enough for that above purpose, the court must then consider whether enough for the above purpose, the court must then consider whether 'the head of damage may be based on some ground other than that of negligence'… The 'other ground' must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it; but subject to this qualification… the existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words are prima facie wide enough to cover negligence on that part of his servants."**

58. Clause 2(g) does not contain any specific language which would exempt Trial Farms from the consequences of its own negligence or other acts of wrong doing. I am satisfied that in the absence of express language, the intention of the parties did not contemplate exempting the Trial Farms from acts of its own wrong doing.

59. The allegation that Pittstown has breached clause 2(g) of the Lot 68 Lease Agreement is unsustainable and an abuse of the process of the court.

NEW EVIDENCE POINT

60. As enunciated in **Ackerman v Thornhill** in order to have a retrial of previously

determined issues on the discovery of " fresh evidence" there must be compliance with the following three requirements:-

(1) The fresh evidence was not available or could not with reasonable diligence have been obtained at the time of the original judgment:

(2) There was conscious and deliberate dishonesty in the concealment of the new evidence;
and

(3) The fresh evidence is material, in the sense that it was a operative cause of the judge's decision to give the judgment in the way that he did , i.e. it would have entirely changed the way in which the judge approached and came to his decision.

61. Each of these requirements have been the subject of judicial pronouncement. Lord Cairns in **Phosphate Sewage Co. v Molleson (1879) 4 App Cs. 801** held:-

> **"67. As I understand the law with regard to *res judicata,* it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. My Lords, the only way in which that could possibly be admitted would be if the litigant were prepared to say, I will shew you that this is a fact which entirely changes the aspect of the case, and I will shew you further that it was not, and could not by reasonable diligence have been, ascertained by me before."**

This speaks to evidence which would entirely change the case.

62. **Hunter v Chief Constable of West Midlands [1980] QB 283** speaks to evidence which was not available and could not have been available.

> **"69. The Court of Appeal unanimously held that a claimant who wished to escape from an estoppel arising out of an earlier decision against him had to adduce evidence that was not available and could not have been obtained by reasonable diligence at the earlier trial. Each of the member of the court referred to such evidence as "fresh evidence": see [1980] QB 283 per Lord Denning at page 318, per Goff LJ at pages 334-335 and per Sir George Baker at page 347. In particular, Lord Denning and Goff LJ expressly affirmed the approach of Lord Carins in Phospate Sewage v Molleson. Goff LJ concluded, _**
>
> > **So, it is not permissible to call further evidence which was available at the trial or could by reasonable diligence have been obtained and the fresh evidence must be likely to be decisive." _**

63. **Finally in Royal Bank of Scotland plc v Highland Financial Partners LP [2013] EWCA** Cw. 328 Aikens LJ held:-

"64. There was no dispute between counsel before us on the legal principles to be applied if one party alleges that a judgment must be set aside because it was obtained by the fraud of another party. The principles are, briefly: first, there has to be a 'conscious and deliberate dishonesty' in relation to the relevant evidence given, or action taken, statement made or matter concealed , which is relevant to the judgment now sought to be impugned. Secondly, the relevant evidence, action, statement, or concealment (performed with conscious and deliberate dishonesty) must be 'material'. 'Material' means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement, or concealment was an operative cause of the court's decision to give judgment in the way it did. Put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision. Thus the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was. Thirdly, the question of materiality of the fresh evidence is to be assessed by reference to its impact on what decision might be made if the claim were to be retried on honest evidence."

64. The date of the Minute paper (September 1st, 2010) was after the trial of the action before Justice Isaacs but before his judgment. There is no pleading as to when the evidence was discovered. The document existed at the time of the trial and could have been obtained with reasonable diligence. There is no pleading as to why it could not have been obtained by the Plaintiffs. In fact, the letter of 20th September 2010 was from the same department and was obtained by Pittstown and placed before the judge prior to his judgment.

65. There are no allegations of fraud or dishonest concealment pleaded against the Defendant. The New Evidence was an internal document which the Defendant nor its agent Mr. Butler could have known of the existence. The court also takes notice of the affidavit filed by Mr. Errol Heastie as the President of Kirakis on February 9th, 2017 when the Plaintiffs sought leave to restore the appeal of Justice Isaacs's ruling. In that affidavit, Mr. Heastie averred that he was present at the very same inspection of the runway in August 2010 and accordingly the Plaintiffs by virtue of their own submission and evidence too could have and would have knowledge of the "existence of the document" which they now claim is "new evidence".

66. The letter dated the 20th September 2010 was a document issued by the Department of Civil Aviation to Mr. Cameron McPhee of the Defendant which stated the position held by the Department with regard to the condition of the runway. The memorandum of the 1st September 2010 was an internal memorandum. There is no evidence before this court or at the trial before Justice Isaacs that there is a failure on behalf of the Department of Civil Aviation to consider the memorandum. What is a fact is that Justice Isaacs considered the 20 September 2010 as dispositive of the issue of whether Pittstown required any further regulatory approval to extend the runway and as a consequence not fall afoul of the terms of the lease agreement.

67. I am satisfied that the existence and disclosure of the memorandum would not satisfy the requirements laid down in Ackerman so as to justify a retrial of the issues previously decided before Justice Isaacs and accordingly, to attempt to do so now is an abuse of the process of the Court.

NON-DISCLOURE POINT

68. The non-disclosure allegation relates specifically to two letters dated the 4th June (sic) 2010 from the Bahamas Investment Authority querying the status of existing litigation and letters dated 5th June 2008 for Pittstown's attorney's responding to the 4th June 2008 letter. The reference to the 4th June 2010 letter is an error and in fact refers to the 4th June 2008 letter to which the Defendant responded by the 5th June 2008 letter.

69. I am satisfied that these documents were both contained in Pittstown Bundle of Documents which was before Justice Isaacs as well contained in the record of Appeal of the Isaacs decision, prepared by the Plaintiffs in this action and therefore were in fact disclosed at the trial before Isaacs J. The non-disclosure point is baseless and unsustainable on the evidence, and to attempt to litigate the same is an abuse of the process of the court.

70. For the reasons set forth above, I am satisfied that all of the issues pleaded by the Plaintiffs in this action have or could have been litigated before Justice Isaacs and an attempt to do so now is to mount a collateral attack on issues which have been tried and determined and to make a collateral attack on the Isaacs decision which has been upheld through all the courts. Accordingly, I rule that this action be struck out as prayed in the Defendant's Summons with costs to be awarded to the Defendant to be taxed and paid by the Plaintiffs. I thank counsel for the Defendant for their assistance and diligence in providing authorities helpful to the issues to be determined.

G. Diane Stewart
Justice