IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF BELIZE

CLAIM No. CV297 of 2023

IN THE MATTER OF THE ESTATE OF HERBERT EDMOND LLEWELYN MCKENZIE

AND

IN THE MATTER OF THE ADMINISTRATION OF THE ESTATE OF HERBERT EDMOND LLEWELYN MCKENZIE

BETWEEN:

[1] MAUREEN HORTENCE MCKENZIE

[2] JAMES NATHANIEL MCKENZIE

Claimants/Respondents

and

[1] DENNIS MCKENZIE

Defendant/Applicant

Appearances:

Mr. Aaron A. Tillett for the Claimants/Respondents

Mr. William A. Lindo for the Defendant/Applicant

2023: November 30th;

2024 April 30th.

DECISION

[1] **ALEXANDER, J.**: The applicant applies to strike out in its entirety the fixed date claim form and the statement of claim dated 15th May 2023. In the alternative, the applicant asks that the period for filing a defence be extended by twenty-eight days from the date on which the court determines the instant application.

[2] The applicant states that the claim is an abuse of process of the court.

[3] The respondents in the instant claim are seeking to re-litigate issues that are the same or substantially the same as were tried and determined in Claim No. 283 of 2017 ("Claim 283"). There was no appeal of that decision. Therefore, the decision in Claim 283 acts as an absolute bar to the instant claim. The matters sought to be tried in the present proceedings are *res judicata* namely cause of action estoppel and/or issue estoppel.

[4] The respondents admit that Claim 283 was indeed struck out for certain procedural failures. It was a pre-emptive strike taken at certain deficiencies in the pleadings in Claim 283 and the failure to put before the previous court certain relevant evidence for it to consider. At no time was there a case management conference or the filing of witness statements or affidavits or a substantive hearing on the merits of Claim 283.

[5] The determination in Claim 283 amounted to a procedural prohibition. As the matter was never determined on the merits of the claim itself, it is not an abuse of process to have brought the present proceedings. There are serious issues to be tried that require a substantive hearing of the merits of the case.

[6] I refuse to strike out the claim dated 15th May 2023 and extend the time for the defence to be filed.

The Facts

[7] I will give a short history of the present matter for context and to provide an understanding of the dispute before me. The parties are siblings. They are the children of Herbert Edmond Llewelyn McKenzie ("the deceased") who died testate on 2nd November 2002 at 76 years.

[8] At the time of his demise, the deceased had eleven living adult children, of which the parties are three. The respondents were unaware of the existence of any Will of the deceased until in or about the year 2007 when they discovered that the applicant had applied for and obtained a Grant of Probate of a Will in 2003. This is not in dispute.

[9] The Will that was probated was dated 23rd July 2002 ("the 2002 Will"). The principal beneficiary to the 2002 Will was the applicant and Elaine McKenzie, one of the siblings.

The Claim

[10] In their claim, the respondents stated that by January 2002, the deceased was showing signs of being in the early stages of Alzheimer's disease and was experiencing a rapid deterioration in health. The deceased died on 2nd November 2002. The 2002 Will dated 23rd July 2002[1] was made four months and nine days before the deceased died.

[11] Sometime in 2012, the first respondent discovered in a sealed envelope a Will dated 22nd February 2001 ("the 2001 Will"). The deceased had given the sealed envelope to the daughter of the first respondent, on a visit he had made to the USA in 2001, for safe keeping without telling her its contents.

[12] The instant claim alleges fraud by the applicant through falsification of the deceased's signature on the 2002 Will. In the alternative, the 2002 Will is invalid as it was made by the deceased under duress. It is also claimed that the applicant fraudulently administered the estate of the deceased including distributing assets pursuant to an invalid 2002 Will. The applicant has defrauded the government of Belize by causing the invalid 2002 Will to be probated in the Supreme Court.

[13] The reliefs sought in the claim are:

1) An Order that the Petition No. 208/2003 for Grant of Probate filed by the Defendant with the High Court (Probate Side) be withdrawn and declared null and void.
2) A declaration that the true and valid Will of the Testator, Herbert Edmond Llewelyn McKenzie is the one dated 2nd February, 2001 and not the one dated July 7, 2003 (sic) that was probated by the Defendant.
3) A declaration that the (sic) dated July 7, 2003 (sic) that was probated by the Defendant is invalid and is a forgery and the (sic) amounts to fraud.
4) An injunction restraining the Defendant whether by himself, his servants or agents from further dealing with the properties described as:
    a. Lot 30 St. Vincent Street, Dangriga Town, Stann Creek District;

[1] The 2002 Will was wrongly pleaded as dated 7th July 2003 which was the date sworn and marked for purposes of the petition for probate.

b. Lot 32 St. Vincent Street, Dangriga Town, Stann Creek District;
c. Lot 364 Magoon Street, Dangriga Town, Stann Creek District;
d. 20 acres of farm land situated at Mile 2, Melinda Road, Stann Creek District;
e. 100 acres of land situated on the Mullins River/Stann Creek Coastal Road, Stann Creek District;
f. Any and all accounts in the name of Herbert Edmond Llewelyn McKenzie held in The Belize Bank Limited.

5) An Order that the Defendant provide an inventory of all proceeds and property held under the Estate of Herbert Edmond Llewelyn McKenzie as from the time of obtaining the grant of administration.
6) An Order that the Defendant provide accounts of all monies collected for rent, leases, sales or dealings with any of the properties that fall under the Estate of Herbert Edmond Llewelyn McKenzie and account for what has been done with the same.
7) Further and or other reliefs as this Honorable (sic) Court deems fit.
8) Costs and Attorney Costs.

Submissions by the Applicant

[14] Mr. Lindo, counsel for the applicant, stated that the issues raised in the current claim are *res judicata*. The claim against the applicant is a clear case of abuse of process.

[15] Counsel advanced that no useful purpose would be served by investigating the facts of this case in a trial and, it would in fact run counter to the overriding objective of the CPR to adopt this course. He urged the court to make a strike out order since it would be appropriate at this early stage to save time, expenses, and resources.

[16] Mr. Lindo stated that the respondents' claim is based on the purported falsification of the Will of the deceased. This claim is grounded on the tort of deceit, which has a six-year time limit under the Limitation Act Chapter 170 of the Laws of Belize, R.E. 2020. Mr. Lindo relies on section 4 of the Limitation Act which reads:

> 4. The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued,
>
> (a) Actions founded on simple contract or on tort …

[17] Counsel advanced that in Claim 283, Shoman J who determined the matter found as a fact that the claim was filed outside the limitation period. She pointed to the relevant date of knowledge as being the date of the discovery of the probated Will, which was 2007. This finding was not appealed so it stands. The respondents have filed the instant claim on 15th May 2023 some 16 years after the discovery in 2007 of the probated Will and the alleged fraud.

[18] Mr. Lindo argues further that the plea of fraud is woefully deficient and made with no specificity. The allegation that the signature of the deceased was forged could have been proven without reference to the newly found 2001 Will, and the deceased could have been treated as having died intestate. Fraud as a cause of action was barred by limitation. It no longer exists and fresh litigation or, as stated by Mr. Lindo, "the purported curing of defects cannot operate as Lazarus to resurrect the cause of action" for the respondents.

[19] Counsel also argued that in Claim 283, the respondents had two other independent grounds to upset the probate of the 2002 Will namely that the deceased was *non compass mentis* or lacked mental capacity and the plea of duress. The respondents could have used a medical expert to upset the grant of probate and duress provides an independent cause of action (without the discovery of the 2001 Will). According to Mr. Lindo, the respondents cannot say that they have cured previously poor pleadings, so they are entitled now to bring fresh proceedings. It is an abuse of process. The strike out order in Claim 283 is an absolute bar to the bringing/maintaining of the instant claim.

Submissions by the Respondents

[20] Mr. Tillett, counsel for the respondents, stated that the 2002 Will is a forgery and invalid. It is an attempt to defraud the deceased's estate and the government of Belize. At the time of its purported execution, the deceased was too sick and weak to have formed the mental intention to dispose of his estate. In any event, he would not freely and of his own volition sign the said 2002 Will.

[21] The strike out decision in Claim 283 was based on technicalities, so the substantive issues were never ventilated. There is nothing barring the respondents from re-initiating the present matter, on similar facts and with the same parties as in Claim 283. What is sought by the instant claim is a determination on the merits.

[22] The present claim is about the administration of the deceased's estate so falls under Section 26 of the Limitation Act that prescribes a 12-year limitation period. The relevant date is when knowledge of the 2001 Will came to the respondents and not the date of discovery of the probated 2002 Will. The 2001 Will was discovered in 2012, making that date and not 2007 the applicable one. The timeline for bringing the claim would expire in 2024.

[23] The current dispute raises serious issues of facts that should be resolved at trial. The court ought to determine which Will is valid and, based on the answer, whether the administration of the deceased's estate is being properly carried out.

[24] In answer to the argument that the current matter is *res judicata*, Mr. Tillett stated that *res judicata* is inapplicable where there is a mere procedural prohibition. The doctrine is applicable only where the matter was determined on its merits and not, as in the present case, where it was decided on mere technicalities.

Issues

[25] The broad issue is whether the claim is an abuse of process. In determining that, it is necessary to consider other issues such as -

i. Whether the respondents are barred from instituting fresh proceedings?
ii. Whether the claim is barred by the Limitation Act?
iii. Whether the Applicant can rely on the doctrine of *res judicata* or cause of action estoppel?

The Law

[26] Rule 26.3 (1) (b) of the Civil Proceedings Rules gives the court the authority to strike out a claim in specified circumstances. It reads:

26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –

(a) …

(b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;

Discussion

[27] My obligation at this stage of the proceedings is to determine whether the claim can proceed to trial or is an abuse of process and to be struck out.

Abuse of process

[28] If the claim is an abuse of process, then it must be struck out.

[29] The jurisprudence is replete with references to the concept of abuse of process and makes clear that the categories are not closed but depend on the circumstances of each case. If the court's process is being used for a purpose that is significantly skewed from its ordinary and proper use, it may constitute an abuse of process.[2] The difficulty with this concept of abuse of process was captured by Sykes J in **Ashman v Commissioner of Correctional Services et al** to wit:

> The expression abuse of process defies a single comprehensive definition. It is often easier to describe rather than define what is an abuse of process …. From the cases, it seems that **an abuse of process arises where the system of justice administered by properly constituted courts are being wrongly used to such an extent that it becomes a misuse**, in that the processes are being used for some purpose for which it was not designed which if unchecked has, or may lead to oppression, unfairness and injustice to a party to the litigation. To grant a stay or the equivalent of a stay, the conduct must be such that it cannot be remedied by any other means but a stay. [My emphasis].

[30] As a broad principle, a claim may be an abuse of process if it seeks to relitigate a matter already closed or to launch a collateral attack on a previous decision of the court without legitimate grounds on which to do so.

[2] AG v Barker [2000] 1 FLR 759, para. 19.

[31] Regarding strike out orders, however, where a claim is defective in law, it can rightly be struck out for abuse of process. This is what happened in Claim 283. The then defective claim was struck out for procedural deficiencies. That court found that Claim 283 did not satisfy the limitation period, the allegation of fraud was not properly made out and the newly discovered 2001 Will needed to establish the claimants' interest was not annexed. The claim was pre-emptively thrown out. The decision was not appealed.

[32] The respondents have now brought fresh proceedings. They argue that the previous defects in their claim have been *cured* and that a court of competent jurisdiction ought to hear their claim. They now have annexed evidence of their interest to their pleadings that was not previously made available.

[33] The test for a strike out application under CPR 26.3 (1)(b) is a decision solely on the parties' pleaded case. There is no need for additional evidence to be adduced.[3] All facts pleaded in the statement of case are assumed to be true for the purpose of getting the order.

[34] In considering whether to exercise the "nuclear option" and strike out the instant claim as an abuse of process, I thought of the peculiar circumstances of this case. A previous claim was thrown out after it was found to contain bad pleadings, no evidence of interest to bring the claim and it was determined to be outside the limitation period. The respondents are siblings who have returned to court with substantially the same allegation. The applicant had obtained the grant of probate by fraud. This follows a positive finding of fact by the judge in Claim 283 that the cause of action being fraud was barred by limitation. It is now 16 years (2007) since the respondents discovered that the grant was issued to the applicant in the deceased's estate. Claim 283 was filed 10 years after that discovery. I will discuss limitation below, but I turn first to examine the issue of re-litigation.

[3] Citco Global Custody NV v Y2K Finance Inc. BVIHCVAP2008/0022 (delivered 19th October 2009, unreported).

Henderson Principle

[35] Mr. Lindo relied on the **Henderson v Henderson** principle[4] to argue that there must be finality to litigation. The **Henderson** principle applies to re-litigation where a party failed to bring his whole case forward in one go and wishes to supplement or bring in other parties in a second set of proceedings. The **Henderson** rule is that a party must bring his whole case before the court and not do so in a piecemeal fashion to get a "second bite". To determine if litigation amounts to an abuse under this rule, all the circumstances of the case must be looked at and the burden of proving that the re-litigation amounts to an abuse of process lies solely with the party alleging abuse. The **Henderson** rule operates in the general interest of the public as well as in the interest of the parties themselves.

[36] In **Barrow v Bankside Members Agency Ltd.**[5] the rule was stated thus, "… litigation should not drag on for ever and … a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed." Mr. Lindo argues that this **Henderson** rule precludes parties from raising in subsequent proceedings issues or matters which they had not previously raised but could have raised in earlier proceedings. This principle is broader than the *res judicata* doctrine in two ways since "it applies, not to matters decided by a court, but to matters which could have been decided but were not; and it applies to parties in subsequent proceedings even if they were not parties to the earlier proceedings (or their privies)."[6] Mr. Lindo's argument seems, at first blush, to apply squarely to the instant case. However, I do not agree that the **Henderson** principle applies to the instant case.

[37] An analysis of the **Henderson** principle reveals that the factual circumstances of the case must be looked at carefully to determine if the rule applies. In **Henderson**, the claim was determined on its **merits**. The court stated that:

> … the court requires the parties to the 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.

[4] Henderson v Henderson (1843) 3 Hare 100.
[5] [1996] 1 WLR 257, 260.
[6] Winston Finzi v Jamaican Redevelopment Foundation Inc et al [2023] UKPC 29.

[38] In **Johnson v Gore Wood**,[7] Lord Bingham stated (demonstrating the development of the law) that it would be "wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive".[8] It seems that to find proceedings are abusive, a court must conduct a broad merit-based judgment taking into account the public and private interests as well as all the facts of the case.[9] The fact that proceedings ended in settlement, or by a judgment, is not determinative of abuse. In effect, there is no presumption against the bringing of successive actions and the burden rests on he who alleges to show it is oppressive or an abuse of process for him to be subjected to the second action. The above judicial pronouncements provide a complete answer to Mr. Lindo's arguments here, but I will proceed to look specifically at strike out orders.

Strike Out Test

[39] Before granting a strike out order, a court must scrutinize the pleaded case. Scrutiny is not a detailed examination of the evidence or a mini trial.**[10]** Scrutiny requires that I satisfy myself that, on the pleaded case, it is not worth the effort in time, expenses, and other resources in allowing the matter to proceed beyond the point of the application. In effect, no further investigation is required or will strengthen the case before me.

[40] The cases on strike out orders are many and advocate for the cautious granting of such orders. I accept that a strike out order should never be the court's first response. These orders are to be used sparingly for they are draconian in nature,[11] bringing an immediate end to proceedings. A strike out order is reserved for and should be limited to clear cases. Courts have made clear that before using CPR 26.3(1) to dispose of 'side issues' early in the proceedings that care should be taken to ensure that a party is not deprived of the right to trial on essential issues in the case. Judges should consider the effect of the order on any

[7] [2002] 2 AC 1, HL.
[8] Johnson v Gore Wood [2002] 2 AC 1, 31C.
[9] Johnson supra.
[10] Barbara Estella Romero v The Minister of Natural Resources Claim No. 302 of 2012 delivered by Young J.
[11] Blackstone's Civil Practice 2013 at 33.6 page 526.

parallel proceedings and exercise the power in accordance with the overriding objective of dealing with cases justly.

[41] Given the jurisprudence, I considered the circumstances when the strike out order should be refused. A good guiding principle for refusing the order was set down in **Swain v Hillman**.[12] The order should be refused if it will deprive a party of the right to a trial on the issues. However, if on its face, the claim cannot succeed or is unsustainable or defective in law then it constitutes an abuse of the process and can appropriately be struck out.[13]

[42] In **Dr. Martin Didier et al v Royal Caribbean Cruises Ltd.**[14] Pereira CJ provided guidance on the test that a court ought to apply when deciding to strike out a matter and applied the dicta, now widely quoted in Belize in these matters, in **Citco Global Custody NV v Y2K Finance Inc.**[15]

[43] Pereira CJ in **Didier** approved the following dicta in **Citco**:

> … the following circumstances are identified as providing **reasons for not striking out** a statement of case: where the argument involves a substantial point of law which does not admit of a plain and obvious answer, or the law is in a state of development: …
> "… a case should not be struck out where the claim is in an area of developing jurisprudence and the facts need to be investigated before conclusions can be drawn about the law: Farah v British Airways plc and the Home Office (2000) Times, 26 January CA"] or where the strength of the case may not be clear because it has not been fully investigated. It is also well settled that the jurisdiction to strike out is to be used sparingly since the exercise of the jurisdiction deprives a party of its right to a fair trial, and its ability to strengthen its case through the process of disclosure and other court procedures such as requests for information: and the examination and cross-examination of witnesses often change the complexion of a case. [Emphasis added].

[44] I am not satisfied that the instant case is one that satisfies the test for refusal of the order or that the facts need no further investigation or that the pleadings are now defective. I turn to consider if the instant claim faces an absolute bar from proceeding.

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[12] [2001] 1 All E.R. 91.
[13] Baldwin Spencer v Attorney General Antigua and Barbuda Civil Appeal No. 20A of 1997, Dennis Byron CJ (Ag).
[14] SLUHCVAP2014/0024 ECS, Court of Appeal.
[15] BVIHCVAP2008/0022 (delivered 19th October 2009, unreported).

Fresh proceedings

[45] Any party whose claim or defence is struck out retains the right to remedy the defects and bring fresh proceedings on the same dispute. This is because a strike out order is not a decision on the merits of the case. This was made clear in **Didier**:

> … the pleadings alone are examined and if the court finds that they are untenable as a matter of law a party may have his/her claim or defence struck out. This does not preclude that party however, from remedying the faults of their claim or defence and bringing further legal proceedings in relation to the same dispute. They are perfectly entitled to do so.[16]

[46] Mr. Lindo submits, however, that while a party can institute fresh proceeding, this can only be done in limited circumstances and the case at bar is not one such case. "The effect of Shoman J's decision is binding on the Claimants (respondents) and created an absolute bar on them which, if dissatisfied, ought to have been properly appealed." According to Mr. Lindo, the failure to appeal renders the instant claim "a proverbial fatality".

[47] I am not wholly persuaded that the bringing of fresh proceedings is barred, as advanced by Mr. Lindo, by cause of action estoppel. In my view, if pleadings are struck out as untenable as a matter of law, and as happened in Claim 283, the respondents are not precluded from bringing a further properly constituted claim. Moreover, the instant claim is not defective or "plainly just bad in law" such as to attract a strike out order. A defence has not yet been filed and certainly no disclosure has occurred. I am entitled to and did consider that the previous Claim 283 was not struck out on its merits and the conduct in the previous claim was not inexcusable.[17] I do not find the pleadings alone are untenable as a matter of law to attract a strike out order. I shall look at the issue of limitation.

Limitation

[48] Limitation was adjudicated on in Claim 283. A finding was made that that claim was statue barred. It was based on the admission of the respondents that they had learned of the

[16] Didier para. 28, page 19.
[17] Davies v Carillion Energy Services Ltd et al [2018] 1 WLR 1734, page 1748 where the court stated that to constitute abuse the conduct in the first action must have been inexcusable.

probated 2002 Will (deemed to be "the fraud") sometime in 2007 but only filed the claim in 2017.The 2001 Will was not produced in court, so the date used for limitation was 2007.

[49] Mr. Tillett, counsel for the respondents, argued that the limitation period should have started on the date of the discovery of the 2001 Will (or new Will) which was 2012. The 2001 Will though pleaded was never annexed to Claim 283 and Shoman J stated, "Unfortunately, the First-named Claimant never saw fit to exhibit this purported will which she says she found in 2012, **and the Court has no such will to consider, as a result**." [My emphasis]. Without evidence of the 2001 Will before her, Shoman J calculated limitation based on the date of discovery of the probated 2002 Will. Mr. Tillett stated that that date was 2007 and it was erroneous.

[50] Mr. Tillet argued that the respondents had 12 years (not 6 years) from the date their interest accrued. The 2001 Will was discovered in 2012 so they have up to 2024 to file a claim. He relied on section 26 of the Limitation. Section 26 reads:

> 26. Subject to section 25(1) of this section, no action in respect of any claim to the personal estate of a deceased person or to any share or interest in such estate, whether under a will or on intestacy, shall be brought after the expiration of **twelve years from the date when the right to receive the share or interest accrued** … [My emphasis].

[51] Mr. Tillett argues in the alternative that there is no limitation to the bringing of a claim against a trustee. The applicant, as executor of the deceased estate, is by definition and is treated in law, as a trustee. He points to section 25(1) which provides:

> 25.-(1) No period of limitation or prescription applies to an action brought against a trustee,
>
> (a) In respect of any fraud to which the trustee was a party or was privy or
>
> (b) To recover from the trustee trust property or the proceeds thereof,
>
> (i) Held by or vested in him or other wise in his possession or under his control; or
>
> (ii) Previously received by him and converted to his use.

[52] Mr. Tillet relied on **Tomas Valencia Gonzales v Ines Hermilio Valencia Gonzales** where Conteh CJ stated that an executor is a trustee and by section 2(a) of the Trust Act Cap 202:

2. A trust exists where a person (known as a "trustee") holds or has vested in him, or is deemed to hold or have vested in him property which does not form or which has ceased to form part of his own estate.

(a) For the benefit of any person (known as "a beneficiary") whether or not yet ascertained or in existence.

[53] In response, Mr. Lindo argues that the reliance on section 26 of the Limitation Act is misconceived as this section deals with the (mis)management of an estate. The respondents' claim alleges fraud so they must first prove fraud. Moreover, the claim of falsification of the deceased Will is one grounded in the tort of deceit, which is subject to a six-year limitation, as prescribed by section 4 of the Limitation Act. Mr. Lindo also accepted that fraud postpones limitation, with the period beginning to run only upon discovery of the fraud. He maintained that the date of discovery of the fraud was 2007, as admitted by the respondents. He also argued that a Will takes effect on death and that is the point when the respondents' interest would have accrued. The grant of probate is a formality. In answer to the issue of trustee, Mr. Lindo stated that the applicant is the trustee of the beneficiaries to the 2002 Will and not the respondents who are not beneficiaries.

[54] Limitation is a defence that must be specifically pleaded. Given the above arguments and the test for strike out, I am not persuaded at this stage it should be determinative of the whole matter. It can be left for the trial.

Res judicata

[55] The applicant relies on the *res judicata* doctrine to argue also that the claim should be estopped from proceeding. The defence of *res judicata* is described thus:[18]

> Where res judicata is pleaded by way of estoppel to an entire cause of action, rather than to a single matter in issue, it amounts to an allegation that the whole legal rights and obligations of the parties are concluded by the earlier judgment, which may have involved the determination of questions of law as well as findings of fact. To decide which questions of law and fact were determined in the earlier judgment the court is entitled to look at the judge's reasons for his decision and his notes of evidence, and is not restricted to the record.
> … The onus of proving it is an abuse of process lies on the party seeking to rely on the previous judgment.

[18] Halsbury's Laws of England 4th Edition (Re-issue) Vol. 16(2), paragraph 977.

[56] *Res judicata* is applicable where the same cause of action is determined on its merits. A procedural prohibition will not satisfy res judicata. This was confirmed in **Bank of Nova Scotia v Alberta Joseph-Felicien** which clarified that *res judicata* can only be properly pleaded or relied upon where the first claim was decided on its merits and not by a mere procedural prohibition.

[57] Claim 283 was determined on limitation, locus standi and failure to properly plead fraud. The 2001 Will was not exhibited, and Shoman J held that the pleadings did not provide the nature of the respondents' interest. Shoman J clarified that she could only rely on the 2002 Will, under which the respondents were neither executor nor beneficiary in the deceased's estate. There was no substantive hearing of the merits of the case. It was struck out for inadequate pleadings.

[58] I am not wholly persuaded by the applicant's arguments that the instant case is an abuse of process. In the face of disputes of facts, involving the validity of documents affecting the deceased's estate, I am satisfied that the matter should proceed to trial.

[59] It follows from what I have said that I refuse the applicant's application to strike out the claim.

Costs

[60] Costs usually follow the event but, in the circumstances of this case, I exercise my discretion and order costs to be in the cause.

Disposition

[61] It is ordered as follows that:

i. The application to strike out the claim is refused.

ii. Time is extended to 29th May 2024 for the filing and service of the defence.

iii. Costs are to be in the cause.

Martha Alexander

High Court Judge