

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CIVIL DIVISION)

CLAIM NO. ANUHCv2023/0123

BETWEEN:

[1] ISABELLE PIQUENET
[2] ERIC PIQUENET

Claimants

and

[1] THE ESTATE OF ENZO ADDARI
[2] SUSANNA ADDARI
[3] ANTIGUA SLIPWAY LIMITED

Defendants

Appearances:

Mr. Rushaine Cunningham, Counsel for the Claimants

Ms. Cheryl-Lee Bolton and Mr. Kemar Roberts, Counsel for the Defendants

2023: October 9th;
December 22nd.

DECISION

Introduction

- [1] **MICHEL, M.:** The Claimants ("**the Piquenets**") commenced these proceedings against the Defendants challenging the legality of an agreement for sale of a business. They alleged that the 1st Defendant was at the material time the "**Vendor**" described under the agreement; that the 2nd Defendant was a majority shareholder of the 3rd Defendant company and received part payment of the purchase price under the agreement; and that the 3rd Defendant company was also a party to the agreement described as the "**Lessor**" under the agreement.
- [2] The agreement provided for the sale of a restaurant business, and the benefit of any pending contracts, engagements and orders of the Vendor in connection with the said business for the purchase price of US\$200,000.00. The Piquenets alleged, among other things, that the 1st Defendant was not at any material time the owner and operator of a restaurant business capable of being sold to them under the agreement for the carrying on of any such restaurant business in succession to the 1st Defendant. They further alleged that the 1st Defendant did

not at any material time possess the benefit of any pending contracts, engagements, and orders in connection with a business nor had he at the material time the right to sell the same. They therefore alleged that the consideration for the payment of the purchase price in the sum of US\$200,000.00 has wholly failed.

- [3] Alternatively, the Piquenets alleged that they have suffered loss and damage by reason of the 1st Defendant's breach of the implied conditions of the agreement and that the Defendants are severally and jointly liable to them for the repayment of the purchase price of US\$200,000.00.
- [4] The 3rd defendant company, Antigua Slipway Limited ("**ASL**") now seeks to strike out the Piquenets' claim as an abuse of process pursuant to rule 26.3(1)(c) of the Civil Procedure Rules 2000 ("**CPR**") and the inherent jurisdiction of the court and also seeks an order that the Piquenets' claim be dismissed pursuant to CPR 26.1(2)(q). The strike out application is accompanied by the affidavit of Roberto Falangola, Managing Director of ASL. An affidavit in response to the application was filed by the 1st Claimant.
- [5] ASL contends that the Piquenets' present claim is based on the same or similar facts and issues raised in previous proceedings, specifically, Claim No. ANUHCv2021/0029 **Antigua Slipway Limited v Eric Piquenet v Isabelle Piquenet** ("the **Previous Proceeding**") wherein the Piquenets in their defence and counterclaim filed in the Previous Proceedings challenged the lawfulness of the very same sale of business agreement that is the subject of this claim on the grounds of, among other things, fraudulent misrepresentation, and breach of contract. ASL contends that in the Previous Proceedings, by way of their counterclaim, the Piquenets claimed damages of US\$200,000.00 and other relief.
- [6] ASL argues that the Previous Proceedings including the Piquenets' counterclaim were compromised by the Parties and fully and finally resolved by a competent court of law. Specifically, that the Parties resolved the Previous Proceedings amicably during private mediation and the terms of the settlement arrived at in the mediation were memorialized in a draft consent order and the Court made a consent order in terms of the agreement. ASL further contends that the Piquenets now seek to relitigate issues that they pursued or ought reasonably to have pursued in the previous proceedings, therefore the current proceedings are an abuse of the process of the Court and should be struck out.
- [7] It is important to set out some background to this matter to place ASL's application in its proper content.

The Previous Proceedings

- [8] By fixed date claim form and statement of claim filed on 20th January, 2021 as Claim No. ANUHCv2021/0029, ASL commenced proceedings against the Piquenets alleging that the parties entered into an agreement for sale of a business wherein the Piquenets purchased a restaurant business from ASL, the said restaurant business being what the Piquenets now refer to as “La Brasserie” Restaurant.
- [9] ASL alleged that as a term of the agreement for sale of business, the Piquenets would sub lease a portion of land rented by ASL where the Piquenets would be allowed to operate the restaurant business. It alleged that the Piquenets entered into possession of the business premises without the execution of any lease agreement. ASL further alleged that four lease agreements pursuant to the sale of business were presented to the Piquenets for execution, but they unreasonably refused to execute any of the four lease agreements. ASL alleged that they therefore had not been afforded the opportunity to formalize integral terms which would govern the landlord/tenant relationship between the Parties with respect to the demised premises. It also averred in its claim that on 20th August 2020, it served the Piquenets a notice to quit for arrears of rent owed as a result of the Defendants’ refusal to execute the lease agreement. ASL further alleged that the Piquenets had an outstanding balance of rent in the sum of US\$8,000.00 for the months of August, September, October and November 2020, that they failed to pay the sum of US\$2,000.00 in mense profits for the month of December 2020 and failed to pay the sum of EC\$1,822.50 for outstanding water utilities incurred on the demised premises.
- [10] ASL sought a declaration that the sub-tenancy between the Parties was determined, that the Piquenets deliver to it vacant possession of the premises, and claimed payment of arrears of rent owed, payment of mense profits and payment for outstanding utilities.
- [11] On 19th March, 2021 the Piquenets filed a defence to ASL’s fixed claim together with a counterclaim. They alleged in their defence that there was no business that formed the subject of the agreement and that the agreement gave them the entitlement to sub lease the property located on the leased premises. By their counterclaim, the Piquenets challenged the lawfulness of the sale of business agreement between the parties on the grounds of fraudulent misrepresentation. They alleged that ASL executed the agreement for sale of business having no belief in any of the statements made in section 1 of the agreement and that the subject matter of the agreement was at all times a fraudulent misrepresentation by ASL. They alleged that as a result of the fraudulent misrepresentation of ASL, they suffered loss and damage. They also alleged that the covenant of quiet enjoyment of the demised premises is implied in every lease and that ASL

breached said covenant repeatedly thereby breaching the lease agreement. They alleged that they therefore suffered loss and damage because of the alleged breach of contract.

[12] The Piquenets claimed specific performance on the equitable lease as agreed in the agreement for sale of business as signed by the parties, damages in the sum of US\$200,000.00 and further heads of damages to be assessed.

[13] The Parties were referred to mediation by a judge but had private mediation prior to the Court ordered mediation. The Parties reached an agreement at the private mediation and executed a consent order. The consent order was signed by the Parties and their attorneys and was made an order of the Court on 12th July, 2021.

[14] I will set out the wording of the consent order dated 12th July, 2021 in full:

“UPON the parties being required to attend mediation pursuant to the order of Her Ladyship, Justice Jan Drysdale dated 11th May 2021;

AND UPON the parties reaching a settled position prior to the scheduled mediation hearing;

AND UPON HEARING Counsel for the parties;

IT IS HEREBY BY CONSENT ORDERED THAT:-

1. The Defendants shall pay to the Claimant the sum of US \$20,000.00 in respect of rent owed on or before 16th July 2021.
2. The Defendants [sic] shall pay to the Claimant the sum of EC \$1912.50; in respect of utilities owed on or before 16th July 2021.
3. The Claimant is hereby granted leave to withdraw its Fixed Date Claim Form and Statement of Claim filed on 20th January 2021 without cost.
4. The Defendants are hereby granted leave to withdraw its Defence and Counterclaim filed on 16 April 2021 without cost.
5. That the Registrar of Lands be directed to remove the caution filed by the Defendants on 23rd November 2020 and registered on property more particularly registered as Registration Section: English Harbour; Block: 35 2580A; Parcel: 463/2.

6. These proceedings are hereby dismissed.

7. Each party shall bear their own costs.”

ASL’s Strike Out Application

[15] ASL argues on its strike out application that the Piquenets’ current claim is *res judicata* and an abuse of the process of the court because, they contend, the Piquenets are seeking to relitigate the lawfulness of the sale of business agreement when this matter was raised and resolved in the Previous Proceedings by the compromise reached by the parties. They argue that the Piquenets current claim relates to facts, matters and issues canvassed by the Piquenets in their counterclaim in the previous proceedings, or ought reasonably to have been canvassed by them in the previous proceedings and those previous proceedings were compromised by the parties and solemnized by the court in a consent order. In the circumstances, they argue that those matters are now *res judicata*.

[16] ASL further argues that the Piquenets’ conduct by again raising these issues for litigation constitutes an abuse of process on the basis that allowing the Piquenets to settle the live issues in one proceeding and then again raising the same issues for litigation two years later does not auger for efficiency and economy in the conduct of litigation in respect to the Parties of this claim or the public as a whole

The Piquenets’ Response

[17] The Piquenets on the other hand argue that its counterclaim in the Previous Proceedings was not fully and finally determined on its merits but there was merely a compromise between the parties solemnised by way of a consent order. They contend that a consent order is in essence a contract between the Parties and not a judicial determination of any issues in dispute. Further, that the consent order made in the Previous Proceedings did not address any aspect of the Piquenets counterclaim. In the circumstances, they argue that there is no basis upon which it could be concluded that they should be prevented from bringing the present claim.

Res judicata

[18] Put simply, the doctrine of *res judicata* arises when a decision given by a judge or tribunal with jurisdiction over the cause of action and the Parties, disposes,

with finality, of a matter decided so that it cannot be re-litigated by those bound by the judgment, except on appeal. It is often described as “portmanteau term” describing a number of different legal principles with different juridical origins.¹ It is closely associated with the legal principles of cause of action estoppel and issues estoppel. Cause of action estoppel will prevent subsequent proceedings when the cause of action in the later proceedings is the same as the cause of action in the earlier proceedings involving the same Parties or their privies and the same subject matter. Issue estoppel is a plea raised in subsequent proceedings where a party is seeking to reopen an issue in later litigation that was a necessary ingredient of a cause of action that was previously litigated and decided.

- [19] The general basis for the doctrine is for there to be finality to litigation and to protect a party to litigation from being vexed twice.

The Rule in Henderson v Henderson

- [20] The case of **Henderson v Henerson** ushered in wider approach by the Courts to previous litigation and the doctrine of *res judicata*, whereby the underlying rationale of the doctrine, having finality to litigation, was considered in a broader sense. In **Henderson v Henderson** it was stated that the doctrine of *res judicata* did not apply only to a matter that had been litigated and decided of a court or tribunal in previous proceedings, but also to issues which could have or should have been dealt with in the earlier proceedings. This has become known as the rule in **Henderson v Henderson**² found in the dictum of Sir James Wingram VC:

“In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except 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-case, 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.”

¹ Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd) [2013] UKSC 46

² 3 Hare 100, 114-1115.

- [21] The rule in **Henderson v Henderson** has been explained as *res judicata* in a wider sense, more properly as abuse of process. Therefore, in its strict sense, *res judicata* requires that there be a previous final determination of a matter on its merits. The rule in **Henderson v Henderson**, recognizes that it is abusive for a party to raise in subsequent proceedings any matter which it ought to have raised in the earlier proceedings. The differences were recently explained by Webster JA in the decision of the Court of Appeal in **Levi Maximea v The Commissioner of Police et al.**³ Webster JA [Ag.] put it thus:

“It is apparent from these cases that one of the fundamental differences between *res judicata* in the narrow sense and the rule in *Henderson* is that a decision on the merits in the first claim is required for *res judicata* to operate, while a decision of the first court is not required for the rule in *Henderson* to apply. The rule applies as a matter of public policy to prevent abuse of the court’s process whether or not there is a decision on the issue that is sought to be re-litigated.”⁴

- [22] The public interest aspect of the rule in **Henderson v Henderson** was examined in greater detail in **Johnson v Gore Woods & Co.** The dicta of Lord Bingham is instructive:

“It may very well be, as has been convincingly argued (Watt, “The Danger and Deceit of the Rule in *Henderson v Henderson*: A new approach to successive civil actions arising from the same factual matter “ (2000) 19 CLJ 287), that what is now taken to be the rule in *Henderson v Henderson* has diverged from the ruling which Wigram V-C made, which was addressed to *res judicata*. But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later

³ DOMHCVAP2020/0009 (delivered 7th December 2023, unreported).

⁴ At para 31.

proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. **That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.** As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice. (My Emphasis)

- [23] This policy-focused view calls for a broad-based approach in considering subsequent litigation. It is not just whether a party is estopped from pursuing a cause of action or issue which was determined in previous litigation (*res judicata* in the strict sense) but whether the conduct of a party bringing a claim or raising a defence in later proceedings that should have or could have formed part of the earlier proceedings, when taken as a whole is an abuse of process of the court. Thus, the rule in **Henderson v Henderson** should not be approached restrictively.
- [24] Having reviewed the applicable law, I will now consider the law in the ASL's application.

Can the Doctrine of Res Judicata arise from a Consent Order?

- [25] An important question that has arisen on this application is whether the doctrine of *res judicata* arises on judgments or orders made by consent of the Parties.

- [26] In David Ferguson v Sarah Anita Ferguson, Actie M discussed consent orders and explained that:

“A consent order records an agreement reached between the parties in respect of certain interim matters or it may also be used for the same purpose when a full settlement compromise is reached. A consent order is not a judicial determination on the merits of a case but only an agreement elevated to an order on consent. The order is based on a contract between the parties. Due to the contractual nature of a consent order, all elements of contractual agreement need to be present at the time when the agreement was formed for the order to exist and be enforceable.”

- [27] Although it has been noted that a consent order is not a judicial determination on its merits, it has consistently been stated that a consent order is no less an order of the court and like any order made otherwise by consent and there is authority that the doctrine of res judicata by way of an estoppel can arise on a consent order. In Kinch v Walcot and others, the Judicial Committee of the Privy Council stated:

“First of all their Lordships are clear that in relation to this plea of estoppel it is of no advantage to the appellant that the order in the libel action which is said to raise it was a consent order. **For such a purpose an order by consent, not discharged by mutual agreement, and remaining unreduced, is as effective as an order of the Court made otherwise than by consent and not discharged on appeal.** A party bound by a consent order, as was tersely observed by Byrne J. in *Wilding v. Sanderson* (1), “must, when once it has been completed, obey it, unless and until he can get it set aside in proceedings duly constituted for the purpose.” In other words, the only difference in this respect between an order made by consent and one not so made is that the first stands unless and until it is discharged by mutual agreement or is set aside by another order of the Court; the second stands unless and until it is discharged on appeal..”

- [28] In the English Court of Appeal case of Zurich Insurance v Colin Richard Hayward,⁵ it was accepted that *Kinch v Walcott* is authority for the proposition that a consent order is capable of creating an estoppel such as will bar a party from bringing a second action. It was questioned however whether the authority strictly speaking relates to estoppel by res judicata as opposed only to estoppel

⁵ [2011] EWCA Civ 641 at para. 23.

but noted that the authors of the leading text book on res judicata describe the form of estoppel as stated in *Kinch v Wallcott* as res judicata.”

[29] The applicability of res judicata to consent orders or consent judgments has found support in academia as mentioned above. The authors of *The Doctrine of Res Judicata*⁶ described the consent order as a situation in which the court is discharged from the duty of interrogating the matters in controversy and does not pronounce a judicial opinion on them, and at the joint request of the parties gives ‘judicial sanction and coercive authority what they have agreed’. Thus, the consent judgment converts an agreement ‘into a judicial decision on which a plea of res judicata may be founded’. The learned authors note that judgments, orders and awards by consent ‘are as efficacious as those pronounced after a contest in creating cause of action estoppels and merging the cause of action sued on,’ however there can be no estoppel unless the issues raised in the second action were necessarily compromised in the first.

[30] In my view, having considered a number of authorities, including from the jurisdiction of this court,⁷ there is no doubt that estoppel or the doctrine of *res judicata* can arise on a consent order.

[31] A consent order, however, has to be examined to determine, what has actually been decided by it. This can sometimes be difficult as was observed in **Zurich Insurance**:

“It seems to me that it will often be more difficult to ascertain exactly what issues are subject to an estoppel where the first action has been compromised than where it has been decided by a judge. The judgment will or should make the position clear; the same will not always be true in respect of a settlement. In my view, there should only be an estoppel if it is clear that the issue now raised has been decided or compromised in the first action.”⁸

[32] Although strictly speaking, the observation by the Court of Appeal in **Zurich Insurance**, relates to estoppel generally, I nonetheless consider the dicta to be useful in approaching estoppel res judicata and in considering what matter could properly have been decided on the consent order.

⁶ Spencer Bower, Turner and Handley, *The Doctrine of Res Judicata*, 3rd Ed. at para. 38.

⁷ See *Eileen Papone v Lourie Anthony et al* BVIHCV2010/0113 (delivered 28th July 2011, unreported).

⁸ At para. 26.

- [33] In determining what was actually decided in a consent order, in the Canadian case of **Bank of Montreal v Jarjoura**⁹ cited in the decision of Hariprashad-Charles J in Eileen **Papone v Lourie Anthony et al**,¹⁰ it was stated that:

“The court must examine the consent order and any agreement, correspondence, or releases leading to its entry, in order to ascertain objectively whether the consent order was intended to finally dispose of all issues in the cause of action...The parties will be precluded by "issue estoppel" from controverting any issue that the parties intended to dispose of through the consent order.”

- [34] In the English case of **Dattani v Trio Supermarkets Limited**, Lord Justice Mummery referred to and adopted several passages from **Foskett, The Law and Practice of Compromise**.¹¹ He cited with approval the following from Foskett, The Law and Practice as it relates to examining a consent order:

"Circumstances may arise when no materials exist with which to determine the disputes apparently compromised in a consent order or judgment. Astonishing it may be, but it is not unknown in practice for a consent order or judgment to appear almost, as it were, out of the blue with the most insubstantial evidence of its background. Unless by inference from such evidence as there may be, the court can conclude the disputes compromised, it would appear that all matters between the parties, except the terms of the actual judgment or order, are at large." (Emphasis added).

- [35] Lord Justice Mummery also cited with approval the following passage from Foskett, The Law and Practice of Compromise:

“Thus where parties have compromised their litigation and have finalised the matter by a consent judgment or order, it would appear to be open to a party to plead *res judicata* in this wider sense if the other sought to raise afresh a matter which “properly belonged” to that litigation but which, through negligence, inadvertence or accident, had not been raised and thus compromised expressly.”

- [36] It should be noted at this juncture however, whether a cause of action or issue is found not to be *res judicata* in the strict sense arising from a consent order, the rule in **Henderson v Henderson**, “Henderson v Henderson abuse of process” may nonetheless arise, and in fact may be the key consideration where previous proceeding were settled by consent.

⁹ 2007 ABQB 751.

¹⁰ BVIHCV2010/0113 (delivered 28th July 2021, unreported) at para 31.

¹¹ (4th ed.) at 6-06.

- [37] In relation to the present application, in light of the authorities, I am of the view that contrary to the arguments of learned counsel for the Piquenets, the fact that the Previous Proceedings were settled by a consent order, does not mean that a party is free to re-litigate those issues concluded by the consent order in new proceedings. The authorities clearly show that a matter forming part of a consent order can become *res judicata*. However, having examined the consent order, I do agree with learned Counsel for the Piquenets that on its face, the consent order in the previous proceedings does not appear to deal with any aspect of the Piquenets counterclaim. To my mind, it does not appear that the issues raised on the Piquenets counterclaim were compromised by the consent order.
- [38] There is nothing in the affidavits filed on this application that provide any background to the making of the consent order. All the Court has before it is the signed consent order and the pleadings in the previous claim to determine the disputes compromised. When one examines the consent order and the pleadings in the Previous Proceedings, it would become readily apparent that the issues determined on the consent order explicitly related to ASL's claim but not the Piquenets counterclaim. In their defence in the previous proceedings, the Piquenets had essentially never denied that there were outstanding payments to ASL. The argument in the previous proceedings was basically over settling the terms of a lease. In their settlement, the parties agreed that the Piquenets would pay the outstanding rent of US\$20,000.00, outstanding utilities of US\$1,912.50 and agreed that the Registrar of Lands would be directed to remove a caution filed by the Piquenets on 23rd November, 2020 and registered against the property. These matters settled concerned issues that in essence were not denied by the Piquenets.

Effect of Withdrawal and Dismissal

- [39] It is noteworthy, that the consent order granted ASL leave to withdraw its claim without costs and granted the Piquenets leave to withdraw their defence and counterclaim without costs. The consent order further ordered that 'These proceedings are hereby dismissed.'
- [40] There is authority that the withdrawing of an action or the withdrawal and dismissal of an action prevents a party from re-litigating that cause of action or that issue.¹² **Kinch v Walcot and others** is certainly one such authority. This does not mean that the doctrine of *res judicata* should be approached inflexibly.¹³ There is a public policy basis for *res judicata* and the Courts may still control the floodgates of

¹² *Ako v Rothschild Asset Management Ltd* [2002] EWCA Civ 236.

¹³ See: *Arnold v National Westminster Bank plc* *Arnold v National Westminster Bank plc*.

litigation where a party's conduct is abusive, applying the principles set out in **Johnson v Gore Wood**. The Court should have regard to the circumstance giving rise to any consent, and what was decided by a consent order.

- [41] In the English Court of Appeal case of **Ako v Rothschild Asset Management Ltd**¹⁴ Lord Justice Mummery observed that ordinarily, the dismissal of a claim would effectively mean that the cause of action is res judicata, however, it may become necessary to consider whether there is material to indicate that a party was not abandoning a cause of action. He observed:

“An order dismissing an action by consent operates in the same way as dismissal by adjudication: the cause of action expires with the dismissal and the fact of the order being made precludes fresh proceedings based upon the same or substantially the same grounds. However, in the event of a subsequent disagreement as to the extent of the disputes settled by a consent order, evidence of the objective background to the consent and to the making of the order would be admissible, even though direct evidence of the parties as to their subjective intentions would not be: see Foskett on The Law and Practice of Compromise (4th edn 1996) at para. 6–05. In my judgment, neither Barber nor Lennon is authority for the proposition that it is never permissible to have regard to the circumstances surrounding a consent order in order to determine the extent of the consent given to the making of the order and the extent of the estoppel arising from it.”

- [42] The consent order in the previous proceedings does raise some peculiar considerations. Firstly, the order granted ASL and the Piquenets leave to withdraw the fixed date claim and the defence and counterclaim respectively with no order as to costs. Although there seems to be a practice among legal practitioners to state that a claim is being withdrawn, it should be noted that the Civil Procedure Rules 2000 (and also the Civil Procedure Rules (Revised Edition) 2023) does not provide for the withdrawal of claim. Rather the rules provide for a claim to be discontinued. It appears that the same holds under the English Civil Procedure Rules. In the English Court of Appeal case of **Spicer & Anr v Tuli & Anr**, Lord Justice Lewison noted:

“Under the CPR an action cannot be withdrawn. It may either be discontinued under CPR Part 38 or it may be dismissed. If an action is discontinued rather than dismissed, it is clear that a second action may be brought even if it arises out of the same facts as the discontinued action, although the permission of the court would be needed under

¹⁴ [2002] EWCA Civ 236.

CPR Part 38.7 if the action is discontinued after the defendant has served a defence.”

- [43] Discontinuance under the EC CPR is dealt with in Part 37. In contrast with the English CPR, permission is not required to bring a second action on the same or substantially the same facts as a previous action which was discontinued even if a defence had been filed, although the court may stay the new action if costs in respect of the previous proceedings have not been paid to a defence. The rules only deal with a matter being withdrawn in relation to appeals under Part 62. Part 62 provides that an appellant may give notice of their desire to withdraw or discontinue their appeal and that the appeal stands dismissed on the date such notice is filed. This is contrasted with Part 37 in relation to discontinuance of a claim. A party may discontinue a claim or part of a claim against a defendant by filing and service a notice of discontinuance and the discontinuance against any defendant takes effect on the date when the discontinuance is served. The discontinuance of a claim against a does not operate as a bar to making a subsequent claim against a defendant arising out of the same or substantially the same facts. Thus, the legal effect of discontinuing a claim and the legal effect of the ‘withdrawal’ and dismissal of a claim would be quite different and distinct.
- [44] Further, it remains unclear whether the order in the consent order that “These proceedings are hereby dismissed” was in reference to the substantive claim brought by ASL or to both ASL’s claim and the Piquenets’ counterclaim. This is an important consideration as rule 18.6 of the Civil Procedure Rules 2000 (which would have been the applicable rules at the time material time) provides that a defendant may continue a counterclaim if the Court gives judgment on the claim for the claimant and does not dismiss the counterclaim; or if the claim is stayed, discontinued or dismissed.
- [45] Considering the totality of the consent order and my findings that the consent order did not explicitly relate to the Piquenets counterclaim, I believe that any uncertainty as to whether the Piquenets’ counterclaim was dismissed by consent should be found in favour of the Piquenets. Further there is no material pointing either to or against the Piquenets abandoning their contentions on the counterclaim. This compounded with the fact that the consent order appears to have ‘come out of nowhere’ with no other material against which to consider its background, then the matters not appearing to be decided on the consent order being the matters arising on the counterclaim are seemingly are still ‘at large’.
- [46] In light of the foregoing, in my view, the Consent Order does not give rise to a plea of res judicata in the strict sense in relation to the Piquenets counterclaim.

Abuse of Process

[47] Although I have found that the Piquenets counterclaim is not res judicata in the strict sense, I will now consider whether nonetheless, the filing of the present claim offends the rule in *Henderson v Henderson* in the sense that they are an abuse of process and should accordingly be struck out.

[48] In **Hunter v Chief Constable of the West Midlands Police** Lord Diplock described the court's power to strike out a matter as being an abuse of process as:

“The inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.”

[49] What can be gleaned from Lord Diplock's descriptions of the Court's inherent power to strike out a matter as an abuse of process is that a litigant's conduct will be considered an abuse of the court's process where the litigant engages in conduct which, whilst not wholly inconsistent with the rules, is nonetheless a use of the court's process 'for a purpose that is different from the ordinary and proper use of the court's process'. As stated by Drysdale J in **HMB Holdings Limited v Gaston Browne**,¹⁵ an abuse of process is 'an improper use of the Court's process in a way which differs or is contrary to its intended ordinary use'.

[50] As already made clear in this decision, relitigating matters that have been decided by a court of competent jurisdiction or the bringing of a claim or the raising of a defence, may, without more, amount to abuse of process if the Court is satisfied that the claim or defence should have been raised in the earlier proceedings if it were to be raised. The onus is on the party alleging the abuse to satisfy the court that the conduct of the party bringing the proceedings is abusive.¹⁶ The underlying reasoning for the finding of abuse being finality to litigation and not having a defendant vexed twice by litigation.

[51] It should be remembered that in determining whether it is an abuse of process to raise a matter in proceedings which could have or should have been raised in earlier proceedings, the court should take:

“a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the

¹⁵ ANUHCv2017/0430 (delivered 8th March 2022, unreported) at para 38.

¹⁶ See *Johnson v Gore*.

circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.”

- [52] Considering the above, taking into account all the facts of the case, I am unable to conclude that the Piquenets’ conduct in bringing these proceedings is an abuse of process. I have reached this conclusion for the reasons set out below.
- [53] The onus is on ASL to satisfy the Court that the Piquenets present action is an abuse of process. Having read the affidavit in support of its application, the only basis on which ASL is contending that these proceedings are an abuse of process is their contention that the parties settled the Previous Proceedings and ASL is raising issues that formed part of its counterclaim in this current claim. Mr. Falangola in his affidavit in support of ASL’s application stated that the settlement amounted to a full and final resolution of the issue in dispute between the parties to the Previous Proceedings and that the consent order amounted to final resolution of that matter. He stated that the Piquenets by the current proceedings are seeking to challenge the same sale agreement and are seeking to rely on the same or similar facts. He then goes on to state that he is informed by his counsel that it is an abuse of the process of the court for the Piquenets to relitigate the lawfulness of the sale agreement.
- [54] Mr. Falangola’s affidavit provides no further evidence in relation to the conduct of the previous and present proceedings. As I have concluded, I am unable to find that there was a determination of the Piquenets counterclaim by way of the consent order. The consent order signed by the parties on its face could have said that it represented a full and final resolution of all the issues in dispute between the parties to the Previous Proceedings. It did not do so. In my view, the only real challenge to the Piquenets current claim would be on the basis that it ought to have formed part of the disposition of the Previous Proceedings; however, ASL’s contention as set out in the affidavit of Mr. Falangola would not be a proper approach to reach the conclusion that the Piquenets conduct is an abuse of process. **Johnson v Gore** is clear authority that it would be wrong to hold that because a matter could have been raised in earlier proceedings it should have been so that raising it in later proceedings renders it abusive. What the court must decide is whether in all circumstances, the Piquenets conduct is an abuse. Based on the material and evidence before the Court I am unable to reach that conclusion.
- [55] Looking at the circumstances of the Previous Proceedings, the challenge to legality of the agreement for sale of business was never addressed by Previous Proceedings. It is true that it was raised in the counterclaim, but the Parties at a very earlier stage attended private mediation and settled the issues on ASL’s substantive claim. As it relates to the Piquenets counterclaim, it does not even appear that any defence to the counterclaim had ever been filed by ASL. ASL

therefore never had to go through the trouble of defending the counterclaim. Further, the parties had been brought to court in the previous proceedings as a result of the fixed date claim filed by ASL, the Piquenets' challenge to the agreement for sale of business arose on their counterclaim in proceedings that had been initiated by ASL.

- [56] Nothing further has been presented to the court on this application by way of evidence which would demonstrate that the Piquenets conduct in bringing this claim is an unjust harassment of ASL.
- [57] As it relates to public policy considerations, the court is firmly of the view that if parties have settled a matter by mediation or otherwise by consent and a consent order has been made, as a matter of public policy and the proper administration of justice the Parties should not readily be able to raise in subsequent proceedings, issues that properly formed the subject matter of their settlement and were compromised in previous proceedings. However, each case must be considered based on its own circumstances and it is not in every case that the Court will make this finding.
- [58] The Court must also be sure that it is not hindering parties from settling matters by inferring too lightly that an issue must have been concluded through a judgment or order given by consent. In such circumstances, a party may end up bound to an extent that they had not envisaged and thus be prevented from pursuing a genuine claim. This could potentially lead to reticence in seeking to settle matters amicably and rather having an entire case fully ventilated and determined by the Courts.
- [59] In relation to these proceedings, there is no suggestion that the Piquenets' claim is frivolous, vexatious or without merit. In the absence of some other evidence, on this application, pointing to their overall conduct being abuse or an unjust harassment of ASL, I do not consider that the present claim this claim is an abuse of process warranting the Court's exercise of its strike out powers.

Conclusion

- [60] In light of my above findings, I am not of the view that this court should strike out the Piquenets' claim and I would therefore refuse ASL's application.
- [61] As it relates to the issue of costs, the general rule is that the unsuccessful party should pay the successful party's costs of the application, and I see no reason to depart from the general rule. The Piquenets' are therefore entitled to their costs of this application which shall be summarily assessed at the next case management conference unless earlier agreed.

[62] The present application to strike was filed during the period for the 2nd and 3rd Defendants to file a defence. For the orderly case management of this matter, I will direct that their defence be filed within 28 days of the date of this Order.

[63] There is also a pending application by the Piquenets for an extension of the period of validity for sever of the claim form on the 1st Defendant which should be dealt with on an expedited basis.

Disposition

[64] In light of the foregoing, I make the following orders in relation to the present application and the further conduct of this matter:

1. ASL's application filed on 2nd May, 2023 to strike out the Piquenets' claim as an abuse of process is refused.
2. ASL shall pay costs to the Piquenets, to be summarily assessed at the next case management conference unless earlier agreed.
3. ASL and the 2nd Defendant shall file a defence to the Piquenets' claim within 28 days of the date of this Order.
4. The Piquenets' application for an extension of time to serve the claim form on the 1st Defendant shall be considered on paper without a hearing pursuant to rule 11.17 of the Civil Procedure Rules (Revised Edition) 2023.
5. The claim shall be listed for case management on a date to be fixed by the Registrar of the High Court in accordance with rule 27.3 of the Civil Procedure Rules (Revised Edition) 2023.

[65] I wish to thank learned Counsel on both side for their helpful oral and written submissions.

Carlos Cameron Michel
High Court Master

By the Court



Deputy Registrar