[2019] JMCA App 7

JAMAICA

IN THE COURT OF APPEAL

APPLICATIONS NO 148/2017 & 191/2018

BEFORE:	**THE HON MR JUSTICE F WILLIAMS JA** **THE HON MISS JUSTICE P WILLIAMS JA** **THE HON MR JUSTICE PUSEY JA (AG)**	
BETWEEN	**WINSTON FINZI**	**APPLICANT**
AND	**JAMAICA REDEVELOPMENT FOUNDATION, INC.**	**1ST RESPONDENT**
AND	**JONATHAN GOODMAN**	**2ND RESPONDENT**
AND	**JANET FARROW**	**3RD RESPONDENT**
AND	**DAVID ALEXANDER**	**4TH RESPONDENT**
AND	**JASON RUDD**	**5TH RESPONDENT**
AND	**NAUDIA SINCLAIR**	**6TH RESPONDENT**
AND	**ALLAN WOOD**	**7TH RESPONDENT**
AND	**LIVINGSTON, ALEXANDER AND LEVY, ATTORNEYS-AT-LAW (A FIRM)**	**8TH RESPONDENT**

Paul Beswick, Miss Terri-Ann Guyah and Miss Gina Chang instructed by Ballantyne, Beswick and Company for the applicant

Mrs Sandra Minott-Phillips QC, Maurice Manning and Miss Tavia Dunn instructed by Myers, Fletcher & Gordon for the 1st, 5th and 6th respondents

B St Michael Hylton QC and Kevin Powell instructed by Hylton Powell for the 7th and 8th respondents

27, 28 November, 19 December 2018, 24 January and 5 April 2019

F WILLIAMS JA

Background

[1] By way of application no 148/2017 (the first application), the applicant sought permission to appeal the decision of Laing J (the learned judge) made on 28 July 2017. By that decision, the learned judge had entered summary judgment against the applicant, and for all the respondents except the 2nd, 3rd and 4th, who were never served and so had not been active parties to the matter.

[2] By way of application no 191/2018 (the second application), the applicant also sought a stay of execution of the orders of the learned judge, until the disposal of the appeal (which they were seeking permission to file in the first application).

[3] After hearing submissions on 27 and 28 November; and 19 December 2018 and reserving our decision, on 24 January 2019 we made the following orders:

> "i. Application No 148/2017 is refused.
>
> ii. Costs of that application to the 1st, 5th, 6th, 7th and 8th respondents to be agreed or taxed.
>
> iii. Application No 191/2018 is refused, with no order as to costs."

[4] We promised, at the time we made those orders, to give brief reasons in writing. This is a fulfilment of our promise to do so.

The orders below

[5] These were the terms of the orders of the learned judge, as reflected in the formal order filed on 28 July 2017:

> "1. Summary judgment is granted in favour of the 1st, 5th, 6th, 7th and 8th Defendants on the claim against the Claimant.
>
> 2. Costs of the claim is [sic] awarded to the 1st, 5th and 6th Defendants against the Claimant to be taxed if not agreed, and a special costs certificate is granted for two counsel (one senior and one junior) as well as instructing counsel.
>
> 3. Costs of the claim is [sic] awarded to the 7th and 8th Defendants against the Claimant on an indemnity basis with such costs certified fit for two Counsel (one senior and one junior) as well as instructing counsel.
>
> 4. The claimant's application for leave to appeal is refused.
>
> 5. The 1st, 5th and 6th Defendants' attorneys-at-law are to prepare, file and serve this order."

The claim below on which summary judgment was entered

[6] By claim number CD 00135 of 2017, filed on 23 February 2017, the applicant had sought several orders and declarations against the respondents. The cause of action was stated in the claim form to be based on a claim:

> "…for fraud and conspiracy to defraud arising out of the purported collection of debt alleged by them to have been transferred to the 1st Defendant from FINSAC and from the illegal sale of lands comprised in Certificate of Title registered at Volume 1203 Folio 671 and at Volume 1255 Folio 157 in the Register Book of Titles under the disguise that they were for legitimate debts owed by the Claimant; and against **ALLAN WOOD**, Attorney-at-law and Partner of the firm **LIVINGSTON, ALEXANDER & LEVY ATTORNEYS-AT-LAW** a firm, both located at 72 Port Royal Street, Kingston for failure to honour the undertaking for the return of Certificate of Title registered at Volume 1203, Folio 671 and for conspiracy to defraud the Claimant herein…"

[7] Figuring prominently among the 25 or so reliefs requested, and giving a snapshot of the substance of the claim, was the first declaration sought, which reads as follows:

> "1. A declaration that the orders granted by and the declarations made by the Supreme Court of Judicature of Jamaica in Claim Nos. HCV 1858/03, 2004 HCV 00369, 2004 HCV 2843, 2005 HCV 5063, 2005 HCV 5397 and 2014 HCV 03311 were procured by fraud occasioned by the Defendants and are null, void and of no effect."

[8] By way of further background, the applicant and the 1st respondent (JRF) on 28 August 2012 entered into a settlement agreement (endorsed on counsel's brief in suit no HCV 5397 of 2005), by which the then-outstanding matters between them were settled. By paragraph 3 of the settlement agreement, it was agreed that there would be liberty to apply "in respect of the enforcement of those terms only". It is useful to set out in full paragraph 24 of that agreement:

> "24. The Defendant acknowledges that he has had the Benefit of legal advice and has freely and voluntarily Entered into this settlement and will offer no defence or Objections to (i) the Claimant's right to enter Judgment In accordance with this settlement; (ii) or the Claimant's right to exercise its powers of sale in respect of the property comprised in Certificate of Title registered at Volume 1203 Folio 671; or (iii) any exercise by the Claimant of its powers of sale by private treaty pursuant [to] Section 22 of this agreement; and for the avoidance of doubt the Defendant relinquishes and foregoes any challenge or rights of appeal he may have or which may accrue to him."

[9] The property registered at volume 1203 folio 671 (the Providence property) is part of Providence Estate in the parish of Saint James. The 8th respondent on behalf of

the JRF then had possession of the duplicate certificate of title for that property. The Providence property was sold by JRF in its capacity as mortgagee to RIU Jamaica Hotel Limited for US$7,000,000.00, with the consent of Mr Finzi after he had defaulted on his obligations under the settlement agreement. The surplus from the sale price was paid over to him.

Permission to appeal (the first application)

The grounds of the application

[10] In respect of the first application, the notice of application was first filed on 11 August 2017. That document was amended several times, with the result that what this court considered when the applications were heard was a document headed: "Further Further Amended Notice of Application for Leave to Appeal" filed on 27 November 2018.

[11] These are the orders that were being sought, as set out in the notice of application filed on 27 November 2018:

> "1. That permission to appeal the judgment of the Honourable Mr. Justice Laing handed down on the 28th July, 2017 be granted;
>
> 2. That the orders of Laing J be set aside;
>
> 3. Alternatively, that in any event the order for Indemnity Costs in favour of the 7th and 8th Respondents are set aside;
>
> 4. Costs of the appeal and in the Court below to the Applicant herein;
>
> 5. That the matter be remitted to the Supreme Court with a direction to the Registrar of the Commercial Division for a Case Management Conference to be fixed before a different judge other than Laing, J. on or before the end of the Hilary Term of 2019;

6. Such further and other relief as this Honourable Court may deem just." (Underlining as in original)

[12] The grounds on which the first application is based have remained constant in the various amended documents that were filed. They read as follows:

"a. The Learned Judge erred when he found that on a balance of probabilities, there was insufficient evidence before the Court and there was no evidence which was foreshadowed as being potentially available at a trial, which could ground a conclusion that the Claimant has a real prospect of succeeding on the issue of the existence of an undertaking and/or the breach of that undertaking;

b. The Learned Judge erred when he found that the claim against the 7th and 8th Defendants was statute barred;

c. The Learned Judge erred when he found that there was no evidence to support a claim of fraud against the 7th and 8th Defendants;

d. The Learned Judge erred when he found the Privy Council decision in **Hip Foong Hong v H. Neotia & Co. [1918] AC 888** did not conclusively decide the issue in respect of the applicability of the reasonable diligence condition;

e. The Learned Judge erred when he found that it was open for the Court to follow the current English position that a reasonable diligence condition exists;

f. The Learned Judge erred when in applying the reasonable diligence condition, he found that the Applicant had not done all he could have done to assert his claim of fraud before the Court before he entered into the Settlement Agreement dated 28th August, 2012;

g. The Learned Judge erred when he found that the 1st, 5th, 6th, 7th and 8th Defendants on whom the burden of proof rests had discharged that burden and had satisfied the Court that the claim against them is a

breach of the Henderson v Henderson abuse of process, which gives rise to a discretionary bar to the proceedings;

h. The grant of Summary Judgment is outwit the reasonable determination of a judicial officer having concluded that a fraud had taken place against the Court and the Applicant herein occasioned by the behaviour of the Respondents."

The law governing an application for permission to appeal

[13] As is well known, an applicant for permission to appeal must satisfy the conditions set out in rule 1.8(7) (formerly 1.8(9)) of the Court of Appeal Rules (CAR), which, so far as relevant, reads as follows:

> "1.8(7) The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success." (Emphasis added).

[14] It has been accepted in several decisions of this court that the term "real chance of success" may be likened to the test used in the case of **Swain v Hillman** [2001] 1 All ER 91, requiring that: "there is a 'realistic' as opposed to a 'fanciful' prospect of success".

[15] In **Duke St John-Paul Foote v University of Technology Jamaica (UTECH) and Elaine Wallace** [2015] JMCA App 27A, for example, Morrison JA (as he then was) at paragraph [21] of the judgment, opined as follows:

> "[21] This court has on more than one occasion accepted that the words 'a real chance of success' in rule 1.8(9) of the CAR are to be interpreted to mean that the applicant for leave must show that, in the language of Lord Woolf MR in **Swain v Hillman and another** [2001] 1 All ER 91, at page 92, 'there is a 'realistic' as opposed to a 'fanciful' prospect of

> success'. Although that statement was made in the context of an application for summary judgment, in respect of which rule 15.2 of the Civil Procedure Rules 2002 ('the CPR') requires the applicant to show that there is 'no real prospect' of success on either the claim or the defence, Lord Woolf's formulation has been held by this court to be equally applicable to rule 1.8(9) of the CAR (see, for instance, **William Clarke v Gwenetta Clarke** [2012] JMCA App 2, paras [26]-[27]). So, for the applicant to succeed on this application, it is necessary for him to show that, should leave be granted, he will have a realistic chance of success in his substantive appeal."

[16] To my mind, it is important to bear in mind as well that, in addressing whether permission to appeal should be granted, the applicant would have to demonstrate, in order to succeed on appeal, that the learned judge was "plainly wrong" in his judgment. (See **Watt (or Thomas) v Thomas** [1947] AC 484). However, it is also important not to lose sight of the fact, in a consideration of this matter, that we are here dealing, not with the substantive appeal; but with an application for permission to appeal.

The applicant's overarching theme

[17] The applicant's overarching complaint in the matter is that a massive and complex fraud has been perpetrated against him by the respondents and that such fraud was so complex that it necessarily took a very long time for it to be unravelled and be discovered. Mr Beswick sought to rely on the case of **Hip Foong Hong v H Neotia and Company** [1918] AC 888 and, in particular, the dictum of Lord Buckmaster, in contending that: fraud is a thing apart and "unravels all". The dictum of Lord Buckmaster is to be found at page 894 of the judgment and reads as follows:

> "A judgment that is tainted and affected by fraudulent conduct is tainted throughout, and

the whole must fail…"

[18] In light of the serious allegations of fraud that have been made against the respondents, therefore, (the submission continued), along with what the applicant contends to be sufficient information before the court to warrant an exploration of the allegations by way of a trial, the leaned judge erred in disposing of the matter as he did.

[19] We may now proceed to an examination of the grounds of the first application.

The question of the undertaking

Ground a: The Learned Judge erred when he found that on a balance of probabilities, there was insufficient evidence before the Court and there was no evidence which was foreshadowed as being potentially available at a trial, which could ground a conclusion that the Claimant has a real prospect of succeeding on the issue of the existence of an undertaking and/or the breach of that undertaking

Summary of submissions for the applicant

[20] On behalf of the applicant, Mr Beswick sought to persuade the court that, on a proper interpretation of several letters passing between the 7th and 8th respondents, on the one hand, and lawyers for the applicant, on the other, the 7th and 8th respondents had given an undertaking. That undertaking was, it was contended, to hand over to the applicant and/or his attorneys-at-law, the documents of title for the Providence property (if we accept as the final request for an undertaking, for example, a letter from Mr L Broderick to the 8th respondent, dated 8 May 2006).

[21] Mr Beswick further submitted that the learned judge engaged in an evidentiary exercise, considering the evidence in the case, which, was inappropriate for a summary

judgment application. As a result of this erroneous approach, he made determinations which would best have been made at the trial stage. In light of this, the learned judge was palpably wrong, he submitted. Counsel submitted as well that the threshold for the test of "real prospect of success" is very low; and, in support of this submission, he relied on the case of **Merrick Samuels v Gordon Stewart, Andrew Reid and Bay Roc Limited**, (unreported), Supreme Court, Jamaica, Claim No 2001/S-081, judgment delivered 23 December 2004, in which a judge of the Supreme Court opined at paragraph 17 of the judgment as follows:

> "17. When the allegations of **Swain** are examined, it will be seen that the threshold to satisfy the test of 'real prospect of success' is very, very low."

Summary of submissions for the 7th and 8th respondents

[22] On behalf of the 7th and 8th respondents, Mr Hylton QC submitted that, contrary to Mr Beswick's submissions, the test for "real prospect of success" is not in fact low, but high; and that in the judgment on appeal in the case of **Samuels v Stewart et al** there are dicta to the contrary of the applicant's submission. So that, in **Gordon Stewart, Andrew Reid and Bay Roc Limited v Merrick Samuels**, (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 2/2005, judgment delivered 18 November 2005, Harrison JA is quoted at page 7 as saying:

> "[The learned judge] by adopting the test of 'good and arguable case' fell into error by rationalizing the test of 'real prospect of success' as requiring a 'low threshold' of proof. The contrary is true. I agree with Mr Garcia for the appellants that the 'mere arguability test' adopted by the learned trial judge was the incorrect approach." (Emphasis added)

[23] Mr Hylton further submitted that the applicant's contention as to the existence of an undertaking and its breach, did not meet the objective criteria for an undertaking to be held to exist. Those criteria included the requirement that there be clarity in the terms of the undertaking, for example, which was absent in the instant case. No undertaking existed, he submitted, which necessarily meant that there could have been no breach.

Discussion

[24] The question of whether the applicant can show that he has a real chance of success in relation to his contention as to the existence of an undertaking, calls for a brief review of the evidence that was available to the learned judge, and which he considered in dealing with the matter.

[25] The following indicates the contents of the various letters, and their timelines.

Date of letter	Summary of contents
(1) 21 April 2006	Letter from Mr L Broderick to 8th respondent, requesting transfer of Providence property to Mr Finzi or his nominee on payment of sums due, but not enclosing payment.
(2) 26 April 2006	Mr L Broderick encloses cheque in letter to the 8th respondent and requests the 8th respondent, in exchange, to give a professional undertaking to forward certificate of title to the

	Providence property to him.
(3) 28 April 2006	7th respondent, on behalf of the 8th respondent, returns cheques, indicating inability to give the undertaking requested.
(4) 1 May 2006	Mr L Broderick requests from the 8th respondent in exchange for cheques enclosed, "all security documents" in possession of 8th respondent or client (JRF), but not limited to Providence property. No undertaking requested.
(5) 2 May 2006	Cheques returned by the 8th respondent on basis of an inability to accept the proposed conditions.
(6) 8 May 2006	Mr L Broderick sends to 8th respondent cheques to settle matter. No undertaking requested.
(7) 11 May 2006	Consent order entered, signed by both Mr L Broderick and applicant, including order for JRF to continue to hold title to Providence property.

[26] Against the background of this correspondence, the learned judge found (correctly in my view) that there was no evidence of an undertaking. Based on what I consider to be the only possible interpretation of the documentary evidence that was

before the learned judge, the applicant has failed to convince me that he has a real chance of succeeding in this appeal, certainly where the allegation of the existence of an undertaking and its alleged breach are concerned.

[27] The letters mentioned in the above table are by themselves sufficient to show that the applicant has failed to cross the threshold on the matter of the undertaking – even if I decided to have no regard to the letter from Mr Brady to Mr Broderick dated 8 May 2006 regarding whether suit no HCV 2834 of 2004 was being settled without conditions. Were I to have regard to that letter, however, its effect could only be to make doubly sure the conclusion that the 7th and 8th respondents gave no undertaking. On the available evidence, there is nothing to rebut the learned judge's finding that no undertaking existed – whether the threshold for applications such as these is low or high.

[28] On that note, I should add in passing that it was not only Harrison JA who had doubted the correctness of the approach of the judge below in **Stewart et al v Samuels**. Harris JA (Ag) (as she then was) is also noted at page 40 of the judgment as making the following observation:

> "The Affidavit of the respondent which sought to introduce the plea of undue influence did not contain sufficient evidence to raise the plea. The leaned trial judge however, considered and found that there was 'a strong arguable case of undue influence.' He also considered and found that there were serious issues of facts to be tried. He had an obligation to have given consideration to the sufficiency of the respondent's evidence with respect to the issue of undue influence and to decide whether based on the evidence before him, there was real prospect of success of the

> respondent's claim. The evidence did not support his findings."

[29] This brings me to a consideration of the question of what approach is properly to be taken by a court in dealing with a summary judgment application: is the matter to be decided solely on the basis of the pleadings or is it permissible to decide issues on the basis of the affidavit evidence?

[30] It seems to me that the answer is to be found, *inter alia*, in the two cases cited by Mr Hylton: **Stewart et al v Samuels** and **National Commercial Bank Jamaica Ltd and Owen Campbell v Toushane Green** [2014] JMCA Civ 19. I accept as a correct statement of the approach that should be taken in summary judgment applications, the dictum of Phillips JA at paragraph [28] of the latter judgment:

> "The court in assessing the parties' respective positions must do so on the basis of the affidavit evidence which must be filed if the parties intend to rely on it. In this case … the respondent did not file any affidavit evidence. The particulars of claim is a pleading, not evidence….The failure to file affidavit evidence, which is a mandatory requirement, in a case such as this, goes a long way toward disposing of the appeal…"

[31] This dictum is, of course, entirely in keeping with rule 15.5(2) of the Civil Procedure Rules (CPR), which reads as follows:

> "(2) A respondent who wishes to rely on evidence must -
>
> (a) file affidavit evidence; and
>
> (b) serve copies on the applicant and any other respondent to the application, not less than 7 days before the summary judgment hearing."

[32] It is important to note at this juncture that the only affidavit evidence that was placed before the learned judge, came from the respondents to this application. No affidavit was filed by this applicant, so that the applicant's efforts to counter the respondents' applications in the court below was devoid of any evidential support. Therefore, there was no evidential support for the main contentions of the existence of: (a) a fraud; or (b) an undertaking on the part of the 7th and 8th respondents.

Alleged finding of fraud

Ground h: The grant of Summary Judgment is outwit the reasonable determination of a judicial officer having concluded that a fraud had taken place against the Court and the Applicant herein occasioned by the behaviour of the Respondents

[33] The applicant, in his affidavit in support of the application for a stay, alleged at paragraph 11 thereof:

> "…[t]he learned judge admitted and agreed that there was a massive fraud".

[34] Suffice it to say in disposal of this point, that, a perusal of the judgment discloses no such finding. If I am correct in this observation, then that removes the premise of ground (h) of the application and so disposes of that ground.

Ground b: The Learned Judge erred when he found that the claim against the 7th and 8th Defendants was statute barred

Ground c: The Learned Judge erred when he found that there was no evidence to support a claim of fraud against the 7th and 8th Defendants

[35] In my view, the conclusion flowing from the foregoing discussion about: (a) the absence of affidavit evidence from the applicant in the court below; and (b) the conclusion concerning whether the 7th and 8th respondents had given an undertaking,

are clear and compelling. This makes it unnecessary to discuss grounds b and c. Mr Hylton's submission in relation to ground b cannot be circumvented: if there was no undertaking, there could have been no breach of it and questions of any applicable limitation period also would not arise.

[36] We may now proceed to consider together grounds d, e and f,

Existence of a reasonable diligence condition

Ground d: The Learned Judge erred when he found the Privy Council decision in Hip Foong Hong v H. Neotia & Co. [1918] AC 888 did not conclusively decide the issue in respect of the applicability of the reasonable diligence condition

Ground e: The Learned Judge erred when he found that it was open for the Court to follow the current English position that a reasonable diligence condition exists

Ground f: The Learned Judge erred when in applying the reasonable diligence condition, he found that the Applicant had not done all he could have done to assert his claim of fraud before the Court before he entered into the Settlement Agreement dated 28th August, 2012

[37] Before looking at the submissions in relation to reopening a case on the basis of newly-discovered fraud and the applicability of the reasonable diligence condition, it may be useful to provide some background in respect of the circumstances in which the applicant became aware of information leading to the discovery of what he contends to be the fraud perpetrated against him. That background is as follows:

a) On 9 August 2011, the applicant received, pursuant to a request made under the Access to Information Act, from the Financial Sector Adjustment Company (FINSAC), information that he had requested on

8 July 2011. He had requested this information in the course of an audit of the loan accounts of two of his companies concerning debts for which JRF had sued him.

b) More than a year after receipt of the information, that is, on 28 August 2012, he entered into a settlement agreement, previously mentioned.

c) The applicant having been in breach of the terms of the settlement agreement, the JRF, (by claim no HCV 03311 of 2014), sued to enforce the said agreement and obtained judgment by default. Pursuant to that judgment, the Providence property was sold in 2015.

d) The applicant's claim, alleging fraud, was not filed until 23 February 2017.

Summary of submissions for the applicant

[38] On behalf of the applicant Mr Beswick submitted, in summary, that the case of **Hip Foong Hong v H Neotia and Company** conclusively decides the issue of whether or not the reasonable diligence condition is applicable to circumstances such as these. The learned judge, he submitted, was bound by it and it determines that the condition is not applicable to proceedings in courts in this jurisdiction. The learned judge therefore erred in deciding to follow the current English position that a reasonable diligence condition exists, the submission further went.

[39] This was how the submission was put (in part) in paragraphs 21 and 22 of the applicant's submissions filed on 11 October 2018:

> "21…In considering the evidence necessary and the weight it should have, they did not include a condition for reasonable diligence in a discussion where it could have very naturally been inserted or implied. By excluding any necessity for reasonable diligence or even new evidence, the natural inference is that the Privy Council's position is that there is no need for reasonable diligence.
>
> 22…. Thus, despite the absence of a specific requirement for reasonable diligence, the decision should be binding according [to] the usual principles of stare decisis…"

Summary of submissions for the 1st, 5th and 6th respondents

[40] On behalf of the 1st, 5th and 6th respondents, Mrs Minott-Phillips QC submitted that in **Hip Foong Hong v H Neotia and Company**, the issue of whether or not the reasonable diligence condition was applicable did not arise for consideration by the Judicial Committee of the Privy Council. She further submitted that the learned judge could not, therefore, be faulted for adopting the English approach and finding that the reasonable diligence condition applies.

Discussion

[41] From a careful reading of the case of **Hip Foong Hong v H Neotia and Company**, it appears that the submissions of Mrs Minott-Phillips in relation to the reasonable diligence condition are correct. I can see no reference whatsoever to the reasonable diligence condition or to a discussion of it in that judgment. The *ratio decidendi* seems to be what appears at page 894 of the judgment as follows:

> "…where a new trial is sought upon the ground of fraud, procedure by motion and affidavit is not the most satisfactory and convenient method of determining the dispute. The fraud must be both alleged and proved; and the better course in such a case is to take independent proceedings to set aside the judgment upon the ground of fraud when the whole issue can be properly defined, fought out and determined, though a motion for a new trial is also an available weapon and in some cases may be more convenient."

[42] If that interpretation or understanding of the case is correct, then the learned judge cannot be faulted for having sought guidance from the English line of authorities and accepting the position that the reasonable diligence requirement applies. Additionally, for my own part, I would consider it injudicious to regard as binding authority for a principle, a case which does not expressly discuss and enounce that principle. In **Hip Foong Hong v H Neotia and Company** it is not expressly stated that no reasonable diligence condition exists or is required. Rather, the case is one that, in setting out a number of matters that might not form an exhaustive list, fails to mention the reasonable diligence condition. So, here again the applicant's contention in this regard must be rejected. The timeline set out at paragraph [25] of this judgment, is, in my view, also sufficient to refute the contention that the learned judge erred in finding that the applicant had not done all that he could have done to assert his claim of fraud before he entered into the settlement agreement in August of 2012.

Henderson v Henderson abuse of process

Ground g: The Learned Judge erred when he found that the 1st, 5th, 6th, 7th and 8th Defendants on whom the burden of proof rests had discharged that burden and had satisfied the Court that the claim against them is a breach of the Henderson v Henderson abuse of process, which gives rise to a discretionary bar to the proceedings

Summary of submissions for the applicant

[43] In relation to the learned judge's application of the principle enounced in **Henderson v Henderson** (1843) 67 ER 313, it was submitted that the learned judge wrongly exercised his discretion in regard to the discretionary bar of abuse of process in light of the serious allegations of fraud being made by the applicant and the evidence in relation to the fraud that had been placed before the court.

Summary of submissions for the 1st, 5th and 6th respondents

[44] In relation to the applicant's contention on the learned judge's application of the **Henderson v Henderson** principles, Mrs Minott-Phillips submitted that the facts of the present case fit squarely within the **Henderson v Henderson** principles and that the learned judge was correct in applying those principles to the facts of this case.

Discussion

[45] I prefer to start this discussion with an outline of dicta coming from the Belize Court of Appeal in the case of **Belize Port Authority v Eurocaribe Shipping Services Limited and Another**, Civil Appeal No 13/2011, judgment delivered 29 November 2012, cited by Mrs Minott-Phillips in the court below. At paragraph [43] of that judgment, Morrison JA, after a review of the relevant authorities, opined as follows:

> "[43] On the basis of these authorities, I would therefore conclude that the doctrine of res judicata in the modern law comprehends three distinct components, which nevertheless share the same underlying public interest that there should be finality in litigation and that a party should not be twice vexed in the same matter. The three components are: (i)

> cause of action estoppel, which, where applicable, is an absolute bar to relitigation between the same parties or their privies; (ii) issue estoppel, which, where applicable, also prevents the reopening of particular points which have been raised and specifically determined in previous litigation between the parties, but is subject to an exception in special circumstances; and (iii) **Henderson v Henderson** abuse of process, which gives rise to a discretionary bar to subsequent proceedings, depending on whether in all the circumstances, taking into account all the relevant facts and the various interests involved, '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' (per Lord Bingham, in **Johnson v Gore Wood & Co (a firm)**, at page 499)."

[46] This dictum gives an accurate summary of the various aspects of the doctrine of res judicata, including **Henderson v Henderson** abuse of process, which this application concerns. I accept as correct as well the dicta of Hoo Sheau Peng JC of the High Court of the Republic of Singapore in **Venkatraman Kalyanaraman v Nithya Kalyani and others** [2016] SGHC 157, where, at paragraph 33, she expressed the following view:

> "33 From the cases above, it is evident that the *Henderson* rule may be engaged when the earlier proceedings concluded amicably, be it by way of a consent judgment or order issued by the court (such as in *Low Heng Leon Andy*), or where the settlement agreement was entered into privately, without being embodied in a court judgment or order (such as in *Goh Yee Fong Peter*)." (Emphasis added)

[47] Having regard to the history of the matter set out previously, and having regard to the authorities, the applicant cannot fairly be said to have established that he has a real chance of success in showing that the learned judge erred in holding that the respondents had discharged the burden of proving that the applicant's case was

brought in breach of **Henderson v Henderson** abuse of process principles. This ground, therefore, in my view, also fails.

[48] This means that the applicant has not made out any of the grounds of his application for permission to appeal, with the result that the application must be refused.

The second application (for a stay of execution)

[49] The refusal of the application for permission to appeal makes it unnecessary for the court to consider the application for a stay of execution, one requirement for obtaining a stay being that there must be demonstrated by the applicant some merit in an existing appeal. That application must therefore also be refused.

Other matters

[50] In written submissions and oral submissions advanced by his counsel, the applicant sought to argue other matters that were not among the grounds of his application for permission to appeal. Additionally, in many cases, it appeared that they were not matters that had been dealt with by or even argued before the learned judge. It was, for those reasons, not appropriate for this court to have considered them. They are, therefore, not dealt with in this judgment.

[51] It was for the foregoing reasons that the applications were refused.

P WILLIAMS JA

[52] I have read in draft the reasons for judgment of F Williams JA. I agree with his reasoning and conclusion and have nothing to add.

PUSEY JA (AG)

[53] I too have read the reasons for judgment of F Williams JA and agree with his reasoning and conclusion.