COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2019/CLE/gen/0076

BETWEEN

PAMELA HEASTIE

(Personal Representative of the Estate of Herbert Heastie)

Claimant

AND

LINDA SYMONETTE

(Personal Representative of the Estate of Ruth Ingraham)

Defendant

Before:	**Her Ladyship The Honourable Madam Senior Justice Deborah Fraser**
Appearances:	**Mr. Cambridge for the Claimant**
	Mrs. Romana Farquharson and Samuel Taylor for the Defendant
Hearing Date:	**25 June 2024**

Civil Procedure – Whether to Strike Out writ for Want of Prosecution - Abuse of Process- Res Judicata- Whether the Court is Functus Officio

RULING

FRASER, SNR J:

[1.] This is an application brought by the Defendant/Applicant, the personal representative of the Estate of the late Ruth Ingraham to Strike Out the Writ filed by the Claimant.

Background

[2.] On 18 January 2019, the Claimant, the personal representative of the Estate of Herbert Heastie, filed a Writ of summons against the Defendant/Applicant seeking:

> (a) a Declaration that the Certificate of Title granted in Equity Action No. 138 of 2011 **("2011 Action")** be set aside on the ground that such certificate was obtained by fraud;
>
> (b) other relief and costs.

[3.] The Defendant/Applicant entered an appearance on the 8 February 2019.

[4.] Since that date, the Claimant has not filed or served any other pleadings for five years.

[5.] On 14 March 2024, the Defendant filed a Notice of Application to strike out the application for want of prosecution on the basis that the present action is abuse of process.

[5.] On 27 November 2024, the Court gave an oral ruling in the matter with reasons to follow. At that time the Court also asked the parties to address it on the issue of res judicata and whether the Court is functus officio. Having read the submissions from Counsel for both sides in this matter my ruling is as follows.

Issue

[6.] The issues to be decided are:-

> (i) Whether Action No 2019/CLE/gen/0076 ought to be struck out?
>
> (ii) Whether the doctrine of res judicata applies to this matter; and
>
> (iii) Whether this Court is functus officio?

EVIDENCE

Defendant/Applicant Evidence

[7.] On 14 March 2019, the Defendant/Applicant filed the Affidavit of Linda Symonette ("Symonette Affidavit"), who is the personal representative of the Estate of Ruth Ingraham, in support of an Application to Strike Out Action No 2019/CLE/gen/0076 for want of prosecution. The Affidavit asserts that, since the filing of the action in 2019, the Claimant has failed to file or serve any further pleadings for over four years, resulting in inordinate and inexcusable delay without reasonable justification. The Symonette Affidavit further contends that the Claimant had

willfully allowed the matter to remain dormant, that the parties and subject property have already been litigated before the Supreme Court and Court of Appeal, and that the Court of Appeal affirmed the Defendant's rightful claim to the property, which was not appealed. According to the Symonette Affidavit, the present action is both vexatious and an abuse of the court's process, and the prolonged delay has caused prejudice to the Defendant due to the unnecessary continuation of the matter.

Claimant Evidence

[8.] The Claimant did not file any evidence.

LAW

[9.] By virtue of **Part 26. 3 of the Supreme Court Civil Procedure Rules 2022 ("CPR")** the Courts has the power to strike out a statement of case. It provides:

> **"(1) In addition to any other power under these Rules, the Court may strike out a statement of a case or part of a statement of case if it appears to the Court that –**
>
> **(a) There has been a failure to comply with a rule, practice direction, order or direction given by the Court in the proceedings;**
> **(b) The statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;**
> **(c) The statement of case or the part to be struck out is frivolous, vexatious, scandalous, an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings; or**
> (d) **The statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10."**

[10.] As a general rule, the Court can strike out a case on its own initiative or by application. Striking Out is considered a draconian action, to be taken cautiously and only in exceptional circumstances as it deprives a party of its right to trial and procedural opportunities like disclosure. In **B.E. Holdings Limited v Piao Lianji [2014/CLE/gen/01472**], Charles J (as she then was) set out the powers of the court to strike out at paragraphs [7] to [11]:

> **"[7] As a general rule, the court has the power to strike out a party's case either on the application of a party or on its own initiative. Striking out is often described as a draconian step, as it usually means that either the whole or part of that party's case is at an end. Therefore, it should be taken only in exceptional cases. The reason for proceeding cautiously has frequently been explained as that the exercise of this discretion deprives a party of his right to a trial and his ability to fortify his case through the process of disclosure and other procedures such as requests for further and better particulars.**
>
> **[8] In Walsh v Misseldine [2000] CPLR 201, CA, Brooke LJ held that, when deciding whether or not to strike out, the court should concentrate on the intrinsic justice of the case in the light of the overriding objective, take into account all the relevant circumstances and make 'a broad judgment after considering the available possibilities.' The court must thus be**

persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of claim is incurably bad; or that it discloses no reasonable ground for bringing or defending the claim; or that it has no real prospect of succeeding at trial.

[9] It is also part of the court's active case management role to ascertain the issues at an early stage. However, a statement of claim is not suitable for striking out if it raises a serious live issue of fact which can only be determined by hearing oral evidence: Ian Peters v Robert George Spencer, ANUHCVAP2009/016 - Antigua & Barbuda Court of Appeal - per Pereira CJ [Ag.] - Judgment delivered on 22 December 2009. [Emphasis added]

[10] The court, when exercising the power to strike out, will have regard to the overriding objective of RSC O. 31A r. 20 and to its general powers of management. It has the power to strike out only part of the statement of claim or direct that a party shall have permission to amend. Such an approach is expressly contemplated in the RSC: see Order 18 Rule 19".

[11.] An application to strike out is a summary procedure and is unsuitable for complicated cases requiring a mini-trial.

Want of Prosecution

[12.] In the exercise of the Court's inherent jurisdiction the Court can dismiss a claim for want of prosecution where there has been an inordinate delay, but no disobedience of a Court order. In **Birkett v James [1978] AC 297 2 All ER 801** Lord Diplock explained the nature of the court's discretionary power to dismiss for want of prosecution on page 318:

> **"The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, eg disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party. In the instant appeal your Lordships are concerned with the application of principle (2) only. Contumelious default is not relied on by the defendant."**

[13.] It is well settled that a Court when exercising its power to Strike Out, should do so in plain and obvious cases: **Drummond Jackson v British Medical Association [1970] 1 WLR 688**;**Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd and another [1986] 1 All ER 129.**

[14.] The principles governing dismissal for want of prosecution highlight the need to balance the proper administration of justice with the defendant's right to a fair trial, particularly where delays by the Claimant risk compromising the integrity of the judicial process. In **Major Consulting Limited v CIBC Trust Company (Bahamas) [2014] 2 BHS J No. 19**, the Defendant sought a dismissal of the action on the basis of want of prosecution, citing a nearly two year delay

by the Plaintiff. Winder J (as he then was) at paragraph 16 elaborated on dismissal under the common law for want of prosecution, stating:

> **"On the question of inordinate and inexcusable delay, the state of the law also requires the defendant to demonstrate that the delay will give rise to a substantial risk that it is not possible to have a fair trial or that such delay is likely to cause or have caused, serious prejudice to the defendant."**

[15.] Winder J further explained the three types of want of prosecution at paragraph 8:

> **"8. There are three types of dismissal for want of prosecution:**
>
> **(a) Where there has been intentional and contumelious (insolent) default of the Court's order e.g. disobedience of a preemptory order of the court, and**
> **(b) Where:**
> **(i) There has been inordinate and inexcusable delay in the prosecution action by the plaintiff or his lawyers, and**
> **(ii) such delay will give rise to a substantial risk that it is not possible to have a fair trial, or that the delay has caused, or is likely to cause, serious prejudice to the defendants either as between themselves and the plaintiff, or between each other, or between them and a third party.**
>
> **(c) Where the plaintiff's (sic) conduct amounts to an abuse of process of the court."**

[16.] The essence of the Defendant/Applicant application is that the current action constitutes an abuse of the court's process. In **West Island Properties v Sabre Investments Ltd [2013] 3 BHS J. No. 57,** Allen J, in referencing the English Court of Appeal case of the **Attorney General of the Duchy of Lancaster v London and North Western Railway Company [1892] 3 Ch. 274** at page 277 observed:

> **"It appears to me that the object of the rule is to stop cases which ought not to be launched – cases which are obviously frivolous or vexatious or obviously unsustainable."**

Discussion and Analysis

[17.] The issue in the Claimant's action is a challenge, based on fraud, regarding the map attached to Defendant/Applicant's Certificate of Title granted in 2011 Action. It is undisputed that the property in question pertains to the 2011 Action, which was adjudicated before both the Supreme Court and the Court of Appeal. The Claimant initiated this action so as to prevent the sale of the property comprising his residence. The Court heard submissions from both Counsel and Counsel for the Defendant/Applicant, provided comprehensive written submissions.

[18.] Counsel for the Claimant did not provide written submissions in the application to strike out and has not provided any reasonable explanation as to why this matter has not proceeded for almost five (5) years.

[19.] I have considered the submissions of Counsel and accept the arguments as presented by Counsel for the Defendant/Applicant. Counsel has referred the Court to several authorities in support of the striking out application: **B.E. Holdings Limited v Piao Lianji 2014/CLE/gen/01472; Drummond-Jackson v British Medical Association and others [1970] 1 All ER 1094; Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd and others [1986] 1 All ER 129).** Counsel for the Defendant/Applicant submits that the matter has already been adjudicated by the Supreme Court and the Court of Appeal. She asserts that the Court of Appeal ruled in the Defendant's favour by granting them a Certificate of Title to the property.

[20.] Counsel further submits that the Court must consider all of the relevant circumstances and factors to determine whether there is a reasonable cause of action and any prospect of success as outlined in **McPhee v Nesbitt and another 2014/CLE/gen/0165**4.

[21.] In that regard there is no reasonable cause of action against the Defendant, and the matter was already adjudicated upon. Further, the Claimant has not filed a Statement of Claim and is abusing the court's process. Counsel contend that the claimant has no prospect of succeeding and the matter ought to be struck out. Counsel cited the case of **Jamile Ferguson v The Commissioner of Police and Attorney General 2019/PUB/con/0002** for the proposition that the court ought to strike out the matter as an abuse of process or is instituted for improper purpose.

[22.] The Claimant is now seeking to re-litigate the 2011 Action. There may be cases where circumstances may amount to good cause as to why the matter ought not to be struck out but none have been provided to this Court.

[23.] For an application for want of prosecution to be successful the Defendant must show that the delay satisfies the requirements set down in **Birkett v James [1978] AC 297**. In considering the principles laid down in **Major Consulting Limited [supra**], I find that the five years delay posed a substantial risk and can be prejudicial to the Defendant's ability to sell any of the properties under the Certificate of Title. The Claimant has failed to prosecute the matter after five years and the Court of Appeal has already determined who the rightful owner is. This decision was never appealed by the Claimant to the Privy Council. The Court of Appeal's decision is therefore final.

Abuse of process

[24.] The doctrine of abuse of process seeks to prevent the misuse of judicial procedures, ensuring that litigation is conducted fairly and in accordance with the proper administration of justice. In **Major Consulting Limited [supra**], Winder J opined at paragraph [12] that inactivity could be evidence of abuse of process.

> **"Dismissals for abuse of process are occasions where a party to proceedings have used the process of the court in a way significantly different from its ordinary or proper use. This may be held to be abuse of the court's process, and an aggrieved party may make an application to dismiss the matter for abuse of process. In Grovit v. Doctor [1997] 1 W.L.R. 640, the House of Lords held that the courts were entitled, under the inherent jurisdiction to prevent abuse**

of process, to strike out/stay proceedings if the inactivity of the claimant amounted to an abuse of process even if the facts of a case did not fall within the principles of Birkett v. James. It was held that the continuation of proceedings when a claimant had no intention of bringing a case to trial could, in appropriate cases, amount to an abuse of process and as such an application could be made to strike out the claim and dismiss the action. <u>The inactivity of a claimant could be the evidence relied upon to establish the abuse of process</u>."

[Emphasis added]

[25.] Counsel for the Defendant/Applicant submitted that the Claimant has commenced these proceedings for improper purposes by seeking to have the matter heard before another judge. The Claimant's Counsel submits there is an error in the Map and this was not raised in the 2011 Action or the Court of Appeal. I find that the present action involves the same parties and subject matter as the 2011 Action which has already been adjudicated upon before the Supreme Court and the Court of Appeal.

Res Judicata

[26.] This Court must also decide whether this matter is res judicata and whether the Court is Functus Officio, given the prior rulings of the Supreme Court and the Court of Appeal on this matter. On 27 November 2024 during the hearing of the present application, I directed both parties Counsel's to provide written submission specifically addressing the point of res judicata and functus officio given the prior decision of the Supreme Court and Court of Appeal with respect to the dispute

[27.] The doctrine of res judicata serves as finality to litigation and to protect a party from being vexed twice. In **Kevin Nigel Andrew v Scotiabank (Bahamas) Ltd BS 2022 SC 27**, Justice Bowe-Darville (as she then was) at paragraph 20 citing the Canadian case of **Innes v Bui 2010 BCCA 322** observed:

"It is for the Court, based on the fact of each case to determine whether the doctrine of res judicata does or ought to apply in all the circumstances.

"18. In Fournogerakis v Barlo, 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 Westminister Bank'. [1991] 2 A.C. 93 (H.L.) at 109 -111."

[28.] The principles governing the doctrine of res judicata were aptly addressed in the Bahamian case of **West Island Properties Limited v Sabre Investment Limited and other [2012] 3 BHS J. No. 57.** In this case, the Court of Appeal referenced leading English authorities, including **Greenhalgh v Mallard [1947] 2 All ER 255 and Henderson v Henderson (100) Hare at paragraph 45** to emphasize that res judicata applies not only to issues expressly decided but also

to those so closely related to the litigation's subject matter that revisiting them in subsequent proceedings would amount to an abuse of the court's process.

[29.] The application of the doctrine of res judicata is central to this matter, as it aims to prevent parties from re-litigating issues that have already been decided, thereby upholding the integrity and finality of judicial decisions. I agree with Counsel for the Defendant that the Claimant is abusing the court's process by re-litigating a matter that was already adjudicated. Counsel directed the court to the case of **Jacob Charles Johnson v The Grand Bahamas Utility Company Limited 2007/COM/lab/FP/00011 and Greenhalgh v Mallard [1947] 2 All ER 255** for the requirement of res judicata and this action is an attempt to have another chance of being heard. Counsel for the Claimant argues that the latent discovery of errors to the Map attached to the Certificate of Title is the reason for the commencement of the current action. Counsel acknowledge that matters relative to the Certificate of Title would be res judicata. I find that the issue raised by the Claimant should and could have been raised during the 2011 Action before the Supreme Court and Court of Appeal. The issue raised is res judicata.

[30.] I find that the present action is frivolous, vexatious and discloses no reasonable cause of action and is therefore and abuse of the process of the court.

Functus Officio

[31.] It is a well-established principle that a court becomes *functus officio* once it has delivered a final judgment or order disposing of the matter. This doctrine emphasizes finality in judicial decisions and limits decision-makers jurisdiction after a decision has been made. In the seminal case of **Taylor and another v Lawrence and another [2003] QB 258**, Lord Wolff CJ highlighted this principle. At paragraph [5], he stated:

> **"5. It is a firm rule of practice that the Court of Appeal will not allow fresh evidence to be adduced in support of an appeal if that evidence was reasonably accessible at the time of the original hearing: Ladd v Marshall [1954] 1 WLR 1489. This rule preclude a defendant from seeking at this stage to base an allegation of bias on material that they could and should have deployed at the hearing of the original appeal….**
>
> **6. The rule in Ladd v Marshall is an example of a fundamental principle of common law that the outcome of litigation should be final. Where an issue has been determined by a decision of the court, that decision should definitively determine the issue as between those who were party to the litigation. Furthermore, parties who are involved in litigation are expected to put before the court all the issues relevant to that litigation. If they do not they will not normally be permitted to have a second bite at the cherry: Henderson v Henderson (1843) 3 Hare 100."**

[32.] The doctrine of *functus officio* was also explained in the Bahamian case of **Finance Corporation of the Bahamas Ltd v Philip Arlington Mitchell BS 2021 SC 14,** Charles J opined at paragraph at 18 that, **"the court becomes functus officio once a judgment or final order disposing of the issue has been entered."**

[33.] Counsel for the Claimant submits that the issue of fraud was not placed before the Court for determination in the prior proceedings. The Claimant has raised the issue of fraud by way of a new action and is now seeking to deny the Defendants their right to the land. Counsel referred the Court to **Bannerman Town, Millers and John Millers Eleuthera Association (Appellant) v Eleuthera Properties Ltd (Respondent) (Bahamas) [2018] UPC 27 at paragraph 81** and **Philip A. Mitchell and Brendamae Mitchell v FINCO SCCIv App No. 109 of 2014 where at The Honourable Jones JA at paragraph 39 states:**

> **"… I agree that the appellants have waived their right to raise the matter at this point and must fail on that issue."**

[34.] Counsel for the Claimant submits that during the Quieting Titles Action before the Supreme Court, the facts were neither challenged nor contested, and both parties accepted that the Claimant had good title to 320 feet of the said property based on two separate conveyances, one from the Defendant's predecessor. Counsel further argues that, under section 15 of the Quieting Titles Act ("QTA") the Defendant cannot now claim property within the Claimant's boundaries. Further, section 27 of QTA provides the Claimant with a statutory right to raise an action of fraud to set aside the Defendant's Certificate of Title. Counsel further contends that the Court is not functus officio because the Claimant has a strong prima facie case, demonstrating that the Certificate of Title was fraudulently obtained and should be set aside.

[35.] Counsel for the Claimant further asserts that the infractions stem from an erroneous map attached to the Certificate of Title. The issues regarding the Claimant's title, which were proven at trial, and the Defendant's Certificate of Title granted on appeal, are both res judicata. However, Counsel for the Claimant contends that the latent error in the map requires resolution before the Defendant can proceed with the sale of the land.

[36.] On the point of fraud, I agree with Counsel for the Claimant that the Certificate of Title can be set aside for fraud and is an exception to the rule in **Bannerman Town** and **Philip Mitchell**. However, this point is mute due to the inaction of the Claimant's in advancing their claim under section 27 of Quieting Titles Act. To do so after five years of inactivity constitutes an abuse of process.

[37.] Counsel for the Defendant/Applicant submits that, according to the general rule, the Court is deemed to be functus officio once it has discharged all its functions in this matter. Counsel directed the Court to **Fairway Property Managers Inc. v Bimini Bay Homeowners Association LimitedSCCiv App No. 44 of 2023,** where it was observed that a Court is functus officio once **"it has discharged all its functions in the matter."**

[38.] Counsel for the Defendant further contends that a court would not reopen a matter, as litigation must be final. Counsel relied on **Bain v The Queen [2009] UKPC 4.** Counsel avers that the Court becomes functus officio once a judgement or final order has been entered and referred to **Finance Cooperation of Bahamas Limited v Philip Arlington Mitchell et al BS 2021 SC 14.**

Counsel argues that the present matter was adjudicated in both the Supreme Court and the Court of Appeal and the Claimant is attempting to have the matter reheard before another Supreme Court judge.

[39.] I have considered both Counsel's written submission on the issue of whether this Court is functus officio. I am satisfied that the submissions of the Defendant/Applicant on the issue of functus officio are correct. Once a Court has discharged all of its functions in a matter, it is deemed to be *functus officio* after a judgment or final order has been entered. Applying the rule in **Taylor v Lawrence, Philip Mitchell,** the doctrine of functus officio prevents an applicant from re-litigating a matter that has been finalized.

[40.] Having reviewed the previous decisions before the Supreme Court and the Court of Appeal, I am satisfied that the issues raised in this present action could and should have been raised during the substantive hearing and the appeal. Any purported error in the Map concerning the property boundaries should have been fully addressed before the Supreme Court. I am further satisfied that this Court lacks the jurisdiction to deal further with this matter, as a final decision concerning the property has been rendered by the Court of Appeal. Since the Court of Appeal's decision was not appealed, the finality of the substantive matter precludes this Court from further adjudication.

[41.] Accordingly, I find that this Court is *functus officio* in this present action.

Conclusion

[42.] The Court therefore rules that the matter filed on 18 January 2019 by the Claimant is hereby dismissed on the grounds that it is frivolous, vexatious and discloses no reasonable cause of action and is therefore and an abuse of the process of the court.

[43.] The Court order is as follows:

i. The Claimant's claim is struck out in its entirety.

ii. This Court is functus officio.

iii. The Claimant shall pay the Defendant/Applicant costs in this matter to be assessed if not agreed.

Date this 16th day of January 2025

Deborah E. Fraser
Senior Justice