HIGH COURT OF THE SUPREME COURT OF JUDICATURE

BETWEEN:

DAVENARINE PERSAUD
Plaintiff

-and-

CITIZENS BANK INC.
Defendant

April 10, 16, May 7, 23, June 6, 25, July 15, Sept 9, 30, Oct 18, Nov, 15 2013; Feb 10, October 13, 2014.

Mr. P. Mohanlall for the plaintiff.

Mr. K. Ramkarran for the defendant.

JUDGMENT

GEORGE, R., J: The plaintiff's claim is for damages for wrongful interference with a contract of sale and purchase he entered into with Joseph and Lokeshwar Ramsingh on April 6, 2004 in relation to the purchase of Letter T, Bartica, Essequibo (Letter T) and for wrongful interference with the plaintiff's business situate at the said Lot Letter T.

The plaintiff bought Letter T from the Ramsinghs in 2004 without buildings and erections thereon. On the signing of the agreement he went into possession and constructed buildings and a business on Letter T despite still not having title to the property. The plaintiff pleaded that prior to the contract with him in relation to Letter T, the Ramsinghs, had a mortgage with the defendant which was secured by two other properties in Bartica that they owned. There was also another loan obtained by the Ramsinghs and a third party similarly secured by a second mortgage on one of the Bartica properties. The Ramsinghs and the third party defaulted in their payments on the loans and in 2002 the defendant instituted two actions against the Ramsinghs and the third party to recover the sums due, securing judgments in 2003.

Subsequent to his purchase and entry into possession, in 2006 the defendant caused levy proceedings to be instituted against the property of the Ramsinghs including Letter T. It is the claim of the plaintiff that the defendant did not cause a levy to be executed on one of the mortgaged properties but levied execution on Letter T. Letter T, with the buildings and erections thereon which the plaintiff claims he constructed, was sold at execution to one Wayne Heber. As a result he claims that the levy was unlawful and that he suffered loss because the business that he had established had to be stopped. He claimed in paragraph 20 of his statement of claim that he had to stop construction on his structure from September 22, 2006 to August 26, 2008 pursuant to a Court Order dated September 22, 2006.

In its statement of defence, the defendant admitted that there were loans and mortgages to the Ramsinghs and the third party on which they defaulted and that judgments were obtained. It was stated that thereafter the marshal of the High Court was instructed to levy execution on the properties that had been mortgaged and they were sold. However, it was claimed that the net proceeds of the sale were insufficient to satisfy the judgment sums and therefore other property

had to be levied on; that since as recorded by the marshal on his return there was insufficient movable property pointed out, the marshal levied on Letter T. As such the defendant denied that the levy was unlawful and further contended that the plaintiff's claim is frivolous and vexatious and an abuse of process because the plaintiff and the Ramsinghs had previously in action 257-CD/2006 challenged the levy proceedings seeking similar reliefs. This action was dismissed for want of prosecution and an application for rehearing was refused. The defendant also contended that the plaintiff had no legal interest in the property and therefore no *locus standi* to bring this action. It was also contended that there was no cause of action disclosed and that in any event the action was *res judicata.*

I raised a number of issues regarding this matter, more particularly whether the plaintiff had *locus standi* and a cause of action and whether the defendant was the property party. After some argument, Mr. Ramkarran indicated that he had no objection to the trial proceeding as evidence led would influence submissions to be made. However, he subsequently raised preliminary objections that this action is *res judicata* and an abuse of process. Mr. Ramkarran contended that the statement of claim is very similar to that in action 257 CD/2006 which was brought by this plaintiff and the Ramsinghs against the defendant. He stated that the statement of claim in that action claimed that there had been a wrongful levy and that the levy should be set aside. Mr. Ramkarran also made submissions on the amendment of the statement of defence to raise the issue that the plaintiff's claim is statute barred.

It came to light that this plaintiff had also filed another action in 2006 – 455W/06 against the defendant claiming similar reliefs. The records of court produced reveal the following:

Action 455W/2006 - Devnarine Persaud v Citizens Bank Inc., Wayne Heber, The Registrar of Deeds and The First Marshal of the Supreme Court

In this action filed on July 27, 2006, the plaintiff sought declarations that he is the bona fide purchaser of Letter T without encumbrances and entitled to transport, that the levy was excessive, illegal, irregular and unjust, that the sale at execution was illegal, unlawful and unjust. He also sought orders setting aside the levy and sale as well as damages for excessive, illegal or irregular levy and fraud and injunctions restraining the transfer of the property to Heber. The proceedings in this action which was appended to the plaintiff's affidavit seeking an injunction in another action, 257CD/2006, indicate that after a number of adjournments in the interlocutory proceedings for the injunction, notice of withdrawal and discontinuance was filed on September 22, 2006 with leave being granted to the plaintiff to withdraw this action on September 27, 2006 with costs to Heber in the sum of $125,000.

Action 257CD/2006 - Joseph Ramsingh, Lokeshwar Ramsingh and Devnarine Persaud v Citizens Bank Inc., Wayne Heber, The Registrar of Deeds and The First Marshal of the Supreme Court

In this action filed on September 15, 2006, the plaintiffs sought inter alia an order setting aside the levy, a declaration that the sale of Letter T at execution was illegal, irregular and void and an order setting aside the sale. This plaintiff, Devnarine Persaud, sought a declaration that he was the lawful owner of Letter T with the buildings and erections thereon and entitled to transport. The plaintiffs also sought damages for illegal and irregular levy and for fraud and injunctions restraining the transfer of the property to Heber.

The flysheet reveals that on April 25, 2007 this action was withdrawn against Heber when a consent order was made by Roy J that this plaintiff, Devnarine Persaud, pay Heber the sum of $2M "in full, final and complete settlement of his [Heber's] claim and/or rights acquired in the property situate at Lot Letter 'T' Bartica, Essequibo … sold by execution by the 4th named defendant herein at the request of the 1st named defendant … ." The order went onto direct that Heber relinquish all rights and interest in the property and that the Registrar of the Supreme Court refund Heber the money he had lodged at the execution sale. On November 14, 2007 it was ordered that witness statements to be filed were to be deemed evidence in chief.

Subsequently, orders were made for an amended statement of claim to be filed as well as the memorandum of case and statement of agreed facts. The case was fixed for hearing on April 29, 2009 and June 10, 2009 when it was dismissed for want of prosecution. A summons for rehearing was filed sometime after on November 11, 2009 and was dismissed after a hearing on March 2, 2011. It was submitted by Mr. Ramkarran that in determining whether the action should have been reheard, Justice Rishi Persaud must have considered that the action had no merit.

Submissions on abuse of process

Mr. Ramkarran submitted that while the plaintiff may claim that the cause of action of wrongful interference was different from those raised in the earlier actions, authorities, for example, Henderson Henderson [1843 – 1860] All ER Rep 378 at 381 and Yat Tung Investment v Dao Heng Bank [1975] AC 581 hold that where a plaintiff should have pleaded a cause of action in earlier proceedings but did not do so, that to permit him to engage in litigation again to raise an issue of which he must have had knowledge would amount to a form of *res judicata* and an abuse of process. Mr. Mohanlall responded by submitting that there being no final adjudication in the case, that it is not *res judicata.* He cited Hart v Hall & Pickles Ltd [1968] 3 All ER 291 at 293 submitting that in this case it was held that where a matter has been dismissed for want of prosecution, this is an interlocutory proceeding that does not affect substantive rights so that it does not give rise to an estoppel *res judicata* and therefore did not prevent the plaintiff from refiling his action. In this regard, therefore, it was submitted, the plaintiff was not prevented from refiling his claim and so this action is not an abuse of process. He said that with the dismissal of the summons for rehearing, the dismissal for want of prosecution order in relation to action 257CD/2006 stood which allowed the plaintiff to refile his action.

Mr. Mohanlall stated that action 455W/2006 was withdrawn on September 22, 2006 with costs being paid. He said that it was withdrawn because the Ramsinghs should have been joined as plaintiffs and they were not. He said that it was after this action in which the Ramsinghs should have been joined as plaintiffs was withdrawn that 257CD/06 was filed. He contended that it would only be an abuse of process if there were simultaneous pending actions, which was not the case here. Mr. Ramkarran in response stated that the submission that there has been an abuse of process speaks to the number of times the plaintiff has filed proceedings against the defendant making the same or similar claims. He said that there must be some finality to proceedings. In effect, he recounted, this was the third action by this plaintiff against the defendant.

Submissions on amendment to the statement of defence to plead that action is statute barred

Mr. Ramkarran also made submissions on amending the statement of defence to plead the statute of limitations. He submitted that Mr. Mohanlall was seeking to amend the statement of claim to read that the levy was executed on April 7, 2006. Mr. Mohanlall did not demur. As such, I requested the production of the levy proceedings that had been filed. Due to the procrastination of Mr. Mohanlall in producing the levy proceeding documents as promised by him, leave was given to the defendant to produce them utilizing a summons with affidavit in support. The documents filed in relation to the levy proceedings that were produced are the Writ of Execution filed in action 1607S/2002 which reveals that the levy was executed on Letter T on April 18, 2006 and a Notice of Withdrawal and Discontinuance of these levy proceedings filed by the defendant on May 3, 2007. Pursuant to this notice, by letter dated May 8, 2007, the Registrar of the Supreme Court acting through a Mr. Kaladin, wrote the Registrar of Deeds indicating that the defendant had withdrawn the levy proceedings in relation to Letter T. A request was made for the necessary annotations to be made to the records to indicate that the levy proceedings were wholly withdrawn and discontinued. In response to the production of the levy documents by the defendant by way of affidavit, the plaintiff swore to an affidavit in which he claimed to be unaware that the levy proceedings were withdrawn until August 26, 2008 when the defendant informed him and the Ramsinghs. He also asserted that despite the letter from Mr. Kaladin, there was nothing to show that the Registrar of Deeds had made the necessary annotations to the records of the Deeds Registry. It is passing strange that the plaintiff would be unaware of what

was happening regarding the proceedings in relation to Letter T when he had withdrawn his action against Heber and entered into a consent judgment with Heber in April 2007 in action 257 CD/2006, as recounted above, that saw him (the plaintiff) in effect paying Heber to withdraw the latter's claim to Letter T. Mr. Mohanlall stated that there was a delay in the Registrar of Deeds making the necessary annotations, with the plaintiff only obtaining transport in 2008. I am of the view that the defendant cannot be held liable for any alleged inaction on the part of the Registrar of Deeds.

Mr. Ramkarran argued that even accepting the date of April 7, 2006 as the date the levy was executed on Letter T then this action, having been filed in 2011, it would have been statute barred as at April 8, 2009. He submitted that the plaintiff is in effect relying on continuing damage as against a continuing tort of wrongful interference. Mr. Mohanlall responded that wrongful interference is an economic tort that is continuous with the cause of action accruing in this case for everyday that the levy continued in force debarring the plaintiff from completing the contract and operating his business. However, the court record reveals, as noted above, that the plaintiff paid Mr. Heber the sum of $2M as reflected in a court order of April 20, 2007 and thereafter the levy was withdrawn as evidenced by court records dated May 8, 2007. Mr. Mohanlall in response to this revelation submitted that the levy was still continuing and that the fact that there was a court order did not negate the fact that it was the levy that led to the plaintiff's loss of business. Mr. Ramkarran however pointed out that while paras 17 and 18 of the statement of claim speak to a levy, para 20, which falls under the heading 'Particulars of Special Damage/Loss', outlines that the plaintiff stopped work on his structures from September 22, 2006 to August 26, 2008 pursuant to an Order of Court dated September 22, 2006 and that this therefore grounds no claim against the defendant as any loss to the plaintiff is referable to a court order. He pointed out that the plaintiff and Mr. Heber entered into an arrangement which resulted in the court order in 2007. Mr. Mohanlall countered that paras 17, 18 and 20 should be read together and are all referable to the levy proceedings and the sale to Mr. Heber which was not completed. He explained that an injunction was filed preventing the Registrar from transferring title to Mr. Heber and the order of September 22, 2006 was made in this regard. However, this injunction would have been to the benefit of this plaintiff. To my mind, the consent order as between the plaintiff and Heber in relation to Heber's acquisition of Letter T pursuant to the execution sale strongly suggests that the plaintiff acknowledged the validity of the levey and sale to Heber, but sought to retain the property by paying off Heber so he would relinquish his claim to the property. But a decision on this issue is not necessary given the findings I have made to which I now turn.

Findings – Whether action *res judicata* and abuse of process

In Yat Tung Investment v Dao Heng Bank [1975] AC 581 the facts of which are a bit similar to the case at bar, the issue was whether the failure of the plaintiff to include a cause of action known to him at the time he filed previous proceedings but which he then failed to include, amounted to an abuse of process. The owners of property borrowed money from the first respondent bank with the loan being secured by the property. They defaulted on their payment of the loan and absconded. The bank sold the property to the appellant who in turn also secured a mortgage from the said bank with the same property as security. The appellant also defaulted in paying the loan and the bank exercising its right of sale sold the property to the second respondent. The appellant sued the bank claiming that the first sale was a sham and that it was therefore a nullity. The bank denied this claim and counterclaimed for the loss suffered on the re-sale of the property to the second respondent. The appellant's claim was dismissed with the bank succeeding on its counterclaim. One month later the appellant sued the bank and the second respondent claiming that the sale to the second respondent was void or voidable on the ground of fraud. The bank and the second respondent applied by summons to have the statement of claim struck out as being vexatious, frivolous and /or otherwise an abuse of the process of the court. It was held at first instance that the allegation of fraud and the voidability of the sale were matters which were available for litigation in the earlier action that was brought by the appellant and the

statement of claim was struck out. This order was affirmed by the Full Court, and an appeal to the Judicial Committee of the Privy Council was dismissed.

It was held that there was no reason why the appellant did not include in a counterclaim to a counterclaim in its earlier action its claim challenging the *bona fides* of the sale by the bank to the second respondent; and "that the doctrine of *res judicata* in its wider sense applied and it would be an abuse of the process of the court to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings." Lord Kilbrandon, giving the judgment of the Court at p 589, adopted the reasoning McMullin J of the Full Court that there being no difficulty shown in pleading what was claimed where it was "so clearly a matter necessary and proper to be litigated at the same time with all other issues between the parties that it would be wrong for the judge in chambers to have permitted the amendment" and concluded that the claims made could have been included in the earlier action. Lord Kilbrandon also went on to consider the doctrine of *res judicata* in a wider sense holding at p 590 that "it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings." His Lordship cited the judgment of Wigram VC in the *locus classicus* on this aspect of *res judicata* – Henderson v Henderson (1843) 3 Hare 100 at p115 where the judge said:

> " ... 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 in 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."

Lord Kilbrandon also cited Greenhalgh v Mallard [1947] 2 All ER 255 at 257 where Sommervill LJ stated that:

> " ... *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."

(See also Wright v Benner & Another [1948] 1 All ER 227.)

There is nothing that has been advanced by the plaintiff in this case to indicate that this is a special case which would permit the non-application of the *res judicata* doctrine in its wider sense. The plaintiff filed two previous actions claiming essentially the same reliefs and he should have included his claim for wrongful interference with his business and the contract of sale and purchase with the Ramsinghs in these earlier actions or, at least, in the later action of the two - 257CD/2006. Further, the facts pleaded by him in this current action indicate that he would have, or at least should have, been aware of the wrongful interference claims he now makes since 2006 when he filed the two previous actions, claiming, as he has in this one, loss from 2006 and continuing. The defendant was entitled to come to the conclusion that with the last litigation in this matter ending in 2007 that there would be no further proceedings that were related to the fact circumstances as must have been known to the parties at that time.

Hart v Hall & Pickles Ltd [1968] 3 All ER 291 at 293 cited by Mr. Mohanlall can be distinguished. While it was held that where an action has been dismissed for want of prosecution this is an 'interlocutory order' in the sense that the case had not been finally determined on the

merits, that is, that the defendant had not been 'sued out to judgment', and the matter could not therefore give rise to an estoppel by *res judicata*, and that the plaintiff could have reinstituted proceedings so long as the Statute of Limitations did not apply, the circumstances are not the same as in the case at bar. In Hart, a personal injuries case, the plaintiff sued the defendant who joined a third party. The plaintiff then joined the third party as a second defendant but due to laxity on the part of the plaintiff the case against the third party as second defendant was dismissed for want of prosecution. At the trial the third party sought an order that since the case had been dismissed against them as second defendant, that it should be dismissed against them as third party also. The Court of Appeal applying the principle outlined above, held that while the case had been dismissed for want of prosecution as against the plaintiff who would have been entitled to reinstitute it, it did not debar the continuation of the first defendant's action against them as third party for contribution if they were found liable.

In the case at bar – it is not a situation of simply a dismissal of the plaintiff's case for want of prosecution in action 257CD/2006, it also a case where after this, and the previous action 455W/2006 against this defendant which he withdrew, the plaintiff is seeking to prosecute another cause of action – wrongful interference - which could and should have been raised in the previous suits. I am therefore of the view and hold that the filing of this 2011 action is an abuse of process.

Findings – Whether action statute barred

As regards the application to amend to plead limitation, having considered the arguments of both counsel on whether the amendment should be allowed, I would have allowed this amendment as I am of the view that the plaintiff's claim is statute barred. I so conclude because from the date of the withdrawal of the levy proceedings in May 2007 to the date of the filing of this action in June, 2011 is more than the three years allowed for the institution of claims for damages which the plaintiff claims for the alleged wrongful interference with the contract of sale that he had with the Ramsinghs and with his business. I find that the plaintiff's cause of action, if he has one at all against the bank, would have accrued in May, 2007. I hasten to say that while I have my reservations as to whether the plaintiff has a cause of action against the defendant, I have made no definitive finding in this regard since I have not had full arguments on this issue. (See the somewhat analogous case of Gangadia v BArracot [1919] LRBG 216.) I however agree with the submission of Mr. Ramkarran that the while the damages flowing, if proven, may have been continuing, the continuance of the alleged tort of wrongful interference would have long expired in 2010 since the withdrawal and discontinuance of the levy proceedings had been effected in 2007. However, there is no need to proceed to an amendment to plead limitation, finding as I do that these proceedings are an abuse of process.

Exercising the court's inherent jurisdiction to regulate proceedings before it, the plaintiff's statement of claim is therefore struck out and this action stayed as being vexatious and an abuse of process. Costs are awarded to the defendant in the sum of $150,000.

I should mention that this is a clear case where pre-trial case management, limited though it was, and full disclosure of documents was beneficial. Without them, a long trial may have been engaged in, utilizing scarce judicial time and adding to our already overburdened system.

Judgment accordingly.

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Roxane George
Puisne Judge
October 13, 2014.