

**IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCv2020/0379

BETWEEN:

ANGELA L. G. DICKINSON

Claimant

-and-

AIDAN McCaULEY

Defendant

Appearances:

Mr. Andrew O'kola for the Claimant

Ms. E. Ann Henry K.C. with Ms. Mandi Thomas for the Defendant

2022: November 4

November 25.

JUDGMENT

[1] **BYER J.:** By way of Notice of Application filed on 4th of October 2022 the Claimant sought the following relief:

a) That the Applicant/Respondent be granted an Occupation Order, requiring the Respondent/Petitioner to vacate the Former Matrimonial Home and property at Mollihawk House, Hospital Hill, English Harbour, St. Paul's Antigua(Mollihawk) so that the Applicant and Sam Alexander McCauley can resume residence there until the determination of the ancillary proceedings or until such times as the Court orders.

b) The Respondent/Petitioner whether by himself or by his servants, agents or otherwise be restrained until further order of this court from selling or transferring or

otherwise disposing of or diminishing or otherwise dealing with any of his assets whether real or personal, whether held in his own name or on his behalf within the jurisdiction including sale of the property at Mollihawk .

c) That claims ANUHMT2020/0063 and ANUHCV2020/0379 be consolidated.

d) The Applicant/Respondent is allowed for the purpose of this application to rely on the affidavits filed in claims ANUHMT2020/0063 and ANUHCV2020/0379.

e) Such further or order relief as the court deems appropriate, fair and just in this application in keeping with the rules and/or its inherent and/or statutory jurisdiction; and

f) Cost of the Application.

[2] The said application was supported by an affidavit of the claimant in which the claimant candidly admitted that she had made an application seeking similar reliefs in May 2021 which had been dismissed. The claimant however informed the court that since the making of that order her circumstances had deteriorated, and it was required for the court to consider this application and the reliefs sought in light of those changes in circumstances.

[3] Those circumstances that had changed as highlighted by the claimant were:

i) that she had been evicted from the residence at which she had resided at the time when the order of Robertson J was made in November 2021 as the landlord needed to do repairs

ii) that the Defendant had unilaterally reduced the amount that he paid her after their son had migrated to school in Canada

iii) that she was unable to find any accommodation other than short-term rentals

iv) that her financial circumstances were dire – both personally and professionally ¹

[4] Upon the filing of the application, the claimant invoked the court's jurisdiction on an urgent basis and filed the certificate of urgency which purported to set out the grounds

¹ The claimant did not provide any documentary evidence to substantiate this claim

of the urgency. The matter was set down before this court on the 12th of October 2022 and at the calling of the matter, counsel for the claimant was not in attendance which resulted in the court dismissing the application for want of prosecution. Within minutes of the court pronouncing that order, counsel for the claimant then appeared and upon his oral application, the application was reinstated. On the reinstatement, orders were given for the further management of the matter which included the filing of the pronounced order of the court by the 14th of October 2022.

- [5] To the date of the writing and delivery of this judgment, the said order has not been filed by counsel despite the recording of the proceedings having been supplied to him at his request. This court, therefore, wishes to make itself clear on two matters at this point. Firstly, this court as it is presently constituted has made it clear that the carriage of orders will be to the attorneys as the court appoints unless otherwise specified. Therefore, when this court gives a directive that an order is to be filed it is to be filed – it is not a suggestion. Secondly, when a party moves the court on an urgent basis it is expected that counsel would be in a position to address the matter as urgent as they indicated it needed to be addressed. The use of the word “urgent” is therefore not to be used simply to circumvent the normal processes of the court office and the manner in which listings are allocated unless the matter is in fact urgent. In that vein all parties would be advised to have sight and consider the directives issued by this court as to the preparation of a certificate of urgency which would cause a party’s mind to focus on whether a matter is indeed urgent.
- [6] That having been said, the order of the court gave the Defendant permission to respond to the application which he did on the 27th of October 2022.
- [7] In that response, the Defendant was clear that he considered the present application an abuse of process the court having considered an application in almost the exact same terms in divorce suit ANUHMT2020/0063 (the divorce proceedings) in which the

court had dismissed the applications for an occupation order, a freezing order, and the consolidation of the proceedings. ²

[8] Moreover, the Defendant also stated that in relation to the allegations of the Claimant's change in circumstances, he averred that he paid for all the needs of their son at school in Canada, that the money he no longer paid to the Claimant had been monies that he had paid when his son lived with her; that although the landlord had given the Claimant notice to leave the house she resided in at the time of Robertson J's order in 2021, that same landlord had also indicated that she was prepared to give the Claimant an opportunity to find permanent accommodation³ and therefore her decision to leave and not find alternative accommodation was a result of the decision she had taken to not mitigate her current situation. Finally, he also averred, that he had in the divorce proceedings given an undertaking not to deal with Mollihawk, the home in which the claimant was seeking an occupation order and made a definitive statement that the said house was not for sale.

[9] Despite being given an opportunity to reply to this affidavit the claimant failed to do so.

[10] The substantive matter was heard on the 4th of November 2022 and the parties filed submissions on the issues supplemented by extensive oral arguments by the Claimant.

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[11] At the hearing of the application, it was clear to the court that they were two central issues that had to be determined on the application. Firstly, whether the application was barred from proceeding based on the doctrine of *res judicata*, however, if the doctrine applied, the corollary question would then be, whether there existed special or exceptional circumstances which made the doctrine inapplicable. Secondly, if the

² Decision of Robertson J dated 24th November 2021 and decision of Robertson J dated 16th June 2022

³ Exhibit "ARM 2" and "ARM 3" to affidavit of the 27/10/2022

⁴ Submissions were ordered to be filed on the 2nd November 2022, the claimant filed his submissions on the morning of the 4th November having been submitted after 4pm on the 3rd November. On the 4th November the court also had sight of a medical leave form on behalf of counsel for the claimant dated the 31st October 2022 expiring on the 14th November 2022. Counsel for the claimant therefore appeared virtually at the hearing of the application and made no oral or written application for an extension of time for the submissions to be deemed properly filed.

doctrine did not apply was the Claimant entitled to an order for an occupation order and a freezing order in all the circumstances as sought? The relief for consolidation was not in this court's mind pursued (and rightly so) and as such this court dismisses the relief sought in that regard.

Res Judicata

[12] As raised by the Defendant, the doctrine of *res judicata* is said to be applicable to the application before the court as the relief sought is in the exact same terms as an application heard and determined by a court of competent jurisdiction, namely my sister Robertson J.

[13] The claimant herein, being the respondent in the divorce proceedings filed an application on the 25th of May 2021 seeking some of the same relief as in the instant application. By judgment dated the 24th of November 2021 (the First judgment) my sister examined the extent of the arguments made in relation to the granting of an occupation order. In making that order it was clear that the court considered all the arguments of the claimant herein (the respondent in the divorce proceedings) and determined inter alia that the contentions made by the claimant including her inability to offer a stable home for the son of the parties(the paramount concern for the court) were not warranted. The court made its determination primarily on two bases, firstly that at the time of the order the claimant was in fact in occupation of a house that offered permanent residency, and which was a house that she had previously lived in when the parties had first separated and she occupied the same without complaint. Secondly the court made it clear that they did not accept that there was an inherent instability in the occupation of the house for the child of the family and therefore did not accept that "...stability was at risk of being undermined and that the situation could be stabilized by occupation of Mollihawk House."⁵ Indeed the court went on to state that in relation to the argument that the claimant had a depleted cash flow based on her business not

⁵ Paragraph 33 of the First judgment

doing well, was that "...if there is an issue of cashflow it is unclear how the applicant's occupation of Mollihawk house would create better stability since the claimant would continue to require the financial support regardless of where she resides." ⁶ It was therefore the conclusion of that court that the application for the occupation order should be dismissed.

[14] The relief seeking a freezing order was also peripherally considered in the first judgment and the court stated that a party had to show that another party was not dissipating the assets and that it was clearly not a proprietary remedy in and of itself⁷. However, the court made no determination on that aspect of the application, and instead considered it in her order of the 16th of June 2022 (the Second judgment).

[15] It is in this Second judgment that this court accepts that my sister comprehensively dealt with the issue of consolidation of these proceedings and the divorce proceedings and found that it was inappropriate, a point this court also accepts was reiterated to the claimant herein (by the submissions of the defendant), perhaps resulting in her non-pursuit of that relief before this court.

[16] In any event, in the Second judgment, the court determined that the relief having been sought in divorce proceedings, it was inappropriate and would not grant the same. ⁸

[17] It is from these determinations that the defendant has stated that the present application must be dismissed as it offends the doctrine of *res judicata*.

[18] At this juncture, it may be useful to be reminded of the definition of *res judicata*. The term is clearly identified as applying to two separate instances firstly, what is termed as "cause of action estoppel" and secondly what is called "issue estoppel". What this in turn means is that the defence of *res judicata* can apply either to an entire cause of action (cause of action estoppel) in that the whole of the legal rights and obligations of the parties have been concluded by an earlier judgment which may have "involved the determination of questions of law as well as findings of fact"⁹ or in it could mean that

⁶ Paragraph 33 of the First judgment

⁷ Paragraph 36 of the First judgment

⁸ Paragraph 24 of Second judgment

⁹ Halsbury Laws of England Vol 11 (2015) paragraph 1605

there was a particular issue which was already litigated and decided (issue estoppel) which is now being raised in a different cause of action “to which the same issue is relevant” and one of the parties seeks to reopen the issue.¹⁰

[19] The essence of *res judicata* is therefore to bring finality to proceedings and as was stated by Lord Jauncey in the case **Thomas v The Attorney General of Trinidad and Tobago**¹¹, “no person should be subjected to action at the instance of the same individual more than once in relation to the same issue.”

[20] Therefore, in order for *res judicata* to succeed, it is necessary that certain parameters exist which are: 1) that the present complained action has the same parties, as the matter in which determination had been given, 2) that the issue or cause of action that is to be ventilated in the present complained action was dealt with substantively in the previous relied upon matter whether determined or should have been brought to the Court in that previous matter and 3) it was a court of competent jurisdiction that dealt with the matter previously.

[21] When this court, therefore, addresses its mind to the parameters it makes the following findings: a) the parties in this matter are the same parties in the divorce proceedings; b) the issue for determination in the application before Robertson J encapsulated the present relief in this application and in fact even sought more going further seeking certain disclosure; c) that the First and Second judgments were rendered by a court of competent jurisdiction. Having therefore made these findings I am satisfied that the present application on the face of it does offend the parameters of the doctrine as identified. However, I have said on the face of it and on a cursory examination I would be minded to agree with the submissions of the defendant and dismiss the application.

[22] However before I can do so, I am bound to consider the further submissions of the claimant that her case, on this application now, raises special or new circumstances that would circumvent the applicability of the doctrine.

¹⁰ Ibid paragraph 1603

¹¹ [1990] JCI No 46 at page 3

Special Circumstances

[23] In the case of **Arnold and ors v National Westminster Bank PLC**¹² the House of Lords considered whether in considering fairness as between parties, whether there were any circumstances that could allow for the non -applicability of the doctrine of *res judicata* in the nature of issue estoppel.

[24] His Lordship Lord Keith of Kinkel stated it this way , “ *in my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstances that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties it is open to courts to recognize that in special circumstances inflexible application of it may have the opposite result....*”¹³ (my emphasis added)

[25] In this court’s mind, it is therefore imperative to consider the new material to which the court has been directed to by the claimant to consider whether this material is “new” material that was not available at the time of the First judgment. This must therefore by necessity involve a consideration as to the nature of the material.

[26] When this court asked the claimant to direct it to the new material amounting to special circumstances the claimant indicated that the entirety of the affidavit filed on the 4th of October 2022 were the special circumstances.

[27] At paragraph 3 herein, this court identified the statements that were contained in the affidavit of the claimant filed herein in support of the present application. From those statements the court has been told the following information which are essential to this

¹² [1991]2 A.C. 93

¹³ Ibid page 109

question: i) that at the time that the First judgment was issued, the claimant had been housed in secure accommodation; ii) that the defendant had been maintaining the claimant and the child of the family in meeting rental, utilities and other necessities iii) that her financial circumstances are now dire.

[28] When this court assesses each of these contentions it is clear to this court that the claimant has in fact failed to adduce any cogent evidence of dire financial circumstances that are any different from what she had stated in evidence upon which the court gave the First judgment. As a matter of fact, in that First judgment the Learned judge made findings on this issue and certainly in this court's mind, that any alleged changed financial circumstances in this court's mind has not been shown to the satisfaction of the court to warrant that as being a reason to circumvent the applicability of *res judicata*.

[29] However, when the court looks at the other two facts that the claimant relied upon, it is clear to the court that in the strict sense of the word, these are not facts that fall within the parameters of **new material** that could not have been discoverable at the first hearing. In fact, these are facts that show a change of circumstances that did not **exist**, as alleged by the applicant, at the time of the First judgment. However, in this court's mind, not falling within the strict definition of "new material" as considered by the courts, does not disqualify the claimant from seeking to rely on the same and certainly, the defendant did not make any such suggestion to the court. The defendant's response to the claimant's reliance was rather that in relation to the fact that the claimant now is not in secure accommodation is a consequence of the claimant's own making and that further the defendant was still in fact maintaining the claimant and assisting towards the rent but that rightly he no longer made a payment to her for the maintenance of the son who now is away at school. Therefore, any difference in the sums that were paid previously and now is totally as a result of the nature of the sums that had been previously been paid, which had been for the benefit of their son.

[30] When this court considers the circumstances advanced by the claimant in the round, this court considers that the only viable "new circumstance" that has any merit is that the claimant at this point (whether of her own making or not) has no permanent

residence. In this court's mind that in and of itself is such a fundamental difference as to what pertained at the time of the First judgment that the court should not and will not bind the claimant to the First judgment and will consider on the merits of this application whether she is now in the present circumstances entitled to an occupation order.

Occupation order

[31] It was of some interest to the court, that on the day before the hearing of the application the claimant purported to make what counsel for the claimant termed as minor changes to the application seeking to amend the provisions pursuant to which the application was brought.

[32] When this court examined the amendments, it was apparent that the provisions which the claimant then sought to rely on were substantially different from the original application even though the relief was exactly the same. In this court's mind, the strategy of the claimant in doing so was to enable her to rely on arguments on the said provisions to the disadvantage of the other side and the court itself. In fact, the claimant made no application to make such amendments before this court and this court therefore will disregard those amendments and strike them out and proceed with the application as originally filed on the 4th of October 2022.

[33] That being said, the relief in this regard is that the claimant is seeking an order to compel the respondent to vacate the property considered the former matrimonial home Mollihawk so that she may be able to occupy the same. In the oral submissions of the claimant, there was some mention of the physical geography of Mollihawk that in fact there were three separate dwellings on the property that would allow for the applicant to occupy one. However, this was not a fact that was set out in any affidavit before the court in these proceedings and as such there is nothing upon which the court can adequately verify that assertion. This court will therefore proceed on the basis that the claimant is seeking an occupation order in relation to Mollihawk at large.

[34] Therefore when this court considers this application it is apparent from the submissions of the claimant and the reliance on the affidavit of the 4th October 2022 and reliance on

the affidavits filed in the divorce proceedings and earlier in these proceedings (even though once again the court made no order to allow such reliance as the application contained in the present application to do so was not ventilated or granted) the basis of the application for the occupation order is that the defendant should be excluded for behaviour that constitutes and amounts to domestic violence.

[35] In laying this foundation it was not lost on the court that the affidavit in support of the present application made no allegations of abuse by means of what they coined coercive and controlling behavior by the defendant. Where these allegations were in fact itemized was in an affidavit filed in the divorce proceedings on the 26th of May 2021. This affidavit was filed in these proceedings as an exhibit as “AD1”¹⁴ and it is on that basis that the court will consider that it is before the court as a means as to what was said by the applicant but not that the applicant is entitled to rely on it without more. Additionally, despite the amendments to the application which have now in any event been struck out by the court, which included purported reliance on the Domestic Violence Act 2015 (DVA), as my sister in her First judgment clearly stated where similar arguments were raised before her, this court would be unable in any event to make an order pursuant to the provisions of the DVA as the applicant has not sought relief in relation to its provisions.

[36] Thus, in this court’s mind, for the court to be empowered to make any orders, reference to a piece of legislation without seeking specific relief is like throwing paint at a wall and hoping something will stick and suffice it to amount to painting.

[37] Be that as it may, this court has considered the submissions and the evidence of the claimant very carefully and considered the authorities relied on by the claimant in support of this relief and the court makes the following determinations in that regard:

a) that from the authorities relied upon, section 33 of the Family Law Act (UK) operates within certain parameters and there are certain criteria which must be considered when an application is made under that legislation which although similar to the provisions of the DVA are much more far-reaching and cover many more instances

¹⁴ Filed 11/10/2022

b) that occupation orders under the UK legislation as stated in the authorities relied upon by the claimant, under the DVA or even within the inherent jurisdiction of the court in considering non-molestation orders, are usually made where the parties are in fact in a shared household where the abusive behaviour is being perpetrated, at that juncture one partner is usually required to vacate

c) that presently and for at least over a year the parties herein have not lived together and effectively this order would be putting one party in a more advantageous position than the other by evicting the defendant from the home he solely occupies

d) that despite the allegation in the submissions of the claimant that the defendant has many other options in which he can reside, there is no evidence before the court that suggests what is the present availability of any other options or what those options may be for the defendant

e) that despite the submission that the defendant is in a better financial position to find alternate accommodation, the claimant has not denied the contention of the defendant that he still gives her an allowance of USD\$3500.00 towards rent and utilities. There is no assertion by the claimant that she is unable to find appropriate accommodation on that sum

f) the submission was also made by the claimant that she is the main caregiver of the child of the family who is presently away from Antigua but there was no response by the claimant to the indication by the defendant that when the child returns to Antigua, that the child can live with him. Indeed the claimant made no affidavit in response to answer that statement of the defendant and this court is of the opinion that even though the claimant may have been the main caregiver of the child as from her evidence that she homeschooled him before his departure to Canada there is no allegation that the defendant has exhibited any act of abuse towards the child or that the child would be in danger living with the defendant on his temporary and short term visits to Antigua during the school holidays.

g) there has been no indication as to if and when the child will return to Antigua before the end of the year, and the extent of that time that he would be home. Further, there

is no evidence that the claimant is unable to find accommodation within the budget of the monies provided by the defendant that would allow her to accommodate their son, sharing such visitation with his father.

f) finally, the court is cognizant that the trial of the matter in relation to the interest of the claimant in Mollihawk comes on as the first matter in January 2023, a mere two months away

[38] In this court's mind, in the round considering all the circumstances and the evidence and submissions of the claimant this court is not satisfied that the claimant is entitled to an occupation order as prayed. That ground of relief is dismissed.

Freezing Order

[39] It is without question that a claimant before the court seeking equitable relief must come with clean hands.

[40] In the case at bar, the basis upon which the claimant has sought to reapply for the defendant to be restrained from selling Mollihawk was solely on the basis that the defendant had purportedly taken steps to dispose of the house by placing the house on the market for sale and in support of that contention exhibited what purported to be an advertisement for the sale of the said house.

[41] It was therefore with extreme consternation that this court noted that the defendant in response to the affidavit of the claimant made it clear not only that Mollihawk was not for sale but that even of more concern was that the purported listing for the sale of Mollihawk exhibited by the claimant was in fact not Mollihawk but a neighbouring property that has nothing to do with the defendant.

[42] The claimant failed to respond to this allegation and in this court's mind, there can be no defence at this attempt to mislead the court in the manner that she has done in this regard. The only attempt to salvage the claimant's prayer was in the oral submission of counsel for the claimant who indicated merely that it was not true that the claimant

was being less than forthright and that there was no attempt to mislead the court. However, the record speaks for itself. This court is satisfied that there has been no attempt by the defendant to dispose of Mollihawk or any other asset over which the claimant has claimed an interest. In considering the circumstances¹⁵ in which freezing orders are granted, this court is satisfied that the claimant has not provided the court with any cogent evidence to substantiate an order of this nature being made in her favour.

[43] The relief sought in relation to the freezing order is therefore also dismissed.

Order of the court

1. The Notice of application filed on the 4th of October 2022 is dismissed with costs to the defendant to be assessed if not agreed upon within 21 days of today's date.

**P. Nicola Byer
High Court Judge**

By the Court

Registrar

¹⁵ There is a justiciable case of action with a good arguable case, the defendant has assets susceptible to dissipation; there is a real risk that the respondent to the application may dissipate the assets before the judgment is given or can be enforced, the respondent would be adequately protected by the applicants undertaking in damages per Robertson J in the Second judgment at paragraph 23