IN THE COURT OF APPEAL OF BELIZE A D 2020

CIVIL APPLICATION NO 1 0F 2018

FIDELIA CUELLAR Applicant

v

ELTON AUDINETT Respondent

And

(1) GERTRUDE GEORGIA MOORE
(2) REGISTRAR OF LANDS Interested Parties

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BEFORE

The Hon Sir Manuel Sosa	President
The Hon Mr Justice Samuel Awich	Justice of Appeal
The Hon Mr Justice Lennox Campbell	Justice of Appeal

M Balderamos-Mahler for the applicant.
D Bradley for the respondent.
No appearance by or for the first interested party.
L Duncan, crown counsel, for the second interested party.

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31 October 2018 and 17 December 2020.

SIR MANUEL SOSA P

[1] I have read the judgment of Awich JA, in draft, and concur in the reasons for judgment given and, subject to the qualification indicated below, the orders proposed therein. With respect to the costs order, I consider that it should further provide that, in

the event of an application by either party who participated in the appeal for a different costs order, (a) each of those two parties should have seven days from the date of the filing of such application within which to file and deliver to the other his or her written submissions on costs and (b) such application should be determined on the basis of the written submissions so filed and delivered.

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SIR MANUEL SOSA P

AWICH JA

[2] This matter is a renewed application by Ms Fidelia Cuellar for leave to appeal to this Court, the Court of Appeal of Belize. The intended appeal is from a set of interlocutory court orders made by the learned judge, S Young J. on 21 March 2017, in claim No 601 of 2016, in the Supreme Court, the trial court. The decision was reduced to a court order dated 19 May, 2019, Ms Cuellar was cited as the second defendant in the claim. She is the applicant in this matter, a civil case appeal application No 1 of 2018. Ms Gertrude Georgia Moore was cited as the first defendant. She is the "first interested party" in this matter, the application.

[3] The first application for the leave to appeal had been made by Ms Cuellar to Young J in the Supreme Court. The learned judge dismissed it on 29 November 2017. The law of practice and procedure authorizes an applicant for leave to appeal to make his application in the first place, to the trial court or the trial judge, and if refused, to the Court of Appeal.

See *Order II.r.2(1); Attorney General and Others v Jeffery Prosser & Others, Civil Appeal No. 7 of 2007;* and *Belize Telemedia Ltd. v. Belize Telcom Ltd. & others, Civil Appeal No. 23 of 2008.*

[4] The set of interlocutory orders in claim No 601 of 2016, that Ms Cuellar desires to appeal from had dismissed an interlocutory application by Ms Cuellar, in the claim, for an order to strike out the entire claim. The grounds were that, the statement of claim disclosed no reasonable grounds for bringing the claim, under *R.26.3(1)(c),* of the *Supreme Court, (Civil Procedure Rules), 2005*, and that, it was an abuse of the process of the court, under *R.26.3(1)(b) of the Rules*. The reasons that I can discern for the grounds were that, claim No 601 of 2016 was *res judicata*, it was an abuse of process; and it was already time-barred by the *Limitation Act, Cap. 170, Laws of Belize*.

[5] Young J. on the 29 November 2017, granted part of the interlocutory application for an order to strike out the claim, and dismissed part. She struck out part of the claim, and allowed the part of the claim that alleged fraud, to be proceeded with. It is that part of the set of interlocutory orders that Ms Cuellar sought leave from the Supreme Court to appeal from, and now seeks leave for the second time round from the Court of Appeal to appeal from.

[6] The set of interlocutory orders in detail is this:

"Order

HEARING DATE January 31, 2017

DECISION DATE March 21, 2017

IN COURT

BEFORE The Honourable Madam Justice Sonya Young

UPON hearing an application to Strike out by the Second Defendant, and upon Mr Darrell Bradley of Bradley Ellis & Co. appearing for the Claimant, Mr David Morales of Morales Peyrefitte LLP appearing for the First Defendant and Mrs Melissa Balderamos Mahler of Balderamos Authors LLP appearing for the Second Defendant.

IT IS HEREBY ORDERED as follows:

1. The claims for the immediate sale of The property or registration of The Property in joint names of the Claimant and the First Defendant are struck out.

2. The claim for a declaration that The Property was transferred to the Second Defendant contrary to an interim injunction in Claim No 576 of 2004 is likewise struck out.
3. The Claimant is granted leave to file an ordinary Claim Form with a Statement of Claim no later than 29 March 2017.
4. The Defendants are both granted leave to file their Defence 28 days of the date of filing the said Claim Form.
5. The matter is listed for Case Management Conference on 2nd May, 2017.
6. Costs shall be in the cause.

Dated the 19 day of May 2017

BY ORDER

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REGISTRAR"

The facts leading to this second application for leave.

[7] It helps in understanding the application before us, filed on 6 February 2018, to recount the scant account of the background of the whole dispute between the parties. It is given in the first affidavit of Ms Cuellar, and in the judgment of Young J., dated 21 March 2017. It is this Mr Elton Audinett, the claimant in claim No 601 of 2016, (also the respondent in the application before us), and Ms Gertrude Georgia Moore, the first defendant in claim No. 601 of 2016, (also the first interested party in this application) were married or cohabited up to about 2004. During the cohabitation they acquired property, No 2217 Belama Extension Phase 1, Belize City. After they separated, Ms Moore had the property registered to her name, "in September of that year [2004]". It became known as Parcel 2217, Block 16, Caribbean Shores Registration Section, Belize City. Mr Audinett discovered that, Ms Moore might have sold, or was in the process of selling the property without his consent or involvement. He made a claim, No 576 of 2004, in the Supreme Court against Ms Moore.

[8] Mr. Audinett was successful in his claim, No. 576 of 2004. On 23 October 2007, the Chief Justice in the Supreme Court made the orders that:

> "1. The Applicant is entitled to half interest in the property situated at No. 2217 Belama Extension, Phase 1, Belize City.
>
> 2. If the property has been sold, the Applicant is entitled to whatever sum constituted the purchase price.
>
> 3. Costs in the sum of $20,000.00 awarded to the Applicant."

[9] Ms. Cuellar says that, by a memorandum of transfer dated 1 November 2004, signed by Ms. Moore, the title to the property, Parcel 2217, Block 16, Caribbean shores Registration Section, passed to her, Ms. Cuellar. It is not clear at what stage Ms. Cuellar made Mr. Audinett aware of her claim.

[10] Despite his success in claim No. 576 of 2004, Mr. Audinett is said to have made in 2009, a subsequent application in the same claim No. 576 of 2004, to the Supreme Court under *s.148 of the Law of Property Act, Cap. 190, Laws of Belize***,** for an order that, the sale of the property be set aside on the ground that, the sale was made to defraud creditors. One of the requests in the application was that, the third party [Fidelia Cuellar, the applicant in this matter] vacate the premises by the end of the month. Ms. Cuellar participated in the proceedings. It is said that, the application was "dismissed on 16 June 2009, by the Honourable Madam Registrar".

[11] Next, on 31 October 2016, Mr. Audinett filed the fixed date claim, No.601 of 2016, the subject matter in this application. It was some 9 years after he was successful in claim No. 576 of 2004, and obtained a declaratory order of the Supreme Court, declaring that he was entitled to one-half interest in the property, No. 2217 Belama Extension Phase 1, Belize City, which became Parcel 2217, Block 16, Caribbean Shores Registration Area, Belize City. There was no ambiguity regarding the identity of the parties to claim No. 601 of 2016; Mr. Audinett was the claimant. He cited Ms. Moore as the first defendant, Ms. Cuellar as the second defendant, and the Registrar of Lands as an interested party.

The interlocutory application in the Supreme Court for an order to strike out the claim

[12] At the commencement of the proceedings in Claim No. 601 of 2016, learned counsel Ms M Balderamos-Mahler for Ms Cuellar, attacked the claim by objecting to it. She made a preliminary application to the Supreme Court for an order to strike out the entire claim on the grounds that, the claim disclosed no reasonable grounds for bringing it, because it was an abuse of process, it was *res judicata*, and it was statute-barred.

[13] But the statement of claim in the claim, No 601 of 2016, was not included in the record for this matter, so I take the version stated at paragraphs, 9 and 10 of the submissions prepared by counsel Balderamos-Mahler, and the quotation of the relief asked for by Mr Audinett. The quotation of relief is in the judgment of Young J. at paragraph 10.

[14] The version of the claim included in the submissions by learned counsel Balderamos-Mahler is the following:

> "9. By virtue of Originating Summons dated the 16th day of November, 2004 in Supreme Court Action No. 576 of 2004, the Respondent sought as against the First interested party the following relief:
>
> (a) a declaration that he is entitled to one half interest in the house located at 2217 Belama Extension, Phase1, Belize City, Belize.
>
> (b) an Order that the said property be settled or transferred equally or equitably between the Applicant and Respondent; or
>
> (c) in the alternative that, the aforementioned property should be sold and the net proceeds of sale be shared equally between the Applicant or Respondent;

(d) an Order of Injunction restraining Gertrude Moore from selling, transferring, leasing, charging or in any way dealing with the said real property until the determination of the Action;

(e) such further Order or other reliefs as may be just;

(f) costs."

[15] The items of relief asked for by Mr. Audinett also help in disclosing what claim No. 601 of 2016, was about and for. The quotation of the relief is this:

"10. The following reliefs were sought:

(1) A declaration that the First Defendant defrauded the Claimant by stating an incorrect and grossly undervalued consideration or purchase price for the sale of Parcel 2217 Block 16 in the Caribbean Shores/Belize registration Section in a transfer instrument dated 1 November, 2004 signed between he First Defendant as transferor and the Second Defendant as transferee, thereby fraudulently and wrongly depriving the Claimant of the value of his interest in the said parcel.

(2) A declaration that transfer instrument dated 1 November, 2004 signed between the First Defendant as transferor and the Second Defendant as transferee is null and void, and that no legal interest thereby passed to the Second Defendant, on the basis that the parties stated an incorrect and grossly undervalued consideration or purchase price for the sale of the said parcel, and parties failed to pay the appropriate sum for stamp duty and defrauded the government revenue in violation of the Stamp Duties Act.

(3) A declaration that the transfer instrument dated 1 November 2004 signed between the First Defendant as transferor and the Second Defendant as transferee is null and void, and that no legal interest hereby passed to the Second Defendant, on the basis that the transfer instrument was signed contrary to an interim injunction in

claim No. 567 of 2004 restraining the First Defendant from transferring her interest in Parcel 2217 Block16 in the Caribbean Shores/Belize Registration Section.

(4) An order directing the Registrar of Lands in accordance with the Registered Lands Act to rectify the register for Parcel No. 2217 Block 16 in the Caribbean Shores/ Registration Section in terms that the Certificate of Title issued in the name of the Second Defendant for the said parcel be cancelled and a new Certificate of Title be issued in the joint names of the Claimant and the First Defendant equally as tenants-in-common on the grounds of fraud against the Claimant and in accordance with the judgment and order of the Supreme Court of Belize dated 12 May, 2008 in Claim No. 576 of 2004.

(5) An order for the immediate sale of Parcel No. 2217 Block 16 Caribbean Shores/Belize Registration Section by public auction or by private treaty and for the proceeds of sale, after the deduction of reasonable expenses associated with the sale of the said parcel, to be divided equally between the Claimant and the First Defendant in accordance with a judgment and order of the Supreme Court dated 12 May, 2018 in Claim No. 576 of 2004.

(6) An injunction restraining the First and Second defendants from in any way dealing with Parcel No. 2217 Block 16 in the Caribbean Shores/Belize Registration Section, including from selling, leasing, transferring, mortgaging, charging or otherwise disposing of their legal interest in the said parcel.

[16] The submissions by counsel Balderamos-Mahler in support of the grounds of the application in which Ms. Cuellar asked Young J. to strike out the entire claim No. 601 of 2016, were helpfully summarized by the judge at paragraphs, 13, 14, 15 and 16 of her judgment. They are these:

"13. Both Defendants say this claim form must be struck out in its entirety because it is totally without merit. They raise res judicata

first, and contend that the issues now before the court has already been litigated and determined in Action 576 of 2004. Moreover, they insist that what the Claimant seeks to bring before the court now, he ought rightly to have brought under the previous case. This, they say, is an obvious abuse of process, which the court ought to … guard itself against. Finally, they submit that pursuant to the Limitation Act the claim is statute-barred. They alleged that on the Claimant's own admission he was aware of the circumstances and facts on which he now relies since 2004. He has six years (First Defendant) or 12 years (Second Defendant) since then to make any new claim. It is their submission that by 2016, he was clearly outside the limitation period.

14. The second Defendant states further that, the Claimant ostensibly has no standing to bring a claim alleging fraud in regards to Stamp Duties Act. This, she says, is properly the right, of the Registrar of Lands, the Commissioner of Stamps or any other appropriate lands officer.

15. In conclusion, she urges that there is no proper claim against the second Defendant. She speaks to a lack of evidence which suggests that she was anything other than a bona fide purchaser for value and she alludes to deficiencies in the pleadings as it relates to any allegations of fraud.

16. To all of this, the Claimant insists that, not only is his present claim entirely different from the original, but he highlights the different parties involved and the fresh causes of action. He maintains that there is nothing at all abusive about his conduct, he simply wants justice. He places the limitation on his actions at twelve years and says such period has not yet elapsed when his claim was filed. He adds that on a proper interpretation of the relevant section of the Stamp Duties Act, he is well within the right to bring the action

> he brought. Further, this cause of action against the second Defendant is properly pleaded and any additional evidence needed could be provided through witness statements as is the usual and proper procedure.

[17] Learned counsel D Bradley for Mr Audinett, of course, opposed the application of Ms Cuellar for an order to strike out Mr Audinett's claim No 601 of 2016, in the Supreme Court. His submissions were that: (1) Mr Audinett's claim was not *res judicata*, the parties were different from the parties in the former claim No 576 of 2004, and the causes of action in the two claims were different; (2) the limitation period for claim No 601 of 2016, was 12 years and had not expired; and (3) Mr Audinett had standing to plead the stamp duty fraud.

[18] I have already stated the ruling of Young J. She allowed the application for an order to strike out the claim in part, and dismissed it in part. She allowed Mr Audinett to proceed with the claim against both Ms Moore and Ms Cuellar, only to the extent that it was founded on fraud.

The application in this Court

[19] Ms Cuellar has now brought her application to this Court for leave to appeal from the part of the set of interlocutory orders that allowed Mr Audinett's claim No 601 of 2016, to proceed on the averment of fraud and the consequential relief**.**

[20] The principle on which Ms Cuellar is required to base her application is primarily that: generally, leave to appeal will be given, unless an appeal would have no realistic prospect of success; but it must be remembered that, a fanciful prospect is insufficient. Leave may also be given in exceptional circumstances even though the case has no real prospect of success, if there is an issue which, in the public interest, should **be** examined by the Court, such as in a case that raises great public interest or a question of general policy.

[21] This Court, in *Belize Telemedia Limited v Attorney General and Others, Civil Appeal No. 23 of 2008,* adopted that principle as stated in *Practice Note (Court of Appeal: Procedure) [1999] All ER 186 (England and Wales),* for deciding whether leave to appeal may be granted in Belize. The relevant text is the following.

> "*The general test for leave.*
>
> *10. … The general rule applied by the Court of Appeal, and thus the relevant basis for first instance courts deciding whether to grant leave, is that leave will be given unless an appeal would have no realistic prospect of success. A fanciful prospect is insufficient. Leave may also be given in exceptional circumstances even though the case has no real prospect of success if there is an issue which, in the public interest, should be examined by the Court of Appeal. Examples are where a court raises a question of great public interest or general policy, or whether authority binding on the Court of Appeal may call for reconsideration.*
>
> *11. The approach will differ depending on the category or subject matter of the decision and reason for seeking leave to appeal, as will be indicated below. However, if the issue to be raised on the appeal is of general importance, that will be a factor in favour of granting leave. On the other hand, if the issues are not generally important and the costs of the appeal will far exceed what is at stake, that will be a factor which weighs against the grant of leave to appeal.*
>
> *A point of law.*
>
> *12. Leave should not be granted unless the judge considers that there is a real prospect of the Court of Appeal coming to a different conclusion on a point of law which will materially affect the outcome of the case. An appeal on the grounds that there is no evidence to support a finding is an appeal on a point of law, but it is insufficient to show that there was little evidence.*
>
> *…*

Appeals from interlocutory orders

17. An interlocutory order is an order which does not entirely determine the proceedings… Where the application is for leave to appeal from an interlocutory order, additional considerations arise: (a) the point may not be of sufficient significance to justify the costs of an appeal; (b) the procedural consequences of an appeal (eg. lost of the trial date) may outweigh the significance of the interlocutory issue; (c) it may be more convenient to determine the point at or after the trial. In such cases leave to appeal should be refused.

…"

[22] The grounds of appeal which counsel for Ms. Cuellar, submits have real prospect of succeeding are the following:

"(1) The Learned Judge erred in law, misdirected herself or acted upon a wrong principle in determining that the matter was not an abuse of process of the court and was not res judicata after having found that during the proceeding in Action 576 of 2004, the Respondent was well aware that the property had already been sold and chosen not to raise those issues at the time and in that Action.

(2) The Learned Judge erred in law, misdirected herself or acted upon a wrong principle in determining and finding that, in reference to Action 576 of 2004, "there was no action related to any fraud between these same parties" when in the application filed by the Respondent against the Applicant in 2009 in the very same action, he sought to set aside the sale to her on the basis of fraud and raised allegations of fraud.

(3) Having acknowledged that the issue of avoiding the sale from the 1st Interested Party to the Applicant could have been dealt with in the original claim, the learned judge erred in law, misdirected herself or acted upon a wrong principle in determining that a new cause of action was currently before the court which had not been litigated before.

(4) The Learned Judge erred in law, misdirected herself or acted upon a wrong principle in finding that the causes of action and the issues ventilated before in Action No. 576 of 2004 and those now being ventilated are not the same.

(5) Having determined that the claim was not one for possession or recovery of land, the learned judge erred in law, misdirected herself or acted upon wrong principle in determining that the new claim was not statute-barred.

(6) The Learned Judge erred in law, misdirected herself or acted upon a wrong principle in not giving weight to the fact that the Respondent had filed an application to appeal the 2007 decision but such appeal was unsuccessful having been filed out of time.

(7) The decision of the learned trial judge was unreasonable and could not be supported having regard to the following:

(a) The Supreme Court has already determined the substantive issues between the Respondent and 1st Interested Party in 2007 and has made an Order accordingly in the Respondent's favor in respect of the subject property;

(b) In 2009, the Respondent commenced a fresh application against the Applicant seeking the very same relief now being sought in this new claim;

(c) The Supreme Court heard that application filed by the Respondent against the Applicant and had dismissed the said application in regards to the same relief now being sought by the Respondent against the Applicant;

(d) The Respondent sought leave to appeal the 2007 decision out of time but such application was refused;

(e) The same facts and evidence now relied on by the Respondent were relied on by him in the 2004 Action and in the application filed by him in 2009.

(f) The Respondent is seeking to relitigate the issues that should have and could have been raised by him I the 2004 Action."

[23] This second time round, Ms. Balderamos-Mahler's submissions were that, the grounds of the appeal enumerated by her should be accepted by this Court, and the intended interlocutory appeal should be regarded as having a good prospect of succeeding; this Court may grant leave to appeal from the set of interlocutory orders made in claim No. 601 of 2016. Counsel made the following supporting submissions which she asked the Court to accept.

[24] First, counsel submitted that: "the principle of *res judicata* is that, where a decision is pronounced by a court [of competent jurisdiction] over a particular matter, that same matter cannot be reopened by [the] parties bound by the decision, save on appeal...,". She explained that, *res judicata* principle included, "cause of action estoppel" and "issue estoppel." She cited *Halsbury Laws of England Vol. 11 (2015) paragraphs 504-1218,* to support the submission. Counsel argued that, Young J. found that, Mr. Audinett was aware when he brought claim No. 576 of 2004, that Ms. Cuellar had bought the property, so the judge erred in holding that, claim No. 601 of 2016, was not *res judicata*, or an abuse of process, or that the issue of fraud had not been part of claim No. 576 of 2004. Counsel cited among others: *Henderson v Henderson (1843) 3 Hare 100; Johnson v Gore Wood & Co (No. 1) [2001] 1All ER481;* and *Hashwani v Jivraj [2015] EWHC998.*

[25] Counsel submitted further that, claim No. 576 of 2004, was brought under a statute, the *Supreme Court of Judicature Act, Cap. 91, Laws of Belize*, for a declaration of interest in matrimonial property. "If the respondent felt aggrieved due to the sale of the property, … he had every opportunity to seek to set aside the sale pursuant to the very same statute…"

[26] About limitation period, Ms. Balderamos-Mahler submitted that, the judge erred in deciding that, claim No. 601 of 2016, was not about possession of the land, but about an order declaring the transfer of tile void, and so the judge erred when she did not apply *s.12 of the Limitation Act, Cap. 170, Laws of Belize*, which fixes the limitation period for the claim at 12 years. The period had expired.

[27] Learned counsel Bradley's submissions for Mr. Audinett, in this Court were these. The learned trial judge, Young J. did not err at all in her decision refusing leave to Ms. Cuellar to appeal the set of interlocutory orders made on 21 March 2017, dismissing Ms. Cuellar's application for an order to strike out Mr. Audinett's entire claim No. 601 of 2016. Ms. Cuellar was unable to show to this Court by evidence that, there was a realistic prospect of her intended appeal succeeding, or that there was "a **prima facie** case" that, the trial judge erred on a principle of law. Counsel then argued that, because the decision to grant or refuse leave to appeal was a discretionary one, the Court of Appeal had to be satisfied that, the decision of the trial judge was based on a wrong principle of law, or was plainly wrong, in order to interfere with it. There was nothing in the judgment of Young J. to cause this Court to come to the conclusion that, the decision of the learned judge was based on a wrong principle of law, or was plainly wrong.

[28] **Regarding abuse of process** and **res judicata**, Mr. Bradley acknowledged the principle regarding finality of litigation between the parties to a case, and the public interest in it. He also cited *Henderson v Henderson (1843) 3 Hare 100;* and *Wan-I Huang v Attorney General, Civil Appeal No. 1 of 2008 (Court of Appeal Belize)*. However, counsel submitted that, Ms. Audinett's case did not fall within the cases to be struck out on the principle of **res judicata** or **abuse of process**.

[29] Counsel argued that: (1) the parties in claim No.576 of 2004, and the parties in claim No. 601 of 2016, were different; (2) the issues were also different, in No. 576 of 2004, Mr. Audinett claimed a matrimonial right to the property. In claim, No. 601 of 2016, Mr. Audinett made a claim based on fraud by Ms. Moore and Ms. Cuellar in the price at which the property was said to have been sold. Counsel submitted further that, the court order in claim No. 576 of 2004, "contemplated the sale as a bona fide transaction."

[30] Regarding the limitation period, Mr. Bradley submitted that, the period of 12 years for a claim of possession of land had not expired. He submitted further that, in a claim based on fraud, limitation period starts to run when the fraud is discovered. Regarding the public interest in the point of law to be decided, counsel submitted that, this case did not raise an unusual question of law, many cases had been decided based on the questions of law raised in this matter. Finally, counsel submitted that, "the procedural consequences of the appeal outweighed the significance of the interlocutory issue."

Determination

[31] Applying the principle ***of res judicata*** and the principle of **abuse of process** to the facts of claim No. 601 of 2016, and the facts of claim No. 576 of 2004, I have reached the conclusion that, the intended appeal has no real prospect of success; this Court should refuse leave to appeal from the set of interlocutory orders made on 21 March 2017, by Young J. I am unable to accept that, claim No. 601 of 2016, is ***res judicata***, or is **an abuse of process**, or that it was time-barred. Further, I do not accept that, claim No. 601 of 2016, raised an important matter of public interest or an important point of law that justifies consideration by the Court of Appeal. It is also my view that, time and expense would have been saved if the preliminary issues were dealt with in the trial. An appeal, if necessary, would have been long made as of right, and would have been considered already.

Res judicata and abuse of process

[32] All the grounds of appeal in which the applicant asserts that, the trial judge erred in that she did not accept the objection that, claim No. 601 of 2016, was ***res judicata,*** or was **an abuse of process,** do not have any prospect of success, let alone a **realistic prospect of success**. The grounds are numbered, (1), (2), (3), (4) and (7). There are two reasons for my decision.

[33] The first reason is that, the facts that disclose the connection between claim No. 576 of 2004, and claim No. 601 of 2016, are not sufficient to cause the Court to apply the rule of ***res judicata*** [Latin for a matter that has been decided]. The connection is also not

sufficient to cause the Court to apply the rule of **abuse of process**. Compare *Johnson v Gore Wood and Co. (a firm) (No.1)[2001] 1AH ER 481 (HL); Yat Jung Investment Co. Ltd. v Dao Heng Bank Ltd [1975] AC 581 (PC);* and *Brisbane City Council v AG for Queensland [1979] AC 411 (PC).*

[34] The second reason is that, were I to find that, the facts disclosed sufficient connection between the two claims, I would still not have applied the principle of ***res judicata*** or the principle of **abuse of process**, because the rules are not applied where there is a special circumstance such as where the second claim could not have been dealt with procedurally or otherwise, together with the first claim; and in particular, where there has been fraud-see *Barrow v Bankside [1996] 1 WLR 257; and Arnold v National Westminsiter Bank Plc. [1991] 2 A.C. 93*.

[35] The principle of ***res judicata*** and the principle of **abuse of the process of court**, are related in as far as making one claim or part of it in a repetitive way in court is concerned. The rules are based on a public policy that, it is desirable in the public interest as well as in the private interest of the parties themselves that, litigation should not drag on forever, and that a defendant should not be oppressed by successive suits when one would do - see *Henderson v Henderson (1843) 3 Hare 100: [1843-60] All ER Rep. 378*; and *Johnson v Gore Wood & Co. (a firm) (No. 1) [2001] 1 All ER 481*.

[36] The restatement of the principles of ***res judicata*** and **abuse of process**, made in the *Henderson v Henderson case* by Sir Wigram V-C at page 382 remains the correct law. It has been approved in *Hoystead v Taxation Commisioners [1925] All ER Rep. 56*, and applied in several cases, among them, *Green v Weatherill, [1929] All ER Rep. 428*; and *Johnson v Gore Wood & Co. (No. 1) [2001] 1 All ER 481*.

[37] *Henderson v Henderson* was a claim in England by Bethel Henderson, the plaintiff, against Gadsden (the administrator of the estate of the deceased Jordan Henderson, the brother of Bethel Henderson), the widow and children of the deceased brother, for account to be taken of a partnership business and personal loan between the plaintiff and

the deceased brother. The partnership business was carried on in Bristol, England, and in Newfoundland, Canada. The defendants demurred that, the plaintiff in the case in England had brought the same claim in the Supreme Court of Newfoundland against the widow and children, and that the matter was concluded by a final decree of that court, subject only to an appeal to the Privy Council. They explained that, upon Bethel absconding from Newfoundland, the Court in Newfoundland made orders for taking the account in favour of the widow and the children; so, the claim in England should be struck out. Sir Wigram V-C, after noting that, the relief sought in the Court in England was founded upon the proceedings which had taken place in the colonial court in Newfoundland from which an appeal to the Privy Council was available, allowed the demurrer.

[38] On page 382 of the judgment, Sir Wigram V-C restated the rule of ***res judicata*** and **abuse of process** as follows:

> "**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 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 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-case, 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. Those who have had the occasion to investigate the bills of review in this court will not discover anything new in the position I have stated, so far as it may apply to proceedings in this country: and in an application to a court of equity in this country**…"

[39] Sir Wigram V-C proceeded to conclude as follows:

> "**Undoubtedly the whole of the case made by this bill might have been adjudicated in the suit in Newfoundland, for it was the very substance of the case there, and prima facie, therefore, the whole is settled. The question then is whether the special circumstances appearing upon the face of this bill are sufficient to take the case out of the operation of the general rule."**

[40] Nearly two centuries after *Henderson v Henderson*, Lord Bingham, speaking on 14 December 2000, in *Johnson v Gore Wood Co*., about the abuse of process aspect of the principle *of* ***res judicata***, quoted with approbation the restatement of the principles by Sir Wigram V-C in Henderson v Henderson. Lord Bingham explained that, the approach to res judicata and abuse of process is that, it should not be applied in a dogmatic way; it should be applied in a broad merits-based way which takes account of the private and public interests involved and the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party was misusing or abusing the process of the court by seeking to raise before it an issue which had been raised before, or could have been raised before.

[41] So, I proceed on the basis that, the principle of ***res judicata*** is primarily that: when a matter has been adjudicated upon by a court of competent jurisdiction, it may not be reopened or challenged by the original parties or their successors in interest, except on appeal; the principle encompasses cause of action estopel and issue estopel. It must be remembered through that, there may be special circumstances to which the principle may not be applied.

[42] The application by Ms. Cuellar in the Supreme Court for an order to strike out claim No. 601 of 2016 was based on cause of action *estoppel*, and in the alternative, on issue *estoppel*. The issue can only be fraud because that is the only basis of Mr. Audinett's claim in claim No 601 of 2016. The question in the intended appeal would be: was the

issue of fraud litigated in claim No 576 of 2004, and was sought to be re-litigated in claim No 601 of 2016?

[43] For Ms Cuellar to successfully raise the objection (defence) of ***res judicata*** based on cause of action *estoppel* in the latter claim No 601 of 2016, she is required to show that, the parties in the latter claim, No 601 of 2016, are the same as the parties in the former claim, No 576 of 2004. She is also required to show that, the cause of action in the latter claim, No 601 of 2016, is the same as the cause of action in the former claim, No 576 of 2004.

[44] Ms Cuellar has not established the two requirements. The evidence is that, in claim No 576 of 2004, the parties were Mr Audinett and Ms Moore, his wife or cohabitating partner. Ms Cuellar was not a party to the claim. Further, the evidence is that, Mr Audinett's claim, No 576 of 2004, was founded on a matrimonial relationship. That was the cause of action. The relief was for a declaration that, Mr Audinett was entitled to one-half part of the interest in the property acquired during their cohabitation. Ms Cuellar could not have been a party to that, cause of action. The cause of action was decided in the Supreme Court finally, only subject to a right of appeal.

[45] In the latter claim, No 601 of 20016, the parties are different. Mr Audinett is still the claimant, but the defendants are different; they are Ms. Moore and Ms. Cuellar jointly. The cause of action is fraud, a completely different cause of action from matrimonial property interest. Moreover, fraud is regarded as a special circumstance to which the principle of res judicata may not be applied.

[46] The intended ground of appeal that, claim No. 601 of 2016, is time-barred also has no realistic prospect of success. It is a matter of evidence. At this stage, it is not clear when Mr Audinett discovered the fraud that he alleges. Lastly, there is no need in this matter to consider any fraud in regard to stamp duty.

[47] The order that I propose is this: this Court refuses the application filed on 6 February, 2018, by Fidelia Cuellar for leave to appeal from the set of interlocutory orders made by Young J. on 21 March 2017. I also propose that, Ms Fidelia Cuellar pay the

costs of the application for leave, to be agreed or taxed. The order for costs is provisional; it shall become final in seven days, unless parties will have made an application for a different order for costs.

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AWICH JA

CAMPBELL JA

[48] I have read, in draft, the judgment of my learned brother Awich JA in this appeal case. I am in agreement with his reasoning and inclusion therein.

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CAMPBELL JA