IN THE SUPREME COURT OF BELIZE, A.D. 2012

IN THE ESTATE OF SANTIAGO JUAN

CLAIM NO: 439 OF 2013

BETWEEN

TRINIIDAD SANTIAGO JUAN
MARIA AZUCENA JUAN de MAHMUD **CLAIMANTS**

AND

RODOLPHO JUAN **DEFENDANT**

Before: Mde Justice Rita Joseph-Olivetti (In Chambers)

Appearances: Mrs. Julie- Ann Ellis Bradley, Barrow & Williams of counsel for the Claimants.

Mr. Richard Bradley, Bradley & Co. of counsel for the Defendant.

J U D G M E N T

Dated: 2013, November 29

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1. **Joseph- Olivetti J.:-** Mr. Rodolfo Juan ought not to be allowed two bites at the cherry, submitted in short Ms. Julie -Ann Bradley learned counsel for the Claimants. On the other hand, Mr. Bradley learned counsel for the Defendant countered that in the interests of justice his client should be allowed to proceed with his Defence and Counterclaim in respect of his claim to ownership of the San Lorenzo Farm.
2. This claim arises out of what Morrison JA called, **" a love story and a family story"** and the entire background can be culled from the judgments of Awich J (as he then was) in Claim No.229 of 2005 and that of the Court of Appeal on the appeal from that decision which was delivered on 22 May 2012. To add anything useful to those would be a vain hope.

3. This claim by way of fixed date claim was filed on 15August 2013 on the heels of the Court of Appeal's said judgment.

4. In it the Defendant, Mr.Rodolpho (not to confuse him with his brother and deceased father) makes the following salient claims (per amended Counterclaim of 15 November) –

(i) that he be joined as an administrator together with the Claimants of the estate of Mr. Santiago Juan ("the Fathe") ;

(ii) a declaration that San Lorenzo Farm does not form part of the estate of the Father; (Emphasis added)

(iii) an order that the Defendant is the legal owner of San Lorenzo Farm **.** (Emphasis added)

5. On perusal of the Counterclaim, Mr.Rodolfo bases his claim to ownership not on contract but instead he relies on the doctrines of proprietary estoppel and constructive trust and alternatively on adverse possession. These issues were not raised in No.229.

6. This claim came on for the first hearing on 15 November, 2013 and the court, of its own volition, having regard to the pleadings and to its case management powers ordered that the parties be heard on 25 November as to whether Mr.rodolfo's claim to ownership of the San Lorenzo Farm was an abuse of the court's process as that issue had already been decided.

7. The hearing took place on 25 November in the presence of the Claimants. Mr. Rodolfo did not attend. The ruling was reserved**.**

8. The following facts are not in dispute.

9. A prior claim No.229 of 2005 entitled **Rodolfo Juan v Trinidad Santiago Juan,Maria Azucena Juan de Mahmud and Iris Lucia Juan de Cam**pos involved the same parties who are now before this court save for the Third Defendant thereto, their sister.

10. As can be seen Mr. Rodolfo was the Claimant in No. 229 of 2005. In No. 229 he claimed, **inter alia,** a declaration that by a separate document titled

"Agreement between Father and Son" dated 10.7.1997, "he alone is entitled to and has an interest in Lorenzo Farm part of the estate of the deceased". (See Awich J's judgment para .7.)

11. The Father, since deceased was the father of all the litigants. He died as long ago as 27 April 2001 leaving at that date a substantial estate. (We have no idea how the costs of litigation so far has impacted on the estate as costs of all litigants in the prior suit were borne by the estate.)

12. Awich J tried No.229 and determined, **inter alia**, the issue of the ownership of the Farm and held in a written judgment dated 12 November 2009 that the agreement was not effective as a will or codicil to pass the Farm to the Claimant and that the Farm was to be dealt with as an item in regard to which the Father died intestate. (See Awich J.'s judgment paras.18- 21 , 37.4 and 37.6).

13. Mr.Rodolfo although appealing did not appeal against the learned judge's decision in relation to the ownership of the Farm but took "**the point which was conceded, that the judge had erred in making an order that San Lorenzo Farm fell into intestacy, the contention being that if as the judge found, the property had not been successfully alienated by Santiago in his lifetime, it was therefore covered by the residuary clause**

in the will". (See the Court of Appeal's judgment No 10 of 2010 Morrison JA para 5).

14. It is also pertinent to note that the conclusion of the Court of Appeal on the other issues before the Court was that Awich J.'s order must be varied and replaced by an order in the terms prayed for by the Respondents, viz, (i) a finding that the will of Santiago Juan dated 1July 1986 was not expressed to be made in contemplation of marriage within the meaning of section 16(1) of the Wills Act and was as a consequence revoked by the subsequent marriage to Carlotta Galvez de Juan on 13 May 1993,(ii) a pronouncement in solemn form against the will of Santiago Juan dated 1July 1986 and (iii) a declaration that Santiago Juan died intestate. (See para. 32 of the judgment).

15. The contention here in short as put forward by Ms. Bradley is that this suit insofar as it seeks to re-litigate the issue of ownership of the Farm is an abuse of process in terms of the **Rule in Henderson v. Henderson**. Mr. Bradley submitted it was not and sought to show the the rule had been amended.

16. Now to the law**.** I accept that there is no real dispute as to the law save that Ms. Bradley does not agree with Mr.Bradley's submissions that the law as laid down in **Henderson v Henderson** was altered by the decision in **Arnold v NatWest Bank plc. (1991 2AC 93)** which by subsequent note to

the court on Tuesday 26 November Mr. Bradley amended to refer to **Johnson v Gore Wood &Co (2002) AC 1.**I have no doubt that Ms.Bradley's argument would have been the same whether the case relied on by Mr. Bradley were **Arnold** or **Johnson.**

17. I have considered the three cases relied on by Ms. Bradley- **Henderson v Henderson (1843) 3 HARE 100, Greenhalgh v Mallard [19747] 2 ALL ER 255 and Yat Tung Investment Co.Ltd. v Dao Heng Bank Ltd.** [1975] A.C. 582 (a Privy Council Case) and the wealth of authorities cited by Mr. Bradley which included both **Arnold** and **Johnson.**

18. In my judgment, no substantive change was made to the **Rule in Henderson v Henderson** by either **Arnold** or **Johnson** .However, I accept that in **Johnson** a broader approach was recommended with respect to the Rule than was customarily applied. (See also P. 33 and 34 in Aryu Tannu v Shiraz Salehbhai Moosajee [2003] EWCA CIV. 815, Mummey J,a case cited by Mr. Bradley, where that point is clearly recognized.)

19. **Arnold,** to use the precis of Lord Bingham of Cornhill at p.25 of **Johnson**,

> **"was a case of issue estoppel. Tenants invited the court to construe the terms of a rent review provision in the sub- underlease under which they held premises. The provision had been construed in a sense adverse to them in earlier proceedings before Walton J, but**

they had been unable to challenge his decision on appeal. Later cases threw doubt on his construction. The question was whether the rules governing issue estoppel were subject to exceptions which would permit the matter to be reopened. The House held that they were."

20. The court in **Arnold** found an exception and also held that the form of the rule of estoppel per rem judicatum known as cause of action estoppel remains as expressed by Sir James Wigram V.-C in **Henderson v Henderson (1843)3 Hare 100 p114-115** as subsequently approved by the Privy Council in **Hoystead v Commissioner of Taxation [1926] AC155.And** that although **Henderson** was a case of cause of action estoppel the statement of Wigram V,-C has been held to be applicable also to issue estoppel. (See Lord Keith of Kinkel p.107.)

21. Now to **Johnson.** This case, in short, concerned an action by Mr. Johnson to recover damages for breach of contract against his solicitors whom he had instructed on behalf of his company to serve notice to exercise an option to purchase land . Matters did not go smoothly and the company lost money as a result. The company subsequently sued the solicitors for damages for breach of contract. Before the action came to trial the company's solicitors notified the defendants that Mr. Johnson also had a personal claim against

the solicitors arising out of the same matter which he would pursue in due course. Subsequently attempts were made to make an overall settlement but that failed. The claim by the company was compromised. Mr. Johnson then brought his personal action. The solicitors sought to strike the action out as an abuse of process on the ground that he ought to have joined his personal action with that of the company's in the first suit .They relied on the rule in **Henderson v Henderson.**

22. The court considered the rule and approved and explained it-

> **" The rule in Henderson v Henderson 3 Hare 100 is very well known. It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defenses which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that 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. That is the abuse at which the rule is directed."p.27 Lord Bingham of Cornhill.

23. The court however went on to explain and amplify the rule and held as summarized in the headnote. [1]. I am guided by the rule in **Henderson v Henderson** and the broad approach to it taken in **Johnson -**

> **" But Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without**

[1] " **there was a public interest in the finality of litigation and in a defendant not being vexed twice in the same matter; but that whether an action was an abuse of the process as offending against the public interest should be judged broadly on the merits taking account of all the public and private interests involved and all the facts of the case, the crucial question being whether the plaintiff was in all the circumstances misusing or abusing the process of the court and that in all the circumstances the plaintiff's action was not abusive.**"

more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all… It is, however, 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. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits- based judgment which takes account of the public and private interests involving and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the

legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of Justice."

24. On full consideration of all the circumstances and in particular the allegations as set out in the counterclaim I find that no new facts have been pleaded which were not known to Mr.Rodolfo at the date of Claim No.229. No special circumstances exist which would enable him to raise the issue of the ownership of the Farm in new proceedings albeit relying on different grounds. His present claim could and ought properly to have been raised in Claim 229- there was no bar to him doing so. And, moreover, he has advanced no reason either in law or in fact why this was not done and one can only surmise that it was because of the legal advice he had been given at the time. His remedy, if so, lies elsewhere. This estate has been lying un-administered for nigh on 12 years and it is not in the interests of the parties that furher litigation on a matter which was already before the courts should be engaged in without more and certainly it is not in the public's interest that the court having regard to its limited resources should be taxed again with a matter which he had every opportunity of ventilating in his prior claim. In all the circumstances, in my judgment, the counterclaim amounts to an abuse of the process in so far as it seeks to re-litigate the issue of the ownership of the San Lorenzo Farm.

25. Accordingly, Mr.Rodolfo's counter-claim with respect to the issue of ownership of the San Lorenzo Farm shall be struck off as an abuse of the process of the court pursuant to CPR 26.3(1)(b). For avoidance of doubt, this refers to the entire counter-claim barring paragraph 1 and the claim to be joined as an administrator.

26. Likewise, the Defence insofar as it seeks to re-litigate the issue of ownership of the San Lorenzo Farm shall be struck off as an abuse of the process. For avoidance of doubt this refers to paras. 2, 3 and 9.

27. The Claimants shall have their costs. The court shall hear the parties at case management with a view to summarily assessing the costs if they are unable to agree.

28. Further case management shall be scheduled for Friday 6 December 2013 at 9 a.m in Court No 5.before me .All parties must attend.

29. I thank both counsel and in particular Mr. Bradley for his written submissions and his eloquence on behalf of his client. Perhaps there might have been no need to attempt a second bite at the cherry if he were on record for him in Claim No.229.

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Rita Joseph-Olivetti

Supreme Court Judge Ag.

Supreme Court of Belize Central America

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