COMMONWEALTH OF THE BAHAMAS 2021

IN THE SUPREME COURT CLE/gen/01575

Common Law & Equity Division

BETWEEN

BANK OF THE BAHAMAS LIMITED

The Plaintiff

AND

SIMEON PETER COOPER
(GUARANTOR)

The Defendant

Before: Registrar Constance A. Delancy

Appearances: Mrs. Nadia Wright for the Plaintiff

Mr. Kahlil Parker, KC with Ms. Lesley Brown for the Defendant

Hearing Date: 16 March 2023

RULING

Estoppel - res judicata – issues available in previous proceeding – autrefois acquit in civil proceedings - party cannot subsequently raise same or similar issues as those raised in earlier proceedings - Order 18 r.19(1) RSC now Part 26.3 CPR applications

1. This is the ruling on Defendant's application by Summons filed 17 January 2022 to strike out the Plaintiff's Statement of Claim filed herein and to dismiss this action.

2. The Defendant's application seeks to strike out the Plaintiff's Statement of Claim under Order 18 rule 19 19 (1) (a), (b), (c) and/or (d) of the Rules of the Supreme Court 1978 ("RSC") and now Part 26.3 of the Supreme Court Civil Procedure Rules ("CPR"). The Defendant's grounds are that the issues raised by the Plaintiff in its Statement of Claim in this action have been adjudicated upon and determined in a previous action between the Plaintiff and the Defendant in the Court of Appeal of The Bahamas and the

Court below; therefore issues raised herein are res judicata and an abuse of the Court process.

3. The Defendant's application is supported by an Affidavit of Mr. Simeon Peter Cooper filed 17 January 2022.

4. The Court has an inherent jurisdiction to prevent an abuse of its process and may stay or dismiss any proceedings in order to do so. Order 18 rule 19 of the RSC (now Part 26.3 CPR) provided that the Court may at any stage of proceedings order to be struck out or amended, any pleading, 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.

5. The Plaintiff commenced action CLE/gen/0728/2019 ("earlier proceedings") by way of an Originating Summons filed 23 May 2019 against Betty Joe Antasha Cooper (nee Smith) as Borrower and Simeon Peter Cooper as Guarantor. The Originating Summons was supported by an Affidavit of Paulette Butterfield filed on the 3 December 2019.

6. The Plaintiff obtained a final Order against the Defendants in the earlier proceedings filed therein on 18 June 2020, granting judgement for sums due and owing to the Plaintiff and vacant possession of property which secured a mortgage between the parties. The Defendant then appealed the said Final Order. The Court of Appeal set aside the said Final Order and dismissed the action as against the Defendant.

7. The Plaintiff commenced this action against the Defendant by way of a specially endorsed Writ of Summons filed herein 23 December 2021 claiming sums due and owing as set out herein.

8. Counsel for the Defendant submitted that the Plaintiff having been unsuccessful in the Court of Appeal sought to re-litigate the issues which were the subject matter of the inter partes hearings before Supreme Court in the earlier proceedings and the Court of Appeal in SCCivApp No.42 of 2020 respectively.

9. Counsel for the Defendant asserted that the Plaintiff is barred from bringing fresh proceedings as the matter is res judicata and constitutes an abuse of process of the court. Counsel relied on the case of **Henderson v Henderson [1843-60] All E.R. Rep. 378** as per Sir James Wigram, VC:

> *"…… I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation* ***to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties,***

exercising reasonable diligence, might have brought forward at the time*."* [*Emphasis mine*]

10. Counsel for the Defendant submitted that under the doctrine of estoppel as stated in at **Arnold et al v National Westminister Bank PLC [1991] 2 AC 93** since the case involves the same parties, the same subject matter and that it was heard inter partes by a Court of competent jurisdiction that the Plaintiff was estopped from commencing a fresh action against the Defendant as per Lord Keith of Kinkel at page 104:

"..it is appropriate to commence by noticing the distinction between cause of action estoppel and issue estoppel. ***Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and the having involved the same subject matter****. In such* ***a case the bar is absolute****, in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment…Cause of action estoppel* ***extends also to points which might have been but were not raised and decided in the earlier proceedings*** *for the purpose of establishing or negativing the existence of a cause of action."* *[Emphasis mine]*

11. Counsel for the Plaintiff countered that the Court of Appeal dismissed the matter based on procedural deficiencies and that once those deficiencies were identified a second action may be commenced, as the merits of the matter were not delved into. Further, that there was no litigation as it relates to the Defendant (Guarantor) in the earlier proceedings there can be no res judicata. Counsel argued that the Defendant as Guarantor ought to answer as it relates to the contractual obligations in relation to the

Guarantees. Counsel submitted the plea of autrefois acquit was similar to that of res judicata. Counsel invited the court to consider the observations the doctrine in the case of **Henderson v Henderson** in the case of **Jelson Estates Ltd. v Harvey [1983] 1 WLR 1401** as per Goulding, J.'s at page 1405, paragraphs D, G and H thereof:

> *"…I am quite clear that if a man has been cleared of an alleged civil contempt on a proper investigation of the merits (he should not be put in jeopardy a second time, it does not seem to me that one should too readily draw a procedural analogies between the contempt process and those either of indictment or summary prosecution. I think it is in accordance with the proper nature and application of the rule against double jeopardy that an applicant should not be prevented from renewing a complaint of the court simply because of a procedural defect in his first attempt to do so…..*
>
> *…..Where there is litigation of a certain question or issue before the court resulting in a final or substantial order which decides it, then it is well established that it is too late (save in exceptional cases) for a party to adduce in subsequent litigation against the same opponent, or one privy to him, a fact that might well have been brought forward on the previous occasion. That doctrine, however, does not apply where there is* ***a mere procedural defect and the court has never gone into the merits*** *though both parties were before it."* *[Emphasis mine]*

12. Counsel for the Defendant submitted that the earlier proceedings was heard on the merits in the Court of Appeal and the Court below and not decided merely on the issue a procedural defect. Counsel relied on the case of **R (on the application of Coke-Wallis) v Institute of Chartered Accountants in England and Wales** [2011] UKSC 1

as per Lord Clark at paragraphs 41 and 43 to support his submission that the decisions of the Court of Appeal and the Court below ought to be considered final and on the merits:

> *"The question is whether the **decision was final and on the merits**. In my opinion the answer is that it was both final and on the merits. The hearing on 19 April has been fixed as a hearing of the complaint on the merits. The Appellant applied for an adjournment which was refused. The hearing on the merits accordingly proceeded. **It was for the Institute to put whatever material it wished before the tribunal and to put its case as it thought fit.** It is plain from the transcript of the hearing to which I have referred that the Institute based its case on the bye-law 7(1) which made the Jersey conviction conclusive evidence of a breach of bye-law 4(1)(a) provided that the Jersey offence corresponded to one which is indictable in England and Wales. **Although it could have done, it did not put its case in any other way**. It could have relied upon the findings of fact as prima facie evidence of the facts under the bye-laws 7(3)(b) or it could have relied upon the underlying facts themselves. **All the relevant evidence was available to it.** It did not, however, do so. Nor did it apply for an adjournment in order to do so. Notwithstanding its reference to findings of fact in their written decision, the tribunal understood the position as being that the Institute was relying on the conviction because, having set out their conclusion that the Jersey conviction was not for an offence which corresponded to an indictable offence in England and Wales, it expressly stated that the compliant was dismissed. If it had reached the opposite conclusion and held that the Jersey conviction was based on an offence which corresponded to*

an indictable offence in England and Wales, it would have found the complaint proved because the conviction would have been conclusive evidence of a breach of bye-law 4(1)(a). There could have been no doubt that such a decision would have been final and on the merits. In judgment, the same is true of the decision to dismiss the complaint." *[Emphasis mine]*

14. The issue is therefore whether this application meets the requirements of Order 18 r.19 RSC to sustain a plea of res judicata and/or cause of action estoppel.

15. The Court of Appeal in SCCivApp No.42 of 2020 examined the Plaintiff's failure to comply with the requirements of Order 77 of RSC. In particular the Court of Appeal found that the Plaintiff's Affidavit in support of its Originating Summons failed provide the information required to support its claim against the Defendant. The Court ordered that the final Order of 13 March 2020 in the earlier proceedings be set aside as it related to the Defendant. The Court of Appeal also found that there was insufficient evidence to support the judgment in the Court below and the dismissal the action as against the Defendant. Crane-Scott, JA at paragraph 41 page 13 of the Court of Appeal's ruling stated:

"As just noted, the Bank's pleaded case *vis-à-vis* Mr. Cooper (as guarantor) is hopelessly deficient. **The claim against Mr. Cooper was very poorly pleaded, and further provided no evidential foundation for the Bank's claim against Mr. Cooper as the guarantor**. Additionally, the requirements of rule 4 were not followed in very material respects. In the circumstances, the appeal is also allowed on grounds 2, 3, 4 and 6." *[Emphasis mine]*

16. I considered the dicta of Goulding, J. in committal proceedings in the case of **Jelson Estates Ltd. v Harvey**, where no decision was made with respect to a first notice of motion in contempt proceedings by Warner, J. in court below and therefore the plea of autrefois acquit did not apply with reference to the second notice of motion. Whereas in the earlier proceedings a final order was granted to the Plaintiff on the substantive issues for monies owed and vacant possession against the Defendants. The principle of res judicata is applicable to civil cases and ought not to be confused with the principles of autrefois acquit or autrefois convict which are applicable to criminal cases.

17. I note that Goulding, J.'s decision at the Chancery Division level in **Jelson** was reversed on interlocutory appeal. Therefore the Plaintiff's submission that the court ought to accept that autrefois acquit in criminal cases is also applicable in civil proceedings cannot be sustained. In the interlocutory appeal of Goulding, J.'s decision Cumming-Bruce, LJ stated at paragraph B page 1410:

> *"I would take the broader approach: accepting that these were proceedings for the punishment of the defendant for breach of an injunction made in civil proceedings, when the learned judge observed the irregularity on the notice of motion and decided that it would be wrong, that is to say unfair, to proceed to adjudicate on the merits when the grounds had not appeared from the notice of motion so that the defendant had not had the time specifically to consider those grounds, there was,* ***in my view, no room in these proceedings for contempt for the application of the doctrine of autrefois acquit by analogy with criminal proceedings. I would take the view that the learned judge when making no order upon the summons never in fact allowed the defendant to be in any peril of any***

punishment upon that notice of motion, and it seems to me wholly unreal to borrow from criminal law a doctrine which in the criminal law may properly be applied with greater strictness than is necessary in these civil proceedings. *" [Emphasis mine]*

18. The doctrine of res judicata as stated in **Henderson v Henderson** was expanded by Somervell, LJ in the case of **Greenhalgh v. Mallard [1947] 2 AER 225 at 257**:

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

[Emphasis mine]

19. The Privy Council in **Yat Tung Investment v Dao Heng Bank [1975] AC 581** held that it is an abuse of the process of the court to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings.

20. The court having considered the submissions made on behalf of the parties herein hereby strikes out the Plaintiff's Statement of Claim filed herein and dismisses the action as the issues raised are res judicata and are an abuse of the court process. Defendant awarded costs on the application to be taxed if not agreed.

Registrar Constance Delancy
Dated: 1 May 2023