COMMONWEALTH OF THE BAHAMAS **2017**

IN THE SUPREME COURT **CLE/GEN/00954**

Common Law & Equity Division

BETWEEN

KEVIN NIGEL ANDREWS

Plaintiff/ Respondent

AND

SCOTIABANK (BAHAMAS) LIMITED

Defendant/ Applicant

Before: Honourable Madam Justice Ruth Bowe-Darville

Hearing Date: 16th January, 2020

Appearances: Candace Hepburn for the Applicant

Edward Turner for the Respondent

JUDGMENT

Strike Out Summons – Order 18 Rule 19 RSC - Fraud – Res judicata

The Applicant (the 'Bank') herein has brought this application seeking to have the claim of Mr. Andrews (the 'Respondent') struck out.

Background

1. The Respondent commenced the current action against the Bank claiming that it has falsely found that he owes money on a mortgage to it and that as a consequence of fraud committed against him by the Bank, it was granted vacant possession of his Gamble Heights apartments (the 'Gamble Heights property') by the Court. The Bank's position is that the Respondent has unsuccessfully pursued his claim previously and should not be allowed to

do so again. Further, it contends that the equitable doctrine of res judicata does not allow the Respondent to bring a new claim. The Bank has brought the current application to this Court asking that this matter be struck out pursuant to Order 18 Rule 19 of the Rules of the Supreme Court.

2. Order 18 Rule 19 of the Rules of the Supreme Court states the following:

> ***The Court may at any stage of the proceedings make an Order to be struck out or amend any pleading or indorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that-***
>
> ***a. it discloses no reasonable cause of action or defence, as the case may be;***
> ***b. it is scandalous, frivolous or vexatious; or***
> ***c. it may prejudice, embarrass or delay the fair trial of the action; or***
> ***d. it is otherwise an abuse of the court process.***

3. Counsel for the Bank advised the Court that while retrieving mortgage documents in relation to the matter at hand it was discovered that there was a previous action between the parties (Scotiabank (Bahamas) Limited v Kevin Nigel Andrews 2013/CLE/gen/01922), (the '2013 action'). She submitted that the Respondent pleaded in his Defence allegations of fraud in the 2013 action which he seeks to do in the current matter before the Court.

4. The Strike Out application was filed on the 18th April 2019 via Summons by the Bank in the following terms:

> ***"LET ALL PARTIES CONCERNED attend...on an application by the Defendant for an Order pursuant to Order 18, Rule 19 of the Rules of the Supreme Court, 1978 to strike out the Writ of Summons filed herein on the grounds that: (i) it is scandalous, frivolous or vexatious and (ii) it is otherwise an abuse of process AND THAT costs of the application and proceedings be borne by the Plaintiff and paid to the Defendant in any event to be taxed if not agreed."***

5. The claim that the Bank is asking the Court to strike was commenced by generally endorsed Writ of Summons on the 16th August, 2017. In it the Respondent claims the following:

> ***1. A Declaration that the alleged Mortgage and Certificate of Up-Stamping dated 5th day of April, A.D. 2007 and 15th August, 2007 and recorded in Book 10883 at***

pages 538 to 556 between the Plaintiff and the Defendant in respect of Lot number 75 should be set aside as fraudulent and void as against the Plaintiff.

2. A Declaration that the Plaintiff if (sic) entitled to the Mortgaged property discharged from all claims under the Mortgage.

3. An order for the delivery up of the Mortgage to be cancelled.

4. Delivery by the Defendant to the Plaintiff of Possession of the Mortgage property.

5. An Injunction to restrain the Defendant whether by himself, his servants or his agents or otherwise howsoever from assigning the benefit of the Mortgage or of the debts purported to be secure or from doing any act which the Mortgage debts or any one or more of them might become vested in any other person or persons on the faith of the execution by the Plaintiff of the Mortgage.

6. Damages."

...

6. Indeed, the 2013 action was between the same parties to the current action and was last heard before Hilton, J. for a Stay of the Writ of Possession that the Bank obtained for the Gamble Heights property. I gratefully adopt the history of this matter as set out in the ruling dated the 21st February, 2018.

> ***1. This matter came before me by the Defendant filing a Summons on 20th November 2017 supported by an Affidavit of even date seeking the execution by Writ of Possession of the Order made by Evans, J. dated 3rd November 2014 be stayed.***
> ***2. The Plaintiff contested the Defendant's Summons and filed an Affidavit on 16th January 2018 setting out the history of the matter and requested that the Defendant's Summons be dismissed with costs.***
> ***HISTORY***
> ***3. This matter commenced with the Plaintiff filing an Originating Summons supported by an Affidavit seeking a judgment for outstanding monies due and owing to the Plaintiff by the Defendant under a Mortgage and possession of the property the subject of the Mortgage.***
> ***4. The matter was heard by Justice Milton Evans who granted an Order in favour of the Plaintiff on 3rd November 2014 for judgment in the sum of $164,518.17; possession of the property to the Plaintiff, and costs to the Plaintiff.***
> ***5. The Plaintiff obtained a Writ of Possession filed on 27th August 2015.***
> ***6. The Defendant applied to the Court of Appeal on 17th August 2016 for an extension of time within which to appeal which was heard by the Court of***

Appeal who gave its ruling on 29th May 2017 refusing the Defendant's application stating at page 55 of the ruling that

"we also find that the prospects of success are not good. None of the grounds, in our view, have any merit..."

7. *The Defendant thereafter filed the Summons specified in paragraph one of this ruling.*

7. In his Statement of Claim, in this matter, filed on the 14th November, 2017 the Respondent set out his claim:

1. *The Plaintiff was at all material times the legal owner of Lot number Seventy-five (75) in Block Number One (1) situate in the Subdivision known as "Gamble Heights", New Providence.*
2. *The Defendant is and was at all material times a Company incorporated under the Statute Laws of the Commonwealth of The Bahamas engaged in the business of Banking throughout the said Commonwealth.*
3. *By an agreement made between the Plaintiff and the Defendant and contained in a Promissory note dated 4th April, 2007 the Defendant agreed to lend the Plaintiff sum of Fifty Five Thousand Dollars ($55,000.00) upon the grant of an equitable charge by way of deposit of the Plaintiff's Title documents to the said Lot number Seventy five (75) in Block One (1) situate in the Subdivision known as "Gamble Height". The terms of repayment was as follows:*
   "the sum of $746.38 on the 27th day of May 2007 and
   Thereafter 179 equal installments of B$554.26 on the 27th
   day of each consecutive month, until the principal, interest
   accrued thereon and all other amounts are paid in full."
4. *Pursuant to the terms of the said agreement and in consideration of the said advance in the sum of $55,000.00, the Plaintiff deposited his title deeds to the said property with the Defendant's Palmdale Branch on or about February 2007.*
5. *As custodian of the Plaintiffs title deed, subject only to the said advance of $55,000.00 the Defendant owed the Plaintiff fiduciary duties, including:*
   (1) a duty to act in good faith and in the best interest of the Plaintiff for the preservation of the Plaintiff's title deeds and the Plaintiff's equity of redemption;
   (2) a duty not to act so as to enlarge its encumbrance over the Plaintiff's title deeds and the Plaintiff's equity of redemption without any lawful basis for so doing and in the absence of the Plaintiff's knowledge or consent.
6. *The Plaintiff received the said advance of $55,000.00 from the Defendant which was disbursed to the Plaintiff's order as follows:*
   (a) Twenty Seven Thousand Dollars ($27,000.00) to liquidate a loan at Royal Bank of Canada.

(b) Twenty Seven Thousand Nine Hundred and Twenty Two ($27,922.00) was left on deposit at Scotiabank Palmdale Branch for the use of the Plaintiff.

7. *Pursuant to the terms of the Promissory note, the Plaintiff repaid the said Loan which was confirmed by the Defendant servant or agent in June, 2015 when the Plaintiff returned to Nassau from Jamaica to enquire about the foreclosure procedure on the said lot #75. The Plaintiff fully discharged his indebtedness to the Defendant.*
8. *On the 31st October 2011 the Plaintiff approached the Defendant for a new loan facility in the amount of Eighty Thousand Dollars ($80,000.00) to complete three (3) one bedroom Apartments that he was adding to his existing apartment building. The Plaintiff's application for the new loan was never completed and the Plaintiff received no additional funds or advances from the Defendant on security of the Plaintiff's said property or at all. The Plaintiff left Nassau for Jamaica from the summer of 2012 to June 2015.*
9. *On or about June 2015 when the Plaintiff returned from Jamaica to Nassau the Plaintiff requested the release and delivery to him of his Title documents to Lot #75 Gamble Heights. At this time, the Defendant's agent informed him that not only was there a legal Mortgage on the said property in the amount if Fifty Five Thousand Dollars ($55,000.00) but also a Certificate of Up-stamping dated 15th August, 2007 on the said Mortgage in the amount of Eighty Thousand ($80,000.00).*
10. *That Plaintiff has never executed a Mortgage dated 5th April, 2007 nor did he authorize the Certificate of Up-stamping of the Mortgage in respect of Lot number 75 Block one (1) situate in the Subdivision known as Gamble Heights. Further, the Plaintiff avers that he never received the benefit of the additional sum of $80,000.00 referenced in the Certificate of Up-stamping or any portion thereof.*
11. *The Plaintiff also discovered that the Defendant had commenced legal proceedings in 2013 to foreclose on the "Purported Mortgage" which proceedings was in its final stage. The Defendant has since sold the Plaintiff property to a third party who has served an Order of Possession on the Plaintiff to vacate the said premises.*
12. *The Defendant its servant or agent has fraudulently instructed the law firm of Cecil Hilton to prepare a Mortgage and Certificate of Up-stamping in the name of the Plaintiff without the knowledge or consent of the Plaintiff.*

PARTICULARS OF FRAUD

(a) The Defendant, its Servants or agent executed the said Mortgage prepared by the Law firm of Cecil Hilton & Co. on the 5th day of April, 2007 without the knowledge or consent of the Plaintiff.

(b) The Plaintiff never executed the Mortgage dated 5th April, 2007 nor did he authorize the Certificate of Up-stamping of the Mortgage.

(c) The Plaintiff never received a further loan in the sum of $80,000.00 from the Defendant, or the benefit thereon, and there was no justification for the Defendant to stamp and record a Certificate of Up-stamping related to the alleged additional advance.

(d) The Defendant, its Servants or agents prepared the Certificate of Up-stamping dated the 15th day of August, 2007 in the name of the Plaintiff's without the knowledge or consent of the Plaintiff.

(e) That the Defendant, its Servants or Agents, stamped and recorded the said mortgage dated the 5th day of April, 2007 without the knowledge or consent of the Plaintiff.

(f) The Defendant, its Servants or Agents stamped and Recorded the Certificate of Up-stamping of the said Mortgage dated the 15th day of August 2007 without the knowledge or consent of the Plaintiff.

13. The Defendant, its servant or agent has wrongfully and unlawfully executed the Mortgage dated 5th April, 2007 and the Certificate of Up-stamping dated 15th August, 2007 in the name of the Plaintiff.

14. By reason of the matters aforesaid the Plaintiff has suffered loss and damage.

THE PLAINTIFF CLAIMS AGAINST THE DEFENDANT:

1. *The sum of $350,000.00 representing the market value of the Plaintiff's property which was lost as a direct consequence of the Defendant's wrongful conduct.*
2. *A Declaration that the alleged Mortgage and Certificate of Up-stamping dated 5th day of April, A.D. 2007 and 15th August, 2007 and recorded in Book 10883 at page 538 to 556 between the Plaintiff and the Defendant in respect of Lot number 75 should be set aside as fraudulent and void as against the Plaintiff.*
3. *A Declaration that the Plaintiff if entitled to the Mortgaged property discharged from all claims under the Mortgage.*
4. *An order for the delivery up of the Mortgage to be cancelled.*
5. *Delivery by the Defendant to the Plaintiff of Possession of the Mortgaged property.*
6. *An injunction to restrain the Defendant whether by himself, his servants or his agents or otherwise howsoever from assigning the benefit of the Mortgage or of the debts purported to be secured or from doing any act which the Mortgage debts or any one or more of them might become vested in any other person or persons on the faith of the execution by the Plaintiff of the Mortgage.*
7. *Damages.*

...

8. The Bank's case is supported by the affidavit of Shannelle Bethell filed on the 18th April, 2019 and the Respondent's case is supported by his affidavit filed on the 4th July, 2019.

9. On the 22nd November, 2018 Ms. Bethell stated that the Respondent filed a Summons and Affidavit seeking documentation from the Bank.

10. In its written submissions before the court for this matter the Bank alleged that the Respondent had previously made allegations of fraud on the part of the Bank before Hilton, J. in the stay application and then before the Court of Appeal in the 2013 action. The Respondent averred that fraud was never pleaded before Hilton, J. and on an ex parte application of the Respondent the ruling was changed by Order of the Court omitting the reference to "fraud". That change is set out and discussed below alongside the Respondent's arguments.

11. Counsel for the Bank maintained that while it was ultimately decided that the word "fraud" should not have appeared in the ruling, that the allegations of fraud by the Respondent in the 2013 action were a feature of the Respondent's Summons filed on the 20th November, 2017 in the 2013 action. She submitted the filing of the Writ in the current matter was another attempt by the Respondent to frustrate the Bank from exercising its right to vacant possession of the Gamble Heights property.

12. The opportunity to plead fraud was available to the Respondent upon the hearing of the Originating Summons but was not advanced by the Respondent at the time. This would be the third time that the Respondent has brought the issue of fraud before the Court said Counsel and the current action is 'frivolous and results in a clear abuse of process.'

13. Learned Counsel for the Bank further submitted that this matter is res judicata in the circumstances and as such the Respondent is estopped by this equitable doctrine from pleading fraud, and upon which he should have sought the Court's relief in the earlier hearings. She relied on the Privy Council case of ***Yat Tung Investment Co. Ltd v Dao Heng Bank Ltd [1975] A.C. 581*** to support this contention. She further pointed to the Respondent's submissions in the 2013 action in which she said fraud was advanced. As such the current action before the Court is vexatious and ought not to proceed. She also

highlighted the case of ***Henderson v Henderson (1843) 3 Hare 100, 115*** and the dicta of Wigram V-C., upon which the Board relied in *Yat Tung* as follows:

> ***"...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 a 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."***

14. Counsel for the Respondent submitted that the Bank's strike out application is ill conceived with no basis in fact or law and should be dismissed. He said that contrary to the Bank's averments in the matter, the application at the Court of Appeal did not address any allegations of fraud but was for an Extension of Time to Appeal the Order of Justice Milton Evans in favour of the Bank to foreclose on the Gamble Heights property on the 3rd November, 2014.

15. As stated earlier Hilton, J. refused the stay application. The Bank's counsel was sure to submit that:

> ***"In his written Judgment, Justice Gregory Hilton erroneously mention (sic) the word "Fraud" in his Judgment."***

16. The Respondent's counsel said this erroneous mention of the word "fraud" was corrected in the ruling corrected by a decision of Hilton, J. on the 24th May, 2019. The correction was brief and this Court believes that it would be useful to set it out here in its entirety as the basis for the Respondent's current claim before the Court is that he was never heard in any Court of competent jurisdiction on the claim of fraud as against the Bank. The decision rendered was as follows:

> ***"The Court has heard counsel for the Defendant and on review of the court's ruling given on 21st February 2018 and on review of the Court of Appeal Judgment on 29th May 2017 it is clear that the Action heard by the Court of Appeal was for an extension of time within which to appeal which application was dismissed primary (sic) due to the period of time of almost three years since the court order in favour of the Plaintiff.***

The ruling delivered by me on 21st February 2018 was for a Stay of execution of the Judgment which I refused to grant as the application heard before the Court of Appeal has rendered the adjudication by me moot as I was bound by the doctrine of Stare Decisis from entertaining the matter.
The word in paragraph 11 of my ruling to the effect that the Court of Appeal "found the Defendant's position (re: fraud allegation) to be without merit" were not a correct representation of what was adjudicated upon by me and as such pursuant to Order 20 Rule 10 R.S.C. I hereby amend my judgment/Ruling to have those words removed there from. The remaining of my ruling stands."

17. With that said, Counsel for the Respondent submitted that the strike out application should be dismissed.

Law, Analysis & Conclusion

18. This Court has considered the claim of fraud raised by the Respondent and the defence of res judicata raised by the Bank; as well as how they interact in the Strike Out application on the applicable law and facts before the Court.

19. In the case of ***Kotonou v National Westminster Bank plc [2011] 1 All ER (Comm) 1164*** the court determined that there are two categories of cases where it is considered whether a claim should be struck out as an abuse of process:

    a) ***Cases where the litigant in the second claim wishes to challenge any adverse findings in the first proceedings; and***
    b) ***Cases where the litigant in the second claim wishes to make a claim which was not made in the earlier proceedings, which the court determines could have and should have been made in the earlier proceedings.***

20. Res judicata is a cause of action estoppel and applies where there has been an earlier final decision on the same cause of action being raised in subsequent proceedings by a litigant (***Arnold v Westminster Bank plc [1991] 2 AC 93***). In discussing the doctrine of res judicata Mostyn J opined the following in the case of ***BP v KP et al [2012] EWHC 2995 (Fam)***. Res judicata creates an absolute bar from having a claim re-adjudicated by a court of competent jurisdiction. Mostyn J also quoted *Henderson*, as set out below:

"26. ...The plea of res judicata applies, except in special cases, not only to points upon which the court 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."

...

"28. The rule in Henderson v Henderson was lucidly explained by Lord Bingham of Cornhill in Johnson v Gore Wood & Co (a firm) [2002] 2 AC 1 at 30:

> *"It may very well be, as has been convincingly argued ..., 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 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 early 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."***
>
> *(Emphasis mine)*

21. This Court has also considered the doctrine of res judicata in Canadian courts and has found the case of ***Innes v Bui 2010 BCCA 322*** to have laid down the same principles regarding the doctrine. It is for the Court, based on the facts of each case, to determine whether the doctrine of res judicata does or ought to apply in all the circumstances.

> ***"18. In Fournogerakis v Barlow, 2008 BCCA 223, (2008) 80 B.C.L.R. (4th) 290, Lowry J.A. stated this broad definition of the defence of res judicata:***
>
> > ***[16] Where it applies, res judicata serves as an equitable estoppel. Its purpose is to ensure justice is done, prevent abuse of process, and fulfil the societal interest of finalizing litigation. The court retains a discretion to refuse to apply the principle where in special circumstances a rigid application would frustrate its purpose: Arnold v National Westminster Bank Plc., [1991] 2 A.C. 93 (H.L.) at 109-111.***

22. The main issue at hand as this Court sees it, is whether the criteria for cause of action estoppel has been met in this case, and if so, whether this Court should exercise its powers to strike out the Respondent's claim.

23. Almost four (4) years into the 2013 action and after the Order of Evans, J. the Respondent filed the following Summons on 20th November, 2017 seeking a stay of the Order of Possession granted over the Gamble Heights property:

> ***"LET ALL PARTIES CONCERNED attend before a Judge of the Supreme Court...on the hearing of an application by the above named Defendant Kevin Andrew (sic) for an Order that execution by Write (sic) of Possession on the Order herein dated the 3rd day of November A.D. 2014 be stayed upon the ground that the said Order was obtained by fraud upon such terms and conditions as the Court shall think fit."***

24. In his affidavit of 20th November 2017 filed in support of his stay application the Respondent said in part:

> ***"3. That upon my return to the Bahamas in June 2015 I went to the Plaintiff Bank at Palmdale and enquired about the status of my loan of $55,000.00 that I was granted on 5th April, 2007 from the Plaintiff Bank. I was informed by an Employee that the loan was satisfied. However, she went on to say that not only did I have a legal Mortgage dated 5th April, 2007 in the amount of $55,000.00 but I also had a Certificate of Up-stamping in the amount of $80,000.00.***
> ***4. That I did not execute a Mortgage dated the 5th April, 2007 nor did I authorize a Certificate of Up-stamping dated the 15th August, 2007 on Lot number 75 Gamble Heights on the said property.***
> ...
> ***6. That I did not receive the benefit of a loan of $135,000.00 from the Plaintiff Bank and I am asserting that the Mortgage and Certificate of Up-stamping are fraudulent documents."***
> ...

25. The Order on the Writ of Possession application was obtained on the 27th August, 2015. The Respondent applied to the Court of Appeal on the 17th August, 2016 for an extension of time within which to file his appeal. The Court of Appeal gave its ruling on the 29th May, 2017 in favour of the Bank. The Respondent's application for a stay was denied on the 21st February 2018. It is significant to note that despite the correction as to the use/misuse of the word "fraudulent allegations" in the Hilton ruling, the learned judge wrote unabashedly and unapologetically in his decision of the 24th May, 2019 that save for the correction of the words "fraud allegations", in relation to the judgment of the Court of Appeal in the 2013 action, his ruling in the 2013 action stood. The following was said:

> ***"11. I am of the view that the Defendant's Summons seeking a Stay of Execution should be dismissed as an abuse of the process of the court. ...The doctrine of Stare Decisis prohibits me from entertaining this matter where the Court of Appeal has made a determination.***
> ***12. The Defendants Summons is hereby dismissed.***
> ***13. Costs to be granted to the Plaintiff to be taxed if not agreed."***

26. This is not a case of special circumstances. The Respondent has sworn an affidavit in the 2013 action in which stated that he did not sign the certificate of Up-stamping produced by

the Bank in those proceedings. This Court cannot fathom that in considering the application for an extension of time that the Court of Appeal did not consider all of the surrounding circumstances. Further, and most recently Hilton, J, refused the stay aApplication for the Writ of Possession as ordered in the judgment of the Court of Appeal after considering pleadings and evidence. It is noteworthy that the ground of fraud was available but not proffered.

27. Since the cases espoused supra, the Supreme Court of the United Kingdom in the case of ***Takhar v Gracefield Developments Limited and others [2019] UKSC 13*** explored the cases of ***Henderson, Arnold and Virgin Atlantic Airways Ltd v Zodiac Sears UK Ltd [2014] AC 160*** and determined a distinct interpretation of the principles laid down in those cases as follows:

> ***"32. ...for reasons that I have given, I do not consider that in Arnold or Virgin Atlantic there has been an unequivocal judicial statement that seeking to set aside a judgment on the basis that it was obtained by fraud constitutes an abuse of process, if evidence of the fraud could, with reasonable diligence, have been obtained and produced at the earlier trial.***
> ***33. I accept, however, that the question whether fraud should "unravel all" even where discovery of its existence was possible before the original trial does give rise to intensely relevant policy considerations. These are considered in the next section of this judgment.***
> ***34. In para 38 Patten LJ referred to the case of Phosphate Sewage Co Ltd v Molleson (1879) 4 App Cas 801. It had been argued in that case that evidence of fraud other than that presented at the original trial should be allowed to enable a company to claim repayment of a sum which it had to a bankrupt. The company had subsequently obtained further evidence of the fraud. It sought to advance a new case founded on that evidence. The House of Lords held that the new allegations of fraud were based on facts within the company's knowledge at the time of the first trial. The plea of res judicata succeeded, therefore. Importantly, Earl Cairns LC said, at p 814, that it would be "intolerable" if a party who had been unsuccessful in litigation could re-open it merely because,***
>
> ***"...since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief [as had been] asked for before, but it being in addition to the facts [in previous litigation], it ought not to be allowed to be the foundation of a new litigation, and [he] should***

be allowed to commence a new litigation merely upon the allegation of this additional fact."

28. The English courts have moved away from the 'rigid' test laid down in *Henderson*. In ***Royal Bank of Scotland plc v Highland Financial Partners lp [2013] 1 CLC 596*** at paragraph 106 of the judgment Aikens LJ laid down the following principles in relation to claims of fraud and how they should be considered:

> ***"The principles are, briefly: first, there has to be a 'conscious and deliberate dishonesty' in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned. Secondly, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be 'material'. 'Material' means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court's decision to give judgment in the way it did. Put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision. Thus the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was. Thirdly, the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence."***

29. Lord Kerr in *Takhar* endorsed the principles set out above and concluded as did the judge at first instance that the obligation to show that the fraud could have been discovered before the original trial by 'reasonable diligence' was too high a threshold for the party alleging fraud.

30. Notwithstanding what this Court would term, the more flexible approach taken by the UK Supreme Court, the Court in no way surrendered its powers to determine whether a matter should be retried when fraud is pleaded. A plea of fraud does not grant a litigant automatic entry to a re-trial upon the mere utterance of the word. Lord Sumption in *Takhar* reminded the Court of this at paragraph 62 of that judgment:

> ***"The rule, originally stated by Wigram V-C in Henderson v Henderson (1843) 3 Hare 100, 115, that a party is precluded from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones, is commonly treated as a branch of the law of res judicata. It has the same policy objective and the same preclusive effect. But, it is better analysed as part of the juridically distinct but overlapping principle which empowers the court to restrain abuses of its process. The relationship between the two concepts was examined by this court in Virgin Atlantic Airways Ltd v Zodiac Sears UK Ltd [2014] AC 160, paras 22-25. Whereas res judicata is a rule of substantive law, abuse of process is a concept which informs the exercise of the court's procedural powers. These are part of the wider jurisdiction of the court to protect its process from wasteful and potentially oppressive duplicative litigation even in cases where the relevant question was not raised or decided on the earlier occasion. Since the decisions of the House of Lords in Arnold v National Westminster Bank plc [1991] 2 AC 93 and Johnson v Gore Wood & Co [2002] 2 AC 1 it has been recognized that where a question was not raised or decided in the earlier proceedings but could have been, the jurisdiction to restrain abusive re-litigation is subject to a degree of flexibility which reflects it procedural character. This allows the court to give effect to the wider interest of justice raised by the circumstances of each case."***
>
> *(Emphasis mine)*

31. Having considered the principles set out in conjunction with the facts of the current matter, this Court was not persuaded that the Respondent has satisfied the principles as set out in *Scotland*. Further, the fraud pleaded in the current matter has not convinced this Court that if it were pleaded (as it was alleged that it had never been before) they would have entirely changed the way in which any of the Courts in the 2013 matter would have approached the case and/or how the previous decisions were arrived at. Simply put, this Court was not convinced that the fraud claim would have had a different impact on the 2013 action. Remembering that the principles are concerned with the earlier decisions of the Court and not on 'what decision might be made if the claim were to be retried on honest evidence.' No decisive new evidence has been brought forward to establish fraud and it appears that the Respondent deliberately did not rely on fraud while having alluded to the possibility that it existed in the 2013 action. The Respondent himself deposed that he alluded to fraud in his affidavit in this matter:

> ***"7. That at paragraph 5 of my Affidavit sworn on 26th April, 2019 in the 2013 Action before Justice Hilton I alluded to the Fact that Scotiabank had sold my***

house to a Third Party and I had commenced legal action against Scotiabank in the Action herein the basis of which was FRAUD."

32. On the 19th February, 2016 the Respondent had his then attorney write to attorneys for the bank, the following:

> ***"Our client, Mr. Andrews, strongly maintains that he only borrowed $55,000.00 from Scotiabank and not the purported $135,000.00. He further maintains that his signature was forged."***

33. This Court does not possess the authority on the filing of a new action to ignore the Order of the Court of Appeal's judgment in the 2013 action, the subject of which was the Gamble Heights property. Allen P. (as she then was) held the following in their judgment on the extension of time application, with which the other members of the panel agreed:

> ***" As to prejudice against the respondents if this application is successful, we find that the order for the payment of the money and for the vacant possession of the property was given almost three years ago. Consequently, there is some prejudice to the intended respondent who has been waiting for three years to obtain the fruits of its judgment.***
>
> ***For all of these reasons, we refuse the application for an extension of time. The appeal is therefore incompetent."***

34. Having considered the history of and the outcomes of the 2013 action and the 2017 application to date and having regard to the facts and the law as stated throughout, this Court also finds in addition to and abuse of process the Bank also succeeds on its submission (defence) of res judicata. The Respondent's claim is therefore struck out.

35. The costs of this action to the Bank to be taxed if not agreed.

Prepared this 11th day of February, A.D., 2022 by Ruth M.L. Bowe-Darville

Delivered by

This 17 **day of** February **A.D., 2022**