1996 No. 5136 DEMERARA

HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF GUYANA

CIVIL JURISDICTION

BETWEEN:

ECCLES DEVELOPMENT COMPANY INC a company with registered address at 6-8 Water & Schumaker Streets, Georgetown, Demerara

Plaintiff/Respondent

and

GUYANA SUGAR CORPORATION, established by an order numbered 13/19/77 under the Co-operative Financial Institutions Act, 1976 whose principal place of business is situate at Lots 26/63 Middle Street, North Cummingsburg, Georgetown

Defendant/Applicant

April 14; June 8; Aug 25; Nov 18, 2005; Feb 28, 2006.

Mr. L. John, for the plaintiff.

Mr. K. Ramkarran, for the defendant.

GEORGE, R., J. (In Chambers)

RULING

When this matter came on for hearing, Mr. Ramkarran, on behalf of the defendant, unsuccessfully argued that this matter be deemed abandoned. Subsequently, Mr. Ramkarran filed a summons dated August 15, 2005, seeking an order that the plaintiff's action be struck out on the ground that it disclosed no reasonable cause of action against the defendant, it was frivolous and vexatious and was an abuse of the process of the court. Alternatively, the defendant sought an order that the plaintiff's statement of claim be struck out pursuant to O17 r4 of the Rules of the High Court, Chapter 3:02. A number of issues were raised and argued on the affidavits and in submissions by counsel and while I have come to a definitive decision that this case is *res judicata* based on a facts disclosed, the submissions and statement of counsel for the plaintiff made before this decision was read which I shall outline below, I was of the view that I should as fully as possible discuss and give my decisions on the issues raised for completeness and avoidance of doubt.

In the affidavit in support of this application by summons, sworn to by Mr. Nikhil Ramakarran, attorney-at-law, on behalf of the defendant, it was deposed that the plaintiff's statement of claim did not disclose any or any reasonable cause of action against the defendant as named or Guyana Sugar Corporation Inc., a company incorporated under the Companies Act, Chapter 89:01, as amended by the Companies Act 1991 and violated the rules of pleading. It was also contended in the affidavit that the defendant which is named in the rubric is the Guyana Sugar Corporation established by an order numbered 13/17/99 under the Co-operative Financial Institutions Act, 1976 (COFA) whose principal place of business was situate at Lot 26/63 Middle Street, North Cummingsburg, Georgetown (hereinafter referred to as Guysuco or the named defendant) and that this entity is different to the entity, the Guyana Sugar Corporation Inc (hereinafter referred to as Guysuco Inc) that is stated in the statement of claim to have instructed the Registrar of Deeds to advertise the property in issue for sale to the Government of Guyana (hereinafter referred to as the GOG). Mr. Ramkarran further contended that the plaintiff's statement of claim discloses

that the Notice of Opposition was filed and obtained by the plaintiff purporting to prevent the said Guysuco Inc of Lot 22 Church Street, Georgetown, from conveying the said property it instructed the Registrar of Deeds to advertise for sale. Mr. N. Ramkarran in his affidavit also swore that since it was not alleged that the named defendant, Guysuco, was the entity that purported to instruct the Registrar of Deeds to advertise the transport nor is it alleged that the plaintiff's Notice of Opposition dated November 8, 1996 referred to and prevented Guysuco Inc from conveying the property, then the action against and restraining Guysuco ought to be dismissed with costs.

In the alternative, the defendant further alleged that the statement of claim be struck out for being frivolous and vexatious because it violates the Rules of the High Court in that it does not outline a concise statement of the facts and it was not divided into paragraphs that were numbered. It was further contended that the defendant would be embarrassed in relation to responding to the plaintiff's claim.

Subsequently, with leave, Mr. Nitya Kissoon, conveyancing clerk of the firm of Cameron and Shepherd swore to and filed a supplementary affidavit on behalf of the defendant in support of the summons. He swore that he searched the records of the Deeds Registry in relation to Blocks AA, BB and CC, being a portion of Eccles, in the Eccles-Ramsburg Village District, County of Demerara and found transport number 277/1997 which relates to this property. He also found the certificate of compliance dated February 4, 1997 # C/08, instructions to advertise by Guysuco Inc to the Registrar of Deeds to advertise the conveyance in the Official Gazette dated October 2, 1996, an affidavit of donor sworn to by Alan Lancaster, Company Secretary, Guysuco Inc, dated October 2, 1996, an amended Cabinet decision signed by Dr. R. Luncheon, Secretary to the Cabinet, dated April 30, 1996 and numbered CP (96) 4:4:E, an affidavit of donee sworn to by Abhai Kumar Datadin, Commissioner of Lands and an Order of Court in action number 31/1997, Demerara granted by the Hon Justice D.P. Bernard, Chief Justice (in Chambers) on February 17, 1997. The record relating to the proceedings in action number 31/1997 to which the order related was not found. The order reveals that action 31/1997 was an application by originating summons

by Guysuco Inc for an order declaring a notice of opposition in relation to the same land in issue in this action and relating to the same notice of advertisement dated October 26, 1996 to be null and void. Chief Justice Bernard granted the application of Guyana Sugar Corporation for an order that the said notice of opposition dated November 8, 1996 in relation to the advertisement was null and void and that the opposition was not just, legal and well-founded. This Order, which was annexed as an exhibit to Kissoon's affidavit, reads as follows:

"1997 No.31 Demerara

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF GUYANA

(CIVIL JURISDICTION)

In the matter of an application by the Guyana Sugar Corporation for an order declaring notice of opposition null and void.

and

In the matter of the Deeds Registry Act and the Rules of the High Court (Deeds Registry)

and

In the matter of the High Court Act, and the Rules of the High Court, Order 43, rule 1 (3).

BEFORE THE HOUNOURABLE MISS JUSTICE D.P. BERNARD, CHIEF JUSTICE (IN CHAMBERS)

DATED THE 17TH DAY OF FEBRUARY, 1997

ENTERED THE 19TH DAY OF FEBRUARY, 1997

UPON READING the application by way of Ex-parte Originating Summons on the part of the Guyana Sugar Corporation, the Applicant herein, filed on the 3rd day of January, 1997, and the affidavit of Alan Lancaster, in his capacity as Company Secretary, of the Applicant, sworn to on the said 3rd day of January, 1997, and filed in support thereof AND UPON READING the affidavit in answer on the part of the Respondent Brian Gittens, sworn to on the 22nd day of January, 1997, AND UPON HEARING attorney-at-law for the applicant and Attorney-at-law for the Respondent, IT IS HEREBY DECLARED THAT the notice of opposition to the passing of transport filed in the Deeds Registry at Georgetown, on the 8th November, 1996, on behalf of Brian Gittens is null and void AND IT IS FURTHER DECLARED THAT the said opposition entered on the 8th November is unjust, illegal and not well founded, AND IT IS FURTHER ORDERED AND DIRECTED that this order be stayed for 14 days. AND IT IS FURTHER ORDERED that costs to the Applicant fixed in the sum of $5000.00 (five thousand dollars.)

BY THE COURT

Sgd. R. Mohamed

FOR REGISTRAR"

Mr. John in response swore to an affidavit in answer on behalf of the plaintiff. He contended that the defendant having entered appearance unconditionally, had taken fresh steps and taken part in the trial and therefore could not raise these objections. The grounds of opposition as stated in the statement of claim were outlined and it was contended that they were properly included in the statement of claim as required by the Deeds Registry Rules. It was also contended that the naming of Guysuco rather than Guysuco Inc as defendant was not a fatal error but a case of mis-joinder or non-joinder which was curable under O14 r14 of the Rules of the High

Court. An order was sought dismissing the summons filed on behalf of the defendant and an order adding Guysuco Inc of Lot 22 Church St, Georgetown as an added defendant. I understand Mr. John to be saying that the name Guyana Sugar Corporation refers to only one entity in Guyana and that there could have been no confusion regarding the entity to which the notice of opposition was addressed.

Mr. Brian Gittens on behalf of the plaintiff swore to an affidavit in answer to the supplementary affidavit filed by Mr. Kissoon on behalf of the defendant in which he contended that while in fact transport number 277/1997 had been passed, it was passed contrary to law and was void because there was non-compliance with the requisites of the Deeds Registry Act, Chapter 5:01 in that there was no accompanying proof that the rates for the land were paid to the local authority. He swore that the record of documents outlined in paragraph 7 of Kissoon's supplementary affidavit in support were not all the requisites for the passing of transport number 277/1997. Mr. Gittens then disclosed in paragraph 7 of his affidavit that the Order granted by Chief Justice Bernard on February 28, 1997 in action number 31/1997 was appealed and that the fact of this was endorsed on the back of the Order. A perusal of the back of the Order does reveal an endorsement dated 97-03-10 which states "1997 Feb 28 – Notice of Appeal filed No. 1003/97".

In relation to the submission regarding mis-joinder or non-joinder of Guysuco Inc, O14 r 14 provides that no action shall be defeated by reason of mis-joinder or non-joinder of parties and permits the Court to deal with the matters in controversy as regards the rights of the parties actually before it. The Court is permitted to strike out the names of parties improperly joined and to add the names of those whose presence would be necessary in order for the Court to effectually and completely adjudicate on the case.

Mr. Ramkarran submitted that the named defendant was not an entity that existed as the rubric referred to Guysuco. He said that the 'real' Guysuco never had its address at Middle St. at the time of the institution of the proceedings and its office is now at Ogle. Reliance was placed on Lazar Bros v Midland Bank [1933] AC 289 where it was held that the writ, the

judgment and garnishee proceedings had to be set aside because the Russian bank against which judgment had been obtained, at "all material times was at the date of the writ and subsequently, non-existent." Mr. Ramkarran in answer to the court's query argued that this is not a case of misnomer of the defendant for an opposition to a transport, like an injunction must be precise; one has to be particular about the party against whom the opposition is sought. He referred to the description of the defendant as set out by the plaintiff in the Notice of Opposition and the rubric of the statement of claim being different to the entity described as advertising the transport for passing in the Official Gazette. A perusal of the Notice of Opposition as set out in the statement of claim suggests that the rubric of the notice is incorrect. As set out, the rubric indicates that the opposition is by Guysuco and not by the plaintiff because, instead of being intituled, 'To: Guyana Sugar Corporation' it is intituled "By: Guyana Sugar Corporation" as though it was this entity that was filing the opposition and not the plaintiff. Therefore the notice of opposition as filed is not in conformity with the precedent set out in Form 1 of the Schedule to the Rules of the High Court (Deeds Registry), Cap. 5:01. I have had no arguments on this issue and would not give a decision on whether such an error in the notice of opposition would result in it being irregular or a nullity.

The notice of opposition as set out in the statement of claim states:

"NOTICE OF OPPOSITION

BY: Guyana Sugar Corporation established
by an order numbered 13/17/99 under the
Co-operative Financial Institutions Act, 1976
whose principal place of business was situate
at Lot 26/63 Georgetown Demerara

and

TO: The REGISTRAR OF DEEDS

In the matter of the Deeds

Registry Act Chapter 5:01

TAKE NOTICE that ECCLES DEVELOPMENT INC, a company with registered with registered address at 6-8 Water and Schumaker Streets, Georgetown Demerara, doth hereby oppose the passing of a conveyance by way of transport advertised in the Official Gazette of 26th October, 1996 and numbered 20 therein for the county of Demerara, by you the said Guyana Sugar Corporation to the Government of Guyana.

Sgd. C.Llewellyn John
Attorney at law for Opposers

Dated at Georgetown, Demerara
This 8th day of November, 1996."

In Davies v Elsby Bros Lts [1960] 2 All ER 672 the plaintiff claimed damages against Elsby Bros (a firm) for injuries and loss sustained while in the employ of the defendant. After the period of limitation had expired, the plaintiff applied for and was granted leave to amend the writ by changing the name of the defendant to Elsby Bros Ltd. The plaintiff had been in the employ of the defendant from the time it had been known as Elsby Bros. It was held that the amendment was the addition of a new defendant, the limited company, and was not merely the correction of a misnomer, for they had been two different entities, the firm and the company, and the writ having described the firm, did not show that the company was intended. Therefore it was held that the amendment should not have been granted. It was argued in this case, that there was only one company which took over the firm and that the plaintiff was suing his employers as such at the correct address. It was further argued that the plaintiff had merely misdescribed them as a firm when he should have described then as a limited company. Pearce LJ stated as follows (p. 674 and 675):

> "In my opinion the addition of a defendant is governed by the same considerations as the addition of a plaintiff. Therefore the principle of Mabro's case [[1932] All ER Rep 411; [1932] 1 KB 465] prevents the amendment in this case if the amendment involves the addition of a party and not the mere correction of a misnomer. That principle also

applies to the substitution of a party, since substitution involves the addition of a party in replacement of the party that is removed."

...

If, however, the addition of the word "Ltd" is not the addition or substitution of a party but the mere correction of a misnomer, we can properly allow it, if the merits justify that course. Is this the mere correction of a misnomer? Counsel for the plaintiff argues that the real question is: who did the plaintiff intend to sue? There was, he argues, only one party in existence at one time, since the two parties concerned, namely, the firm and the company, were mutually exclusive and were consecutively engaged in carrying on the same business ...

...

If one of the deciding factors be whether the defendants, on looking at the writ, must have known that the writ, though the name was inaccurate, was addressed to them, then in my view it was not possible for them to say that the writ must have been intended for the company. The date of the accident is not specified in the writ. It was possible that the accident referred to in the writ was one which had occurred while the firm was still carrying on the business. Therefore, there being two definite, separate entities, the firm and the company, it is not possible to say that the inclusion of the firm on the writ was a mere misnomer for the inclusion of the limited company."

Devlin LJ at p. 676 outlined this test –

"How would a reasonable person receiving the document take it? If, in all the circumstances of the case and looking at the document as a whole, he would say to himself: 'Of course it must mean me, but they have got my name wrong', then there is a case of mere misnomer. If, on the other hand, he would say: 'I cannot tell from the document itself whether they mean me or not and I shall have to make inquiries', then it seems to me that one is getting beyond the realm of misnomer. One of the factors which must operate on the mind of the recipient of a document, and which operates in this case, is whether there is or is not another entity to whom the description on the writ might refer."

Applying this test Devlin LJ stated using an example cited by counsel for the plaintiff, that "if there had never been a firm Elsby Brothers, if no business had been carried on before the company was formed, then it might well be that there would be no possibility of confusion: there would be only one entity which, under the description of 'Elsby Brothers', could be meant, and the description of it as a firm would be an obvious misnomer."

On the other hand, in Whittam v W J Daniel & Co Ltd [1961] 3 All ER 796 the plaintiff was employed by W J Daniel & Co Ltd and suffered an accident while at work. She sued the defendant in the name of W J Daniel and Co (a firm) for damages for personal injuries. At the date of filing the writ, no firm by that name existed, it having been previously taken over by W J Daniel & Co Ltd. The plaintiff was granted leave to amend the writ after the expiration of the limitation period, by changing the name to W J Daniel and & Co Ltd. On appeal by the defendant it was held distinguishing Davies v Elsby Bros Ltd that the amendment was a correction of a mere misnomer since, in all the circumstances of the case, there could have been no doubt who it was that the plaintiff intended to sue; and that the mere omission of the word "Limited" did not mean that no person was sued and that, until that was corrected, there was no defendant to the proceedings. In this case though, unlike Davies v Elsby Bros Ltd, there had been a written correspondence correctly stating the name of the defendant and the plaintiff had been examined by a doctor on behalf of the defendant. Therefore, as stated by Donovan LJ, it was "perfectly plain that the limited company knew precisely who the plaintiff was and were under no misapprehension that it was they whom she intended to sue." Further, Donovan LJ distinguished the latter case because the plaintiff in that case had been employed by the previous entity and therefore "there was room for reasonable doubt, when the limited company got a writ, whether it was they who were intended to be sued or whether it was the partnership firm that had ceased to exist only shortly before."

It is clear that the rubric refers to Guysuco established by an order numbered 13/17/99 under the Co-operative Financial Institutions Act, 1976 (COFA) whose principal place of business was situate at Lot 26/63 Middle Street,

North Cummingsburg, Georgetown while the notice of opposition as set out in the statement of claim in reciting the advertisement in the Official Gazette refers to Guyana Sugar Corporation Inc, a company registered under the Companies Act, Chapter 89:01 and whose registered office is situated at Lot 22 Church Street, Georgetown, Demerara. These are two separate entities. Applying the test laid down by Devlin LJ outlined above, I should think that anyone looking at the document would have to enquire whether the plaintiff was referring to Guysuco Inc of Church Street or another entity – Guysuco of Middle Street. The situation in the case before me is therefore also distinguishable from that in Whittam v W J Daniel & Co Ltd; and it is also not a case in which the inclusion or exclusion of the term 'Inc' would be an issue as discussed in Whittam. As such Guysuco as named by the plaintiff owned no transport against which an opposition could have been filed. In Fausett v Mark [1943] LRBG 354 (as cited in Hanoman v Rose [1955] AC 154 at 166) the plaintiff sued certain persons as executors, claiming that they should be ordered to pass transport of property to him. The plaintiff obtained the order but on appeal he advanced the point which was accepted by the Court of Appeal that the defendants not being executors of the deceased to whom the property belonged would have had nothing to convey. The Court of Appeal dismissed the action.

Bearing the above in mind, I am of the view and so hold that this is not a simple case of mis-joinder or non-joinder or misnomer which can be cured by the operation of O14 r14 and based on what I have to say below, in any event, the addition of Guysuco Inc would not permit a determination of the issues in contention as this entity has already passed transport to the GOG. Like an injunction, an opposition must be specific and precise, hence the rule that the opponent cannot, in his action filed subsequent to filing the opposition, include any other ground for opposition outside of that pleaded in the notice of opposition unless amended with the permission of the court (see Budhoo v Allim & Anor [1953] LRBG 72). It is clear and I so hold that like an injunction, a notice of opposition must be precise in the party it names and the property in relation to which the opposition has been filed. Therefore, there can be little room for misjoinder or non-joinder. If the plaintiff now seeks to join Guysuco Inc that would be a different entity to that against which the notice of opposition would have been filed it having

been filed against Guysuco. In fact, Mr. John in paragraph 10 of his affidavit in answer has admitted that Guysuco Inc is a separate and distinct entity from Guysuco and sought an order that "the name Guyana Sugar Corporation Inc, a Company registered under the Companies Act, Cap. 89:01 and whose registered office is situated at Lot 22 Church Street, Georgetown, Demerara, be added as Defendants."

As Dr. Fenton Ramsahoye stated in his text 'The Development of Land Law in British Guiana" (Oceana Publns., 1966) at p. 245 citing dicta of Dalton J (ag) in Obermuller v DeSouza "proceedings by way of opposition were a simplified method of obtaining an interdict or injunction." He further quoted from Dalton J (ag) as follows:

> "It is an action to oppose a conveyance by the defendant, a simplified method, governed by Rules of Court, of obtaining in certain cases an injunction against a party to prevent him dealing with specified property whether conveyance or mortgage."

Similarly at p. 246, Ramsahoye cited Duke J. (ag) in Ablack v Lutchmee Persaud A.J. 2. 10. 1909 where he said:

> "An action brought to enforce an opposition to a transport is an action of a special nature ... . Further, the entry of an opposition to a transport of immovable property operates as an interim injunction to restrain the passing of the transport. The interim injunction continues until the opponent brings his action within the time limited ... . The interlocutory injunction arises without notice being given to the defendants, it arises by virtue merely of the entry of opposition and the subsequent bringing of the action."

Therefore it means that the defendant had to ensure that the opposition was in relation to a correctly named defendant and property, otherwise, the opposition could have no efficacy. The plaintiff therefore cannot now seek to add a defendant when the notice of opposition did not specifically apply to that defendant.

In relation to the plaintiff's submission that the defendant had entered an appearance unconditionally and therefore it was too late to raise any objections, the applicant contended that there was no provision for conditional entry of appearance in Guyana. It was argued that if a person does not want to be prejudiced by an order which may affect him/her or be met with contentious proceedings, his/her course of action would be to enter an appearance and raise the objection as to why the action should be dismissed. It was also argued that the trial had not commenced and the defendant has not filed a defence.

O10 r20 (1) provides that "An entry of appearance shall not constitute a submission to the jurisdiction of the Court and it shall not be necessary to enter a conditional appearance or an appearance under protest." Thereafter O 10 r20 (2) speaks to an application to strike out the writ of summons for want of jurisdiction in the Court, irregular service, service out of the jurisdiction and service on a person who was not a partner of a firm. None of these is applicable in this case. Therefore, I am of the view that the defendant cannot be taken to have waived any irregularity or nullity by entering an appearance to contend that it is not a defendant in the action where there is a great similarity in the name of the defendant and which could have implications in terms of its ability to properly defend the action, implications regarding its rights to property and the payment of damages and costs. In Caesar v British Guiana Mine Workers' Union [1958] LRBG 50 Bollers J, as he then was, highlighted the need for a plaintiff to be careful in naming the party which it was suing as this had implications for the property rights of the defendant in terms of the payment of costs. In this case the plaintiff sued the secretary to the defendant union and not the union itself. It was held *inter alia* that the writ was improperly issued against the secretary.

The defendant further contended through the affidavit of Mr. Kissoon that the issues in this action were determined by the Order of Chief Justice Bernard granted on February 17, 1997 declaring that the opposition filed and entered by the plaintiff was null and void. The opposition in this action has the same date as that in action 31/1997, the Order of which refers to Brian Gittens, as respondent and the Guyana Sugar Corporation, as applicant. Brian Gittens is the managing director of the plaintiff in this action (see

supplementary affidavit of Brian Gittens dated November 30, 2005 and affidavit in support of summons dated February 13, 2006). The relief sought by the plaintiff in paragraph (iii) (b) of the statement of claim is for an order restraining the named defendant, Guysuco, from passing transport. However, the entity, Guysuco Inc that owned the property did pass transport. It was contended that this action is not against Guysuco Inc which was the proper entity to pass transport and which did pass transport. For the court to now grant an injunction to prevent the passing of transport that has already been passed would be to make an order in vain. In the arguments, Mr. John conceded that the Order in the originating summons number 31/1997 relates to an opposition in relation to the same land that is the subject matter of this action, number 5136/1996 and the same advertisement number 20 in the Official Gazette dated October 26, 1996 by which the plaintiff has opposed the passing of transport by Guysuco Inc to the GOG. But I note that the opposition to which the Order dated February 17, 1997 relates, suggests that the opponent was Brian Gittens, because he is named as the respondent, whereas here the opponent and plaintiff is Eccles Development Company Inc., albeit that Brian Gittens swore to an affidavit in this action on behalf of this company. Mr. James who held for Mr. John when this decision was given, indicated to the Court on its enquiry before the decision was given, that only one opposition was filed, it being by the plaintiff herein. As such without the record of proceedings I have taken counsel's word on this issue. I should mention that while the submissions were being made I did ask Mr. John whether the case was *res judicata* and he did not make any definitive submissions on this issue. Having gone through the submissions and affidavits in detail for the purposes of writing this decision it was realised that it was not entirely clear whether one or two oppositions were filed.

Therefore is this a case of *res judicata*? – If counsel's word is accepted, then yes, because a decision would have been given by Bernard CJ that this opposition which is before me now is not just, legal and well founded and that would be the end of the matter, even though the order as worded refers to Brian Gittens and not Eccles Development Co. Inc. If one were to say, in the absence of the record of proceedings before Bernard CJ that the parties are not identical for the purposes of applying this rule i.e. the Brian Gittens named in action 31/1997 is not one and the same as Eccles Development Co.

Inc. then strictly speaking, the matter would not be *res judicata*. However, where the issues raised are substantially the same as that ventilated in previous proceedings, the Court has an inherent jurisdiction to enquire and determine whether proceeding with the current action would be frivolous and vexatious or an abuse of process. (See Metropolitan Bank v Pooley (1885) 10 App. Cas. 210). In these instances, the Court has a discretionary jurisdiction to stay or dismiss the action before hearing. (See Gleeson v J. Wippell & Co. Ltd. [1977] 1 WLR 510; [1977] 3 All ER 54 following Carl Zeiss Stiftung v Rayner & Keeler Ltd (No. 3) [1970] Ch 506; [1969] 3 All ER 897.)

Paragraph 18/19/18 of the 1988 Rules of the Supreme Court states that "if a party seeks to raise anew a question which has already been decided between the same parties by a Court of competent jurisdiction, this fact may be brought before the Court by affidavit, and the statement of claim, though good on the face of it, may be struck out, and the action dismissed; even though a plea of *res judicata* might not strictly be an answer to the action; it is enough if substantially the same point has been decided in a prior proceeding." (See McDougal v Knight (1889) 25 QBD 1 and other authorities cited therein). Where the issue to be determined is the same as that decided in a previous proceeding by a court of competent jurisdiction, then the matter having already been decided, it would be an abuse of process to have the issue re-litigated. (See Henderson v Henderson (1843) 3 Hare 100 cited in Barrow v Bankside Ltd [1996] 1 WLR 257 at 265, and Re Norris [2000] 1 WLR at 1094, 1099.)

As held by Buckley J in Carl-Zeiss-Stiftung v Rayner [1969] 3 All ER 897, 909: "To make a good claim of estoppel per rem judicatam the party asserting the estoppel must establish: (i) that there has already been a judicial decision by a competent court or tribunal; (ii) of a final character; (iii) of the same question as that sought to be put in issue by the plea in respect of which the estoppel is claimed; and (iv) between the same parties, or their privies, as the parties between whom the question is sought to be put in issue."

While one may argue that the issue was determined by a court of competent jurisdiction because an opposition was ruled null and void, the company Eccles Development Co. Inc. is a separate person from Brian Gittens and the former cannot be said to be a privy of the latter. (see Carl-Zeiss-Stiftung v Rayner per Buckley J at pp 912 – 913 for a discussion on privies to decisions of courts as they relate to the issue of *res judicata*.) However, applying the authorities cited and based on Mr. John's statement that only one opposition was filed, it being the one that is the subject of this case, I am of the opinion that this case is *res judicata*. And it is on this point that this case has been ultimately decided; but as I stated at the outset, I have decided to address all the issues argued.

So even if it is argued that *res judicata* does not strictly arise because of the difference in the names of the parties as recorded in the Court documents, the fact remains that the Court also has an inherent jurisdiction to stay an action or dismiss it as being frivolous and vexatious where the plaintiff cannot prove the case and it is without any solid basis. (See Lawrence v Lord Norreys (1890) 15 App. Cas. 210; Willis v Earl Howe [1893] 2 Ch 545; 1988 Rules of the Supreme Court p.326).

Can the plaintiff prove this case? I will now go through the claims made by the plaintiff in its statement of claim to determine this. These are set out hereunder with my findings:

a) An order that the opposition by the plaintiff is just, legal, and well founded.

As referred to above, there was a similar prior action containing a claim which resulted in the Order of Court dated February 18, 1997 granted by Bernard CJ. Mr. Gittens on behalf of the plaintiff has admitted in his affidavit dated November 30, 2005, that the plaintiff has appealed this order. It is unclear if it is still pending. As I have held, this issue, having been decided, is *res judicata;* and the fact remains that the issue of an opposition to the passing of transport by Guysuco Inc to GOG having been adjudicated upon this resulted in transport eventually passed – number 277/1997. Even if it were argued that *res judicata* did not apply, the transport having been passed, whether the opposition in this action is just legal and well founded

has been overtaken by events and this claim cannot therefore now be proven. This claim is therefore struck out.

b) An injunction restraining the defendant from passing the said transport advertised in the Official Gazette on October 26, 1996 and numbered 20 therein for the County of Demerara.

The grant of this relief would also be an exercise in futility as it has been disclosed by Guysuco Inc and conceded by the plaintiff that transport for the land in issue was passed to the GOG by transport number 277/1997. Apart from the issue of *res judicata,* this fact supports the view that the naming of the defendant in a notice of opposition must be precise and that it cannot be a simple case of misjoinder or non-joinder as claimed in the submissions on behalf of the plaintiff. The entity Guysuco Inc passed transport of the land as was originally advertised in the Official Gazette of October 26, 1996, as distinct from the entity, Guysuco.

While the plaintiff has conceded that the transport was passed, in the affidavit dated November 30, 2005, Mr. Gittens on behalf of the plaintiff sought to claim that the proper procedure as laid down by the Deeds Registry Act, Chapter 5:01 was not followed in relation to the passing of transport, more particularly that there should have been accompanying proof that the rates for the land were paid to the local authority. I hold that whether this is so in fact or not, in order to overturn or nullify transport number 277/1997, an action would have to be brought which is founded on section 22 of the Deeds Registry Act, Chapter 5:01 which provides that "every transport of immovable property other than a judicial sale transport shall vest in the transferee the full and absolute title to the immovable property or to the rights and interest therein … provided that any transport …obtained by fraud shall be liable in the hands of all the parties or privies to the fraud to be declared void by the Court … ." Alternatively, applying Sahoy v Sahoy [1967] LRBG 240, the plaintiff could seek to prove that some fundamental mistake was made that could lead to a rectification of the transport. As such in relation to this claim, the plaintiff would not be able to obtain an injunction and it is therefore struck out.

c) A declaration of nullity of the transport of the immovable property sought to be passed.

This claim seems to suggest that the plaintiff was requesting a declaration that the transport of Guysuco Inc which was then going to be passed was a nullity. There is no basis or ground for pleading that the transport which was already in the name of Guysuco Inc was a nullity. There is no material on record through the affidavits that shows that the transport in the name of Guysuco Inc was a nullity. The plaintiff could not then be seeking a declaration of nullity of the transport that was going to be passed to the GOG for at the time this action was commenced there was no such transport in being. One cannot seek to nullify a future transport. One would have to seek the nullification of a transport that has already been passed. Therefore I find that this claim is misconceived and it is hereby struck out.

d) An order restraining the Registrar of Deeds from passing the said transport.

As in the case of the claims at a) and b) above, a grant of this order in the circumstances would be an exercise in futility. Therefore this claim is also struck out.

e) Damages exceeding the sum of $50,000 for misrepresentation hereinbefore particularised.

There is no misrepresentation disclosed on the pleadings made by the named defendant to the plaintiff. There is also no misrepresentation claimed against Guysuco Inc. The statement of claim itself does not refer to nor outline any particulars of misrepresentation. While the grounds of opposition as outlined in the statement of claim refer to misrepresentation, there is no clear allegation of misrepresentation against Guysuco whether as the named defendant or Guysuco Inc. I find that the grounds stated in paragraph 4A and B of the Notice of Opposition are not particulars or grounds of misrepresentation as advanced. In any event, if as stated by the plaintiff in the grounds of opposition, there was an agreement that simultaneously on the passing of transport by Guysuco Inc to the GOG, transport would have been passed to the plaintiff, then the entity to so do would have been the GOG and not Guysuco Inc. Any failure to pass transport to the plaintiff would have been that of the GOG and not Guysuco or Guysuco Inc. In the

circumstances, though I will below consider whether the plaintiff could have founded his opposition on a claim for damages for misrepresentation, I find that this claim, in relation to misrepresentation is frivolous and vexatious and it is struck out.

The plaintiff, through Mr. Gittens, subsequently filed a summons dated February 13, 2006 in which an amendment was sought to the statement of claim to include a claim for damages for breach of contract and misrepresentation. Though Guysuco Inc did not seek to file an answer to this summons, there were some arguments in relation to it.

Assuming that the defendant was properly named, it has not been disclosed in the pleadings that the plaintiff had a contract with Guysuco in relation to the purchase or acquisition of the land in issue. In fact, in the arguments, Mr. John conceded that the plaintiff had no contract with Guysuco or Guysuco Inc. Therefore there would be no basis for a claim of breach of contract and an amendment in this regard cannot be permitted. In addition, it is my view that to do so would be to add a new ground of opposition which is not permissible. Further, the authorities to which I will refer shortly on oppositions being based on liquidated claims would preclude an opposition being made on a claim for damages for breach of contract which would be a claim for unliquidated damages.

In any event, to permit an amendment at this stage would be to deprive Guysuco of a defence to which it would have been entitled since a claim in damages would have been barred by the Limitation Act Chapter 7:02 which provides for a three year limitation period for damages for breach of contract. And if Guysuco Inc were to be joined now it would be deprived of a defence. (see Ramalho v Persaud (1977) 22 WIR 72 at pp.78 and 79.) In the circumstances, I do not find that the justice of the case warrants that the plaintiff be given leave to amend its statement of claim to include a claim for breach of contract.

But there are two other fundamental issues pertaining to whether the opposition could be just, legal and well founded which I feel in the circumstances I should address for completeness, and which were not the subject of submissions by counsel but which I have identified after reading

the treatises of Ramsahoye, 'The Development of Land Law in British Guiana' and of Duke, 'The Law as to Immovable Property in British Guiana'. Duke at p. 12 cited Clark v Watson (1877) where it was held that "opposition to a transport would not lie at the instance of a claimant not showing a 'clear and distinct' right against the intended transporter." This is taken to refer to (1) a liquidated claim or demand that can be made the subject matter of a specially indorsed writ or (2) to persons having a dominium in the property or some legal or equitable right therein.

Therefore, the statement of claim must set out a claim upon which the plaintiff has based his opposition. Duke at p. 24 has this to say on this issue:

> "As a rule, it is necessary to claim some other relief in the writ, for it is provided that if the opposer opposes by virtue of any claim in respect of which a right of action has accrued to him he must seek to enforce such claim as well as to restrain the passing of the transport or mortgage. This rule is imperative and not merely directive."

(See also r8 of the Deeds Registry Rules, Cap. 5:01).

The plaintiff in this case has founded his claim to the opposition on alleged misrepresentations as outlined above. But can he do so? A claim for damages on the ground of misrepresentation is a claim for unliqidated damages. Ramsahoye at p. 247 had this to say on this issue:

> "Although it would appear that in former times opposition was possible in respect of illiquid claims the Courts are now upholding oppositions only in respect of the liquid claims of simple contract creditors in respect of which they may proceed by a specially indorsed writ to obtain judgment."

Duke cited Administrator General rep Estate of daSilva, an insolvent v Willems (1892) LRBG 128 at p. 12 where this issue of the opposer having a clear and distinct right was fully argued:

"The plaintiff previous to the institution of the opposition suit had brought an action against P.J. Willems and J.P. Farnum trading under the name of Farnum & Co., for damages in respect of torts alleged to have been done by them by which it was said that the estate of da Costa an insolvent, had suffered injury. Farnum advertised a mortgage on immovable property in Georgetown in favour of the wife of Willems to which mortgage the plaintiff entered opposition setting out as the reason thereof his claim against Willems and Farnum and the facts and circumstances upon which it was founded. In the language of the pleadings of those days the defendants excepted "*Tibi adversus me non competit action,*" and in support of that "*tibi*" pointed out that the claim was for non-liquid damages. The learned Chief Justice in his decision said that the extent of the right to oppose must be decided on authority and principle. And, so far as authority was concerned he said that "in the older authorities the faculty to oppose is founded in a right to or in the property or a nexus to it." In discussing the point at issue the Court remarked that it was agreed upon by counsel on both sides that opposition would lie in respect of a liquid claim or liquidated demand, and that the only point at issue was whether the right to oppose also applied to illiquid claims. The Chief Justice did not then express any opinion as to whether the above mentioned excrescence on the Roman Dutch law was to be considered the law of the colony or not. He merely contented himself with saying that the time had not yet arisen for giving a decision on the point. But in the following year in the case of Hogg v Butts (1893) LRBG Vol 3 N.S. 94, 96, Sir David Chalmers CJ, was not so reticent. He there referred to the long and undisputed practice there had been of making use of oppositions at the instance of simple contract creditors as one of the strongest arguments for affirming that such a law prevails, and he concludes as follows: 'from the written authorities and the practice the Court is justified in giving sanction to the proposition that a simple contract creditor can oppose a voluntary alienation or encumbrance of his debtor's property giving an undue preference with the qualification that the creditor's claim in respect of which he opposes is not contingent or uncertain.' Willems' case was in respect of a claim for a tort. And the quantum of damages clearly being an unliquidated sum

the opposition suit was dismissed. In Hogg v Butts, *supra*, the claim was in respect of cross accounts which were not balances and settled as correct between the parties. Here again the Court held that the claim was an illiquid one, and dismissed the action being of the opinion that "any action in the nature of an illiquid claim is not the proper subject for an opposition suit."

Duke at p. 15 went on to cite Andrew v Parrat G.J. 3rd Dec. 1913 where the opposition was upheld with the Full Court holding that "apart from some legal or equitable right to the property opposed or to some interest therein, a person could only oppose by virtue of such a claim as might properly be brought before the Court by means of a specially endorsed writ; in other words, the opposition must be in virtue of a liquidated demand. The Court was of the opinion that the claim before it was of an unliquidated nature, since it was in the nature of an action for accounts, and therefore dismissed the suit."

Applying the above learning and authorities, since the plaintiff is relying on a claim for damages for the tort of misrepresentation, which is a claim for an unliquidated sum, the plaintiff's claim for an opposition must fail as not being for a liquidated sum.

The second issue regarding whether the opposition could be just and well founded is in relation to whether the plaintiff has disclosed a legal or equitable right to the property that Guysuco Inc transported to the GOG. What is the clear and distinct right of the plaintiff in this regard against the named defendant or Guysuco Inc, the then intended transporter? In Demerara v De Clou [1965] LRBG 543; (1965) 23 WIR 13 the Full Court held that an opponent must in his statement of claim disclose with preciseness the nature of his interest, for to do otherwise would have the effect not only of embarrassing the proponent but also of failing to disclose a triable issue. In this case, the Full Court held that the genealogical table on which the opponent relied in support of her interest in the land did not disclose the nature of her interest whether it be legal or equitable, and this she had to do in order to sustain her opposition. Her statement of claim was struck out and the action in opposition dismissed.

The plaintiff, Eccles Development Company Inc, must therefore have disclosed its interest in the land. The plaintiff stated in the first ground of opposition that "The Opponents are the owners of one undivided half or part or share of and in all the right title and interest in and to the immovable property the subject matter of the conveyance, and is also a company registered under the name of Eccles Development Company Inc, whose registered office is at 6-8 Water and Schumaker Streets, Georgetown, Demerara." The second ground states that "Possession of the property aforementioned in the Opponents was confirmed by the execution of an agreement between the Opponents on the one hand and the proponent, the Government of Guyana, acting through Henry Jeffery the Minister responsible for Housing and the Central Housing and Planning Authority, a body corporate established by statute on the other hand who caused the property to be surveyed and the opponents expended large sums of money exceeding $90,000,000.00 (ninety million dollars) for the improvement and development thereof." In Ground 3 the plaintiff states that "The Proponents acting in consort with the proposed transportee and the Central Housing and Planning Authority agreed that, simultaneously with the passing of conveyance by way of transport to the proposed transportee and the Central Housing and Planning Authority, transport of the property would be passed to him as developer to enable him to fulfil contracts to be entered into with prospective home owners." After stating that there was collusion between the proponents, the GOG and the Central Housing and Planning Authority to suppress material facts and perpetrate a misrepresentation so that the property would be passed to the GOG thereby depriving the plaintiff of the property for development purposes as proposed, the plaintiff went onto state in Ground 5 of the notice of opposition that "The Opponents acquired, prior to the conveyance sought to be advertised legal, equitable possessory and proprietary rights to the property sought by the proponent to be conveyed otherwise than to the Opponents, and it is not competent for the proponent to pass the conveyance proposed without excepting the rights of the Opponents aforesaid." As mentioned before, in this case no where in the pleadings has the plaintiff advanced that he had any contractual or other arrangement with the named defendant or Guysuco Inc in relation to the property and as stated before, Mr. John, during his submissions, conceded that there was none. It

appears that there was an arrangement between the plaintiff and the GOG which was then to transfer the property to the plaintiff. Therefore I find that the plaintiff did not have an enforceable or equitable interest in the property in issue at this stage.

I find support for this view in the following excerpts from Duke at pp. 19 to 20. At p. 19 Duke has this to say:

> "The most frequent instance of a person having a legal or equitable right in the property opposed occurs where the intended transporter has already by a binding contract of sale agreed to sell the land, the subject matter of the opposition to the opposer. And in the opposition suit the defendant can be ordered to transport the land to the opposer."

The cases of Benjamin v Samuels L.J. 25th June 1910, Hipplewith v Davis L.J. 3rd Jan, 1912 and Ramlall v Whyte (1919) were cited in support (see pp 19 – 20 Duke). Here, the plaintiff does not claim to have a binding contract with the named defendant or Guysuco Inc. Similarly in Dalsing v Omraosing L.J. 12.12.03, that was cited by Duke at p.20 of his text, "the plaintiff together with S and the defendant purchased a piece of land, each contributing his share of the purchase money. Transport of the whole piece was passed to the defendant on the understanding that he would transport to the others when called upon. In breach of that trust he failed to do so. He sold two-thirds of the land to S whereas, in equity, he was only entitled to one-third; and he was now seeking to carry out that contract by transporting that interest to S. The plaintiff opposed, and it was held that he had a right to oppose since he was equitably entitled to one-third of the land. The Court will protect any equitable interest of the opposer in the res opposed." In this case, unlike that of the plaintiff before me, there was an agreement that involved the plaintiff and the defendant and a third party regarding the purchase of the land along with a corresponding agreement for the defendant to pass title to him, all being part of one transaction.

Also in Pabaroo v McNeil L.J. 30th Dec, 1913 as cited by Duke at p. 20, Justice Hill said that "the Court would refuse on equitable considerations to allow a defendant to pass transport of land in which he had no real interest, but merely happened to have the legal title."

In a decision on interlocutory proceedings to strike out the plaintiff's statement of claim as disclosing no cause of action based on an opposition to the passing of transport in Demerara Bauxite Co. Ltd. v. Hubbard and Demerara Bauxite Co. Ltd. v McIntosh [1920] LRBG 66 Berkeley J held that the plaintiff had an equitable interest in the land as the ultimate purchasers and therefore a right to oppose the passing of transport so that the statement of claim did disclose a cause of action. The facts in this case were that the defendant, Hubbard, entered into an agreement to purchase an undivided share in certain properties from on Van Sertima. Hubbard contracted to sell the said properties to Humphrys who in turn contracted to sell the properties to the plaintiff. Humphrys intimated to the defendant that he had entered into the contract of sale with the plaintiff. It came to the knowledge of the plaintiff that the defendants – Hubbard and one McIntosh, the executor of Van Sertima's estate, had advertised the passing of transport by each of them of the said properties to and in favour of one Emory. The plaintiff filed notices of opposition and alleged in its statements of claim in the actions against Hubbard and McIntosh, that they, acting in collusion with one Emory, had sought to defeat and defraud the plaintiff of its legal and equitable right to the said properties. Berkeley J held:

> "The question is, is it impossible for the plaintiffs to succeed in one or other or both of these actions? It is beyond question that they have an equitable right in these properties and it seems that they might prove facts and obtain if necessary amendments which might lead to their being successful in these actions. I do not for a moment say that plaintiffs will succeed but I am unable to find that it is impossible for them to do so and therefore I cannot order that the statements of claim be struck out."

Citing what would appear to be the substantive action in Demerara Bauxite v Hubbard [1921] LRBG, this factual situation was then set out by Duke at pp. 20 – 21 of his text though it is stated that the court did not give decision on this particular issue because the contract between A and B was held not to be binding. This situation as outlined by Duke is as follows:

"For instance, A agrees to sell Broomlands to B who in turn agrees to sell it to C. A subsequently advertises transport to D. C calls on B to oppose the passing of transport. B refuses to do so. C enters opposition. Has he got a right to oppose? This point has never been decided, but it is submitted that he has. B was equitable owner of Broomlands, and he agrees to sell his equitable interest to C who thus acquired an equity therein. It is true there was no privity of contract between A and C but C has acquired an equitable interest of some sort in the land, and the Court will not allow that equity to be defeated through fraud, negligence, or nonchalance, or absence of his vendor B. We are of the opinion that the Court in such a case would grant an injunction restraining A from passing transport to D but it seems that no other order would be made as there never was any contract between A and D; if C wanted title for the land he would have to bring a separate action against B for specific performance and join A, as co-defendant."

Placing the facts of the case before me into the above scenario of Demerara Bauxite Co.Ltd. v Hubbard and Demerara Bauxite Co. Ltd. v McIntosh – Guysuco agreed to sell to the GOG which in turn agreed to sell to the plaintiff which would have acquired an equitable interest. However, unlike the above scenario, according to the facts as pleaded, Guysuco did not subsequently advertise transport to be passed to any other person or entity other than the GOG, which would have then allowed the plaintiff to call on the GOG to file a notice of opposition, and in the absence of which, the plaintiff would have been allowed to do so pursuant to its equitable interest. In fact, in opposing the transport by Guysuco to the GOG which had the contractual arrangement with the plaintiff for the transport of the land to it, the plaintiff would have thereby blocked the onward conveyance to itself as Guysuco had no enforceable contractual obligation such as to allow the plaintiff to claim specific performance against Guysuco. And applying the scenario outlined above the plaintiff would have had to sue the GOG for specific performance and join Guysuco Inc as a co-defendant; or if Guysuco or the GOG had advertised the sale of property to other persons or entities, then oppositions could have been filed in relation to those advertisements. As such I think that the plaintiff's action in this case was premature and it

has not established a clear and distinct right that would have been enforceable against the named defendant or Guysuco Inc.

The plaintiff has therefore in my view, advanced no cause of action against the named defendant or Guysuco Inc, whether as regards establishing a liquidated demand or an equitable interest that is enforceable at this point in time.

Having considered the submissions of counsel and perusing the statement of claim, I also hold that the statement of claim does not comply with O17 of the Rules of the High Court. While I agree with Mr. John that the opposition and grounds therefor must be set out in the statement of claim, it is a fact that the statement of claim is not divided into properly numbered and identifiable paragraphs as required by the Rules of Court. The statement of claim as required by the rules recites the content of the notice of opposition and the grounds therefor, though this is not in a specific paragraph. Then the statement of claim contains a paragraph (ii) which states that the writ in this action was filed on November 18, 1996. Thereafter, the plaintiff sets out his claim for relief in a paragraph (iii). If there were not the more fundamental issues on which I have ruled that this action be dismissed, then pursuant to O26 and O54 of the Rules of the High Court, I would have permitted an amendment of the statement of claim so as to cure its defects regarding the paragraphs.

O17 r32 provides for the striking out of pleadings where no reasonable cause of action has been disclosed. It states:

> "The Court or Judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a Judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

Applying this rule to the issues raised in this case, and based on the submissions, and the authorities I have read and outlined, as an alternative to

my finding that the matter is *res judicata,* the statement of claim is struck out as disclosing no cause of action.

It is my view that the plaintiff must have had knowledge that Bernard CJ had adjudicated on the validity of the opposition and that as a result of her finding that the opposition was a nullity, that transport in relation to the property in issue was passed by transport number 277/1997. In addition, from my understanding of the authorities, the plaintiff's entire action was totally misconceived. The plaintiff should have sought leave to withdraw and discontinue this action. As such for the reasons outlined, judgment is granted in favour of the applicant with costs to be paid by the respondent to the applicant in the sum of $100,000.

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Roxane George

Puisne Judge

December 15, 2006