

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV 2000/0277

BETWEEN:

MAVIS HENRY
Attorney for MILLICENT RALPH

Applicant/Claimant

-and-

TYRONE WARNER

Respondent/Defendant

APPEARANCES:

Mr. Peighton Knight of Hill & Hill for the
Mr. Steadroy Benjamin for the

Claimant
Defendant

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2009: May 7
2009: May 25
.....

DECISION

Striking out Defence – issue estoppel – cause of action estoppel – overriding interests -
s.28 Registered Land Act - Antigua and Barbuda.

1. **Harris J:** This is an application by the Claimant to strike out the Defence to a claim for possession of land as an abuse of process on the basis of *res judicata*¹. The Defendant

¹ See Judgment of Redhead J. in Millicent Ralph v Clarkson Ralph and others 133/1987 Antigua and Barbuda.

Application is also made for several other Orders flowing from a striking out.

denies that the matter is *res judicata* and alleges that he has acquired an equitable and unregistered interest in the land and house thereupon. Further, the Defendant alleges proprietary estoppel.

Background

2. The High Court of Justice entered judgment on behalf of Millicent Ralph, the Claimant herein and Petitioner on the judgment of June 10 1996 in suit No. 133 of 1987– concerning ancillary proceedings for the establishment of proprietary interests of a spouse, one Millicent Ralph. The Defendant in the instant case was one of the Respondents on the said Petition 133/1987. Prior to the commencement of that action the defendant, Tyrone Warner, procured registration of himself as the proprietor of parcel 70, by mistake. Since the filing of that earlier action in 1987, the Claimant, Millicent Ralph, has died. Further, the Defendant herein, Tyrone Warner and Clarkson Ralph the person through whom Tyrone Warner now claims his interest, were both parties in the earlier 1987 matter and bound by the said Judgment of Redhead J. Tyrone Walker is also the defendant in this matter now before the court.
3. The Judgment Order declared that Millicent Ralph is beneficially entitled to 50% share in several properties including parcel 70, the property, the subject of dispute in this present action. The Order read further, that the titles to the said properties be delivered up the Registrar of Titles to be cancelled on the ground that the said registration of the titles that were obtained *“by the mistake on the ground that they were registered on the belief that the documents were property executed by Clarkson Ralph (decd)”*¹
4. The Defendant herein claims an unregistered (‘overriding’) interest in parcel 70.²
5. The background to this claim is that the defendant is resident on the subject parcel of land – parcel 70 - having been put to reside in a chattel house there, by the deceased and one

¹ See the Judgment Order; The action and consequent Order related to several parcels of registered land.

² Pursuant to the Registered Land Act (RLA), at S.28 (g)

of the defendants in the Petition, prior to his death. The Defendant alleges he was subsequently given permission to put his own house on the land and knowingly permitted by the deceased to do additions and modifications to the house and at the same time *giving him the assurance that no one would move him from the said land.*¹

6. Acting on these assurances, the Defendant says that he expended huge amounts of time and money to improve the house and land which he occupied.
7. Sometime prior to the death of Clarkson Ralph (also a defendant in the 1987 matter), the Defendant alleges that the said Clarkson Ralph purported to transfer his interest in the parcel of land to him.
8. The Defendant alleges that prior to the death of Clarkson Ralph, he, the Defendant, had already acquired an equitable interest in the land; parcel 70; an unregistered interest in the land pursuant to S. 28(g) of the Registered Land Act (“RLA”).
9. He claims now that the Claimant is estopped from dispossessing him from parcel 70 and the house he built thereon.
10. The Claimant Millicent Ralph was the wife of the deceased. The relationship between the Defendant herein and the deceased is not disclosed on the pleadings or Affidavits in this application. What the defendant does say is that the Clarkson Ralph (decd.) permitted him to come on to the land, build and improve on the house of the defendant and give him the assurance that no one would remove him from the land. This state of affairs, if true, reflects a relationship between the two that goes beyond a mere commercial relationship.. Yet, nothing sufficient is said about the nature of that relationship in this application or indeed the later substantive action.

¹ These are facts one would have expected to have been asserted at the earlier 1987 trial by either the deceased or the defendant, Tyrone Walker.

11. In the earlier action filed in 1987 - Matrimonial ancillary proceedings - the Claimant then claimed that she contributed to the acquisition of several properties held in the name of her husband at the time, Clarkson Ralph, and also to the construction of the matrimonial home.¹ The judgment of Justice Redhead speaks of an injunction which was granted on the 11th July 1988 against Tyrone Warner restraining him from further erecting or constructing a building on the subject Parcel 70 in which the Petitioner Millicent Ralph (also now deceased) had an interest. This has not been denied by the defendant.

12. In the end the court held in favor of the Petitioner, Millicent, reversing the process of registration of Tyrone Warner as registered proprietor of parcel 70. Nowhere in the judgment of Justice A. Redhead is any reference made to a defense by Tyrone Warner (also a Defendant in that 1987 action) of the nature and extent he now raises as a defendant in the instant action. Neither is it suggested, by the content of the said judgment, that such a defence was raised in the matter. Very importantly, the defendant in the instant matter does, neither by his pleadings nor his affidavit nor by his counsel in argument, suggest that the present defence was raised in the earlier matter. Counsel for the defendant, Mr. S. Benjamin, in fact, at the hearing of this application, suggested that the defence was not raised in the earlier case because his client felt confident then of his right of ownership and saw no need to defend it in that action.

13. The injunction order of 1988 and the Judgment Order of June 1996 by Justice A. Redhead are both flash points in the history of this matter neither of which, it appears from the record, moved Tyrone Warner at that time(s) to lawfully and diligently defend his alleged interest in the disputed property with the arguments he now raises on this application.²

Claimants Submission

14. The Claimant submits that Tyrone cannot in the present action raise the Defense that (i) He is the lawful owner of the parcel 70 or (ii) That he has an equitable interest in the said

¹ This matter was filed in 1987 and apparently for several reasons including the death of Mr. Clarkson Ralph, judgment was delivered in **1996**.

² This substantive action was filed in **1987**.

parcel 70 on the grounds that; the issue as to ownership of the parcel 70 has already been determined by the court in 1996. The court held that the Claimant has a 50% interest in the said property. This interest was an equitable interest. Having regarded to the history of this matter since it was filed in 1987 nothing has transpired to alter the Claimant's interest.

15. Counsel for the Claimant contends that all issues relating to or forming the basis for the present action and/or Defence were determined in the earlier case and if any issue now raised by the Defendant was not then raised when it could have been raised, then, they are estopped from now raising it, as *an abuse of process*.

Defendant's Submission

16. The Defendant contends that he does not claim a registered interest in the property. That notwithstanding the present registered property interests in parcel 70, he has an unregistered and overriding interest in parcel 70 which is protected by S. 28 (g) of the R.L.A. This section he says, protects the rights of a person in actual occupation of land registered under the R.L.A.
17. The Defendant contends that his interest predates the death of Mr. Clarkson and the Claimant is estopped from dispossessing him on the grounds of Proprietary Estoppel attributable to Mr. Clarkson (decd.). The defendant does not provide the date from which his interest accrued. Counsel for the defendants submits that the defendant does not however claim prescriptive rights. In any event, neither the defendant's pleadings nor his affidavit in defence of this application disclose the basis for the acquisition of prescriptive rights.

Findings

18. The law with respect to the elements of proprietary estoppel is well established. Counsel for the Respondent/Defendant, Mr. Steadroy Benjamin, submitted: an excerpt of Snell's Principles of Equity 27th edit pp 564 – 569; the cases of, Inwards and Others v Baker

[1965] 1 ALL ER and; Sir J. W Ramsden, Bart v Lee Dyson and Joseph Thornton (1865) L.R. Vol 1 129; as authorities on the nature of proprietary estoppel. I accept as the prevailing Law on point, that which is set out in those authorities.

19. There is also much authority on the Law with respect to *res Judicata* and more specifically the related "*cause of Action estoppel*" and "*issue estoppel*". However, I believe there is perhaps no single better authority on the point than the case of Arnold v Nat West Bank PLC (H.L. (E))¹

20. The application before the court is to strike out the Defence as an abuse of process. The abuse of the process arises from the contention that the issues required to be resolved in this matter or, the cause of Action/Defence, have been litigated already, resolved and disposed of by the High Court of Antigua and Barbuda – giving rise to *res Judicata*. There is an important distinction between cause of action estoppel and issue estoppel. They represent two species of estoppel *per rem judicatam*². The case for issue estoppel is the stronger case for the claimant in this application.

21. In Arnold and others v National Westminster Bank PLC ("Nat West")³ Lord Keith of Kinkel distinguished the two estoppels thus: "*It is appropriate to commence by noticing the distinction between cause of action estoppel and issue estoppel. Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter that could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the Law of England, permit the latter to be reopened....Cause of action estoppel extends also to points which might have been but were not raised and decided in the earlier proceedings*"

¹ [1991] 2 A.C. 93

² See Diplock L.J. in *Thoday v Thoday* [1964] P. 181 (197 – 198)

³ At pp 104 D – G, foot note 1

for the purpose of establishing or negating the existence of a cause of action.”(emphasis mine)

22. Lord Keith of Kinkel refined the distinction between *cause of action* and *issue estoppel* by reference to the case of Thoday v Thoday [1964] pp181 at 198, where Diplock L.J. defined *issue estoppel* thus:” *The second species, which I will call ‘issue estoppel,’ is an extension of the same rule of public policy. There are many causes of action which can only be established that proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfillment of an identical condition is a requirement to two or more causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfillment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was.”*¹

23. The Cause of Action in the instant substantive matter is for; *inter alia*, possession of parcel 70, from a trespasser in the person of the Defendant Tyrone Warner. The cause of action in the earlier suit No. 133/1987 was a claim to establish an interest/share in the same property by way of either a resulting trust or a constructive trust/Common intention by the Claimant/Petitioner². It appears the cause of action in the two matters may not be the same; the present claim assuming an existing interest/right of the claimant in the same property that was the subject of the earlier action and seeking possession of same. However, it appears to me that the question as to who owns the land (whether in law or in equity) in the circumstances of both cases must be decided in both cases in order for the

¹ See also the *Nat West case* at pp105(g) for reference to this quote;

² In any event it was a claim for an equitable interest – see the Judgment of Redhead J.

court to dispose of the matters. Although trespass - as in the latter case - can be against an occupier as opposed to an owner, the facts do disclose the claimant as an owner.

24. But if I were wrong on the existence of a cause of action estoppel, I turn to the question of Issue Estoppel that arises in this matter. Issue estoppel is described by Lord Keith of Kinkor at pp 105 E of the *Nat West Case* thus: *"Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seek to re-open that issue"*¹
25. In my view, all issues relating to competing interests in the property had to be litigated and decided in the earlier case. The Defendant in the present action was a defendant in the earlier action. The earlier action concerned the ownership and the interest, legal or equitable, in the parcel 70. Indeed, the Claimant's interest in the disputed land in the earlier action was an equitable interest. The issue as to whether the Defendant had acquired an interest in what is now known as parcel 70 could have been raised and should have been raised in that earlier action. The defendant was, it appears, in occupation of the said lands at the time of the filing of the earlier action and now claims that his interest predated the filing of that earlier action.
26. It was incumbent on the Defendant to have raised the issues he presently raises, for the purpose of establishing or negating the existence of a cause of action in the earlier 1987 proceedings especially when the person through whom he now alleges he obtained his interest in parcel 70 - Clarkson Ralph - was alive and a co-defendant in the same 1987 action.²
27. Like Cause of Action estoppel, issue estoppel is extended *"to cover not only the case where a particular point has been raised and specifically determined in the earlier proceeding, but also that where in the subsequent proceedings it is sought to raise a point*

¹ See also Diplock L.J. in *Mills v Cooper* [1967] 2Q.B. 459 at 468 F.

² Apparently, Clarkson Ralph died in 1990 – shortly after the 1987 action was filed; see the Judgment of Redhead J.

which might have been but was not raised in the earlier". (See Fidelities Shipping Co. Ltd. v v/o Exportschleb [1966] 1. Q.B. 630, 642 per Piplock L.J.)

28. Sir James Wigram V – C in Henderson v Henderson (1843) 3 Hare 100 114 – 115 expressed the defendant's obligation to put his case forward in the earlier action thus: *"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 that 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 subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." (emphasis mine)*

29. Suffice it to say, the issues that are required now to be determined are issues and points that *properly belonged* to the earlier litigation and which the earlier court would have of necessity had to resolve in the earlier case had it been raised. Key witnesses to the facts in this matter such as the claimant, Millicent Ralph along with the Defendant in the earlier matter, her husband Clarkson Ralph, are now both deceased. The defendant failed to exercise *reasonable diligence* to have his claim for an interest in the subject property brought before the earlier court so that that court could have had the benefit of the first hand evidence of the key witnesses somewhat contemporaneously with the happening of the events. If the Defendant had established his interest in the earlier case, the court could not have made the order it did. Put another way still, the court could not have awarded a 50% interest in parcel 70 to the claimant/petitioner if the Defendant had a

greater and earlier interest/claim to the said parcel 70 and had established that interest/claim.

30. The authorities establish somewhat, that there are exceptions to issue estoppel in special circumstances. These circumstances extend to include; where earlier proceedings have resulted in default judgment¹; where there is a subsequent change in the law indicating the earlier decision was wrong ² where fresh materials which could not with reasonable diligence been adduced in the earlier proceedings is now available.³
31. I am not satisfied on all the material before me of the existence in the instant case of any one of the special circumstances referred to above.⁴ The authorities provide however, that the court ought not to take an inflexible approach in applying the special circumstances rule (see the *Carl Zeiss Case* at pp 947; see pg 10 hereof at foot note 2). Adopting and applying this approach to the instant case, I am still unable to glean circumstances that would prevent the application of issue estoppel (if not cause of action estoppel) to the facts and law of this case.
32. Finally, the Defendant alleges that his interest in the subject property predates the death of Mr. Clarkson Ralph. No allegation is made in the Defendant's Defence or for that matter, is any reference made in the earlier judgment of Justice A. Redhead, of the Defendant's interest far less one that predates the marriage of the Ralph Clarkson and the Claimant, or the date on which the Claimant vacated the matrimonial home or made her last contribution towards the acquisition of the property. Indeed, having regard to the nature of the Defence, it surprisingly lacks particularity with respect to dates. At para 5 of the defendant's Affidavit in Reply on this application, he merely states that he obtained an

¹ New Brunswick Railway Co. v British and French Trist Corporation Ltd [1939] AC 1 (28,21,38)

²This is subject to certain limiting conditions; The authorities are not entirely clear on the existence and/or application of this exception.

³ See *Carl Zeiss Sifting v Rayner & Keeler Ltd (No. 2)* [1967] 1 AC 853 (947) Lord UpJohn.

⁴ Fraud or collusion is not disclosed in this matter either.

overriding interest in the property prior to the death of Clarkson Ralph¹. If the defendant did raise these issues at that trial, then the court found against him and in favor of the claimant's interest. All the evidence the defendant would have required to establish his case would have been available to him then. There is now nothing new raised by the defendant, neither does the nature of his defence and pleadings admit of any fresh evidence or facts accruing after the death of the deceased. The defendant does not allege either in the application to strike out or in his defence to the substantive matter, that any new facts have arisen in relation to his interest claimed. In any event, he claims now that his interest – an equitable interest - arose and crystallized before Mr. Ralph died in 1990.²

33. Be that as it may, the effect of the earlier order by the court declaring the interest of the claimant in the subject property vest her rights certainly well prior to Mr. Ralph's death if not at the date of their marriage; both points in time prior to the Defendant entering upon the property³.
34. Further, the Defendant claims an overriding interest under S. 28 (g) of the R.L.A. But this section, as I understand it, does not create or confer substantive rights on the Defendant. Rather, section 28 protects existing rights or the right to assert ones existing rights, if you have one.
35. So, whatever rights the Defendant has acquired or in any event has, he is entitled to establish while he is still in occupation of the lands. For the reasons provided above I am of the view that he would not have acquired any rights adverse to that of the Claimant and in any event and most importantly, even if he had done so prior to the filing of the earlier action as he has alleged, having failed to raise them before the court on the earlier 1987 action, he is estopped from doing so now.

¹ Justice Redhead at pp 5 of the Judgment of 1996 exhibited to the claimant's affidavit in the instant application, referred to Mr. Ralph's date of death as December 1990, some three years after that earlier matter was filed.

² He is also claiming an **overriding interest** pursuant to **S.28 (g) of the RLA**.

³ The defendant does not contend that his entry or cause of action arose earlier than that date; also the chronology of the claimant's acts of contribution towards the acquisition of her interest in the property as set out in the Judgment of Justice Redhead suggests her acquisition of her interest well before the death of Mr. Clarkson. ,

36. I note that the evidence before the court suggests that the Defendant disregarded both the 1988 injunction and the subsequent Judgment Order of the court in relation to several particulars.¹.
37. Further still, the Judgment Order of June 1988 remains without compliance. This present application, in addition to being one for the striking out of the Defence, concerns what is essentially an action for an enforcement order in relation to the judgment order of Justice Redhead, in No. Suit 133/1987.
38. The recent action to which the instant application relates, concerns giving effect to the long out - standing judgment of suit 133/1987.
39. For the reason provided above the application of the Claimant/Applicant is allowed and :

IT IS HEREBY ORDERED that:-

1. The Defence of the Defendant is struck out as *res judicata* and an abuse of the process of the Court.
2. A date for the trial of this matter within the next 14 days be fixed by the court office forthwith.
3. Evidence in chief be given at trial viva voce.
4. The Claimant to serve a copy of this Order on the Defendant forthwith.

**David C. Harris
High Court Judge
Antigua and Barbuda**

¹ The evidence before the court includes the judgment exhibited to the affidavit of the claimant.

