IN THE COURT OF APPEAL OF BELIZE AD 2012

CIVIL APPEAL NO 13 OF 2011

BELIZE PORT AUTHORITY	**Appellant**
AND	
EUROCARIBE SHIPPING SERVICES LIMITED dba MICHAEL COLIN GALLERY DUTY FREE SHOP	**Respondent**
FORT STREET TOURISM VILLAGE LIMITED	**Interested Party**

BEFORE:

The Hon Mr Justice Sosa	**-**	**President**
The Hon Mr Justice Morrison	**-**	**Justice of Appeal**
The Hon Mr Justice Awich	**-**	**Justice of Appeal**

Denys Barrow SC for the appellant
Eamon Courtenay SC and Fred Lumor SC for the respondent
Rodwell Williams SC for the interested party

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17 July, 29 November 2012

SOSA P

[1] I concur in the reasons for judgment given, and the orders proposed, in the judgment of Morrison JA, which I have read in draft.

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SOSA P

MORRISON JA

Introduction

[2] In a fixed date claim form dated 30 June 2009 ('the 2009 action') the respondent, Eurocaribe Shipping Services Limited ('Eurocaribe') seeks declarations and an order against the appellant, the Belize Port Authority ('BPA'), the Attorney General, the Minister of Natural Resources ('the Minister') and the Belize City Council ('the City Council'). These declarations are that (i) BPA, the Minister and the City Council abused their powers by allowing the interested party, Fort Street Tourism Village Limited ('FSTV') to erect a concrete wall ('the new wall') on its common boundary with Eurocaribe's property on the boardwalk existing along the north bank of the Haulover Creek, in the Fort George area of Belize City; and (ii) the decision to allow FSTV to erect the new wall "is unlawful and therefore void and a nullity". Eurocaribe also seeks an order directing the removal of the new wall, as well as damages.

[3] By a preliminary objection dated 19 April 2010, BPA sought an order that Eurocaribe's claim against it be struck out, on the ground that Eurocaribe ought to have put its whole case forward in previous litigation involving the parties and that the instant claim "is a duplication of the court's time and resources, is vexatious to [BPA] and amounts to an abuse of process".

[4] In a judgment given on 1 October 2010, Muria J refused BPA's application and dismissed the preliminary objection. This is BPA's appeal against the judgment and the sole issue which arises on the appeal is whether the learned judge was correct in his determination that the 2009 action is not an abuse of process.

The parties

[5] BPA is a statutory body (established by virtue of the provisions of section 3 of the Belize Port Authority Act). BPA is statutorily responsible for the regulation of all ports and harbours in Belize and it is common ground that FSTV is one of the six international port facilities for which it has responsibility. Among other functions,

BPA is also the 'Designated Authority' under the Port Facility Security Regulations 2004. In that role, it is responsible for ensuring that port facilities in Belize are in compliance with the International Code for the Security of Ships and Port Facilities ('the ISPS Code'), promulgated under the auspices of the International Maritime Organization.

[6] Eurocaribe is a private company incorporated under the laws of Belize engaged in the business of, among other things, as Michael Colin Gallery Duty Free Shop, selling duty free products to day cruise ship passengers landed at the Belize Tourism Village ('the tourism village'). FSTV owns the tourism village, which is the only officially designated port of entry for the large numbers of cruise ship passengers who arrive in Belize on international cruise ships for a day's visit on a regular basis. Eurocaribe is also engaged in the shipping business and acts as port agent for some of the major shipping companies.

[7] These are the parties who took part in the hearing of this appeal. As I have already indicated, the other parties to the 2009 action are the Attorney General, in a representative capacity; the Minister, who has responsibility for the administration of national lands; and the City Council, which has responsibility for all public streets, thoroughfares, buildings and fences in Belize City.

The background

[8] Michael Colin Gallery Duty Free Shop is located on property adjacent to FSTV's property, with both properties having a street-side and a sea-side. On the sea-side is the boardwalk, which in part traverses the northern frontage of Eurocaribe's and FSTV's property. The boardwalk was initially constructed in or about 2003, pursuant to a licence granted to the City Council by the Minister on 31 October 2003. Among the conditions of the licence were stipulations that "[n]o gates or barriers shall be placed on the boardwalk" and that "[t]he public shall have access to the boardwalk at all reasonable times".

[9] On 4 December 2008, at the juncture of FSTV's and Eurocaribe's properties along the boardwalk, FSTV erected a wall ('the original wall'). The effect of this was

to prevent cruise ship passengers who disembarked on FSTV's property from accessing Eurocaribe's and other establishments, by walking along the boardwalk. Rather, they were obliged to walk through FSTV's property onto the street-side and then, if desired, to access Eurocaribe's property from the entrance on the street. Eurocaribe (and others) contended that this denied direct access to their facilities by cruise ship passengers and thus affected their businesses.

[10] In 2007, dissatisfaction with this state of affairs led to the commencement of litigation on behalf of Eurocaribe and Maritime Estates Ltd, a related company, against FSTV, BPA, the Minister, the City Council and the Belize Tourism Board. These were Claims nos 28 and 29 of 2007, which were in due course consolidated and heard together ('the 2007 proceedings'). In its fixed date claim form filed on 17 January 2007, Eurocaribe claimed constitutional relief, on the ground that the defendants had contravened its rights under sections 6(1) and 15(1) of the Belize Constitution ('the Constitution'), by (i) causing or allowing FSTV to deprive it of access to the cruise ship passenger market at the tourism village; and (ii) causing or allowing FSTV to discriminate against it or subject it to unequal treatment by depriving it of access to the cruise ship passenger market at the tourism village. Eurocaribe also prayed for an injunction restraining the defendants from further contravention of its constitutional rights and, most significantly for present purposes, an order directing the removal of the original wall within seven days of the court's order.

[11] Eurocaribe's claim in the 2007 proceedings was supported by an affidavit sworn to by Greta Martha Williams ('Mrs Williams'), a director of the company. At paragraph 17(3) of that affidavit, Mrs Williams stated the grounds on which relief was sought against BPA as follows:

> "(3) The Second Defendant, Belize Port Authority ("BPA"), has statutory responsibility for all ports and harbours –
>
> i) The Belize Port Authority Act, Chapter 233 in Section 20(2) gives power to the Minister responsible for the BPA to define the limits of ports.

ii) By Section 21(1) of the Act all wharfs and docks constructed along the foreshore within the limited of any port is vested [sic] in the BPA. The Fort George Wharf is also vested in the BPA and under its control.

iii) By an order dated 11th October, 1980 (S.I. No. 69 of 1980) captioned "Definition of Limits of Ports Order", the limits of Belize City Port is defined [sic] as follows: "Starting at the Belize City Swing Bridge on the North bank of the Haulover Creek thence down stream to Fort George Light thence northwards along the coast to the Belize River mouth, thence easterly to Mapp's Caye thence along the western coast of the Drowned Cayes to the Southern point of Water Caye thence south-westerly to the north point of Long Caye, thence due west to the coast thence northerly along the coast back to the Belize City Swing Bridge".

iv) The Shoreline of the FSTV, the Harbour View Restaurant, the West Lizard Restaurant and the Brown Sugar Market Place Limited are [sic] all within the limits of the Belize City Port and therefore under the authority of the BPA.

v) Further, the Harbours and Merchant Shipping Act, Chapter 234, also defines the limits of the Belize City harbour and wharfs. The Regulations made under the Act defines [sic] the Fort George Wharf to "include the entire area situate in the City of Belize and lying between the Queen's Bonded Warehouse and the Fort Street Light and extending for a distance of forty feet on the seaward side of the said area."

vi) The shoreline of the Harbour View Restaurant and the FSTV are [sic] all within the Fort George Wharf and the Belize City Harbour and fall under the authority of the BPA.

vii) The statutory responsibility to grant leases of public wharfs is given to the Harbour Master and the Minister responsible for Belize Port Authority.

viii) The Government of Belize has delegated its responsibilities to the BPA to administer the International Ship and Port Facility Security Code, the ISPS Code, on its behalf and therefore responsible for the certification of all ports to ensure their compliance with the ISPS Code.

(4) The BPA has neglected to perform its statutory duties or functions in relation to the FSTV in accordance with the above laws and regulations and as a result the FSTV has acted in

> violations [sic] of the laws and regulations of the BPA and in so doing has contravened the fundamental rights of the Claimants guaranteed in Chapter 2 of the Belize Constitution especially Sections 6(1) and 15(1)."

[12] The trial of the consolidated claims was heard by Conteh CJ in the Supreme Court in June 2007. The transcript of the proceedings produced by BPA in support of the preliminary objection in the instant case indicates that in argument before the Chief Justice the claim against BPA was put squarely on the basis of neglect of statutory duties. A fair sampling of the arguments is collected in the second affidavit filed in support of the preliminary objection by Mr Kendrick Daly, BPA's Chief Safety and Security Officer (paragraphs 13 and 16 of the affidavit sworn to on 19 April 2010), but for present purposes it is only necessary to refer to two:

> "MR LUMOR [counsel for Eurocaribe]: If the Belize Port Authority would perform the statutory duties given to it under its statute and also perform the duties assigned to it under the ISPS Code, these claims would not be before the Court."
>
> "MRS McSWEANEY [counsel for BPA]: My Lord, I will deal with the statutory provisions that the Claimant have alleged that were breached either by the act or omission of…[BPA]…And it is our submission that [BPA] has acted in full compliance with its statutory duties particularly where it relates to the ISPS Code and other security issues."

[13] On 11 March 2008, Conteh CJ gave judgment in favour of Eurocaribe, granting the declarations prayed for and making the order for removal of the original wall that was sought. In due course, the original wall was in fact removed pursuant to the order of the court.

[14] With specific reference to BPA, Conteh CJ found that "…there was a failure to supervise [FSTV] in such a manner that it would not have placed or continued to have in place obstacles [including the original wall] on the boardwalk that would impede and in fact prevent cruise ship passengers landed thereon access to the claimants' establishments" (**Fort Street Tourism Village v Attorney General of Belize and others (2008) 74 WIR 133,** para. [72]). Further, BPA "…failed to understand or apply the relevant legal provisions and thereby failed to supervise [FSTV] such not to place walls and other obstacles on the boardwalk…" (para. [74]).

[15] FSTV appealed against this judgment and on 17 June 2008 the Court of Appeal unanimously reversed Conteh CJ's judgment and set aside the orders made by him. In considered judgments subsequently delivered on 17 October 2008 by all three members of the court (Mottley P, Carey and Morrison JJA), the court held that (i) FSTV was not a public authority and did not carry out functions of a public nature, such as to make it amenable to the enforcement of the fundamental rights and freedoms provisions of the Constitution; (ii) the action of FSTV in constructing the structures complained of (including the original wall) did not infringe Eurocaribe's right to work, or its right to equal protection of law.

[16] None of the judgments in this court addressed the issues of fact relevant to BPA which were canvassed before Conteh CJ, viz, whether BPA had, as the learned judge concluded, failed "to understand or apply the relevant legal provisions", or to supervise FSTV in such a manner "as not to place walls and other obstacles on the boardwalk". Indeed, Mottley P considered, certainly in relation to the issue of a contravention of the right to work, that "the issue whether the wall was built without permission or breach of any condition granted in any permission is not germane to the substance of the allegation of a breach of the provisions of section 15(1) of the Constitution" (2008) 74 WIR 156, para. [47]). In my own contribution, I specifically associated myself with Mottley P's view, observing that "the question of whether or not the walls were built with the necessary permissions has no real bearing on the issues raised by this appeal" (para. [150]).

[17] Although FSTV was granted conditional leave to appeal the decision of the Court of Appeal to the Privy Council in October 2008, this appeal was not pursued and, by notice dated 16 March 2009, it was in due course wholly withdrawn.

The 2009 action

[18] On or about 28 June 2008, FSTV erected the new wall on the boardwalk, in the same location as the original wall. As already indicated, the 2009 action was commenced by Eurocaribe by fixed date claim form filed on 30 June 2009. It is supported, as was the previous action, by an affidavit sworn to by Mrs Williams, which rehearses the history of the dispute between the parties, including Conteh

CJ's judgment in the 2007 proceedings and its subsequent reversal by this court. Mrs Williams stated (at para. 66) that, "Sometime between 18th June, 2008 and 16 January, 2009, the Defendants allowed FSTV to erect a new concrete wall on the boardwalk on the common boundary between the FSTV property and [Eurocaribe's] property."

[19] In its statement in support of the application for a declaration dated 30 June 2009, Eurocaribe set out the basis of its claim that BPA had abused its powers as follows (at paras 50 – 62):

> "Neglect of Statutory Duties by Belize Port Authority
>
> 60. The Belize Port Authority ("BPA") has statutory responsibility for all ports and harbours –
>
> i) The Belize Port Authority Act, Chapter 233 in Section 20(2) gives power to the Minister responsible for the BPA to define the limits of ports.
>
> ii) By Section 21(1) of the Act all wharfs and docks constructed along the foreshore within the limits of any port is vested [sic] in the BPA. The Fort George Wharf is also vested in the BPA and under its control.
>
> iii) By an Order dated 11th October, 1980 (S.I. No. 69 of 1980) captioned "Definition of Limits of Ports Order" the limits of the Belize City Port was defined [sic].
>
> iv) The Shoreline of the FSTV and the Harbour View property and the Wet Lizard Restaurant are [sic] all within the limits of the Belize City Port and therefore under the authority of the BPA.
>
> v) Further, the Harbours and Merchants Shipping Act, Chapter 234, also defines the limits of the Belize City harbour and wharfs. The Regulations made under the Act defines [sic] the Fort George Wharf to "include the area situate in the City of Belize City and lying between the Queen's Bonded Warehouse and the Fort George Light and extending fir a distance of forty feet on the seaward side of the said area".
>
> vi) The shoreline of the Harbour View property and the FSTV are [sic] all within the Fort George Wharf and the Belize City Harbour and fall under the authority of the BPA.

vii) The statutory responsibility to grant leases of public wharfs is given to the Harbour Master and the Minister responsible for Belize Port Authority.

61. The BPA neglected to perform its statutory duties or functions by failing to regulate developments in the port and harbour of Belize City or in the Fort George wharf by allowing FSTV to erect illegally a structure on the boardwalk, the concrete wall, in the Belize Harbour or in the Belize City Port or in the Fort George Wharf in contravention of the relevant Acts and Regulations.

Abuse of Power

62. In the circumstances, the unlawful and illegal decisions of the Defendants in allowing and condoning the acts of FSTV amount to an abuse of power on the part of the Defendants."

[20] By a request for further information dated 18 February 2010, as regards the allegation that "BPA neglected to perform its statutory duties or functions", BPA asked Eurocaribe to "identify the statutory provisions which you allege [BPA] has contravened". In its response dated 15 March 2010, Eurocaribe stated, among other things, that –

> "the BPA allowed the FSTV to erect or construct the illegal wall, and fences on the boardwalk on its common boundary with [Eurocaribe's] property. In the circumstances, [Eurocaribe] says that BPA neglected its duties under sections 19(3) and 47(1) of the Belize Port Authority Act."

[21] These allegations of abuse of powers are, BPA contends, no more than a rehash of the same allegations that were a central part of the 2007 proceedings. Further, that "any breach of statute or statutory duty is by necessity an 'abuse of powers' so that the characterization 'abuse of powers' adds nothing to the allegation" (see Mr Daly's affidavit, para. 34). As a result of this, BPA contends, it "necessarily finds itself raising the same defence it did in the 2007 proceedings including considerations of the ISPS Code" (para. 35).

Muria J's judgment

[22] BPA's case before Muria J was based on the principle of *res judicata* and the extension of that principle now known as '**Henderson v Henderson** abuse of

process', whereby a party may be barred from raising in subsequent proceedings an issue which could and should have been raised in previous proceedings (**Henderson v Henderson (1848) 3 Hare 100**).

[23] Muria J considered it appropriate to start his analysis "with the issue of the legality of the wall in question" (para. 10). In this regard, he posed three questions for the court's consideration, as follows: (i) was the issue of the legality of the wall raised in the 2007 proceedings; (ii) if it was not, could and should it have been raised; and (iii) if it was raised, did the court determine it "finally and conclusively between the same parties and their privies". Questions (i) and (iii) were, the judge said, concerned with issue estoppel, while question (ii) was concerned with "the extension of the *res judicata* cause of action estoppel as expounded in **Henderson v Henderson**".

[24] After considering the factual material that had been placed before him (which was essentially similar to that set out in the foregoing sections of this judgment), Muria J's conclusion was that the issue of the legality of the wall was raised in the 2007 proceedings. He therefore answered question (i) in the affirmative. He further considered that, in the light of the answer to question (i), question (ii) no longer arose, since, the issue of illegality of the wall having been raised in the 2007 proceedings, "it would be illogical to pray upon the argument that the claimant could and should have raised the issue of neglect of statutory duty in the claim form so that the court could make a finding on it" (para. 32). Finally, as regards question (iii), from a perusal of Conteh CJ's judgment in the 2007 proceedings, Muria J concluded that "[t]here was no finding that the wall was legally or illegally erected" (para. 37). Thus, this issue "not having been finally determined between the same parties, the claimant is not prevented from raising it again in the 2009 proceedings" (para. 39). And further, even in cases to which **Henderson v Henderson** applies, a party can be allowed to raise an issue that could and should have been raised in special circumstances (para. 40).

[25] The learned judge therefore concluded that neither *res judicata* in its narrow sense, nor **Henderson v Henderson** abuse of process applied in the instant case

and that BPA's challenge to the 2009 action accordingly failed. But the judge went further (at para. 42):

> "There is, however, an even stronger reason for saying that the issue now complained of is not an abuse of process. The illegality issue now raised is in connection with the *new wall* that was built after June 2008. A challenge to the legality of the construction of that new wall must surely be, in my view, a completely new issue from that raised in respect of the wall which was the subject of the 2007 proceedings."

The appeal

[26] By notice of appeal dated 22 February 2011, BPA challenged Muria J's ruling on the preliminary objection on the following grounds:

> "1. The learned trial judge having initially identified the complaint of the Belize Port Authority (hereinafter called BPA) to be that the issue of neglect of statutory duties by the BPA was raised by the Appellant and thoroughly argued in Claim No. 29 of 2007 (the 2007 proceedings), and ought not therefore to be raised again in Claim No. 589 of 2009 (the 2009 proceedings) (paragraphs 5, 13, 14, 15), contradicted himself and thus erred in law when he proceeded to find that in order to decide on the BPA's complaint it was thus appropriate to decide whether the issue of the legality of the wall had been raised in the earlier 2007 proceedings (paragraphs 10, 11, 16).
>
> 2. The learned trial judge misdirected himself and thus erred in law when thereafter and throughout his judgment he proceeded to misconstrue the basis of the Appellant's complaint as being that to re-litigate the issue of the legality of the wall is an abuse of process (paragraphs 30 to 34 of judgment), when in fact the Appellant's complaint was that it is an abuse of process to allege against the BPA a neglect of statutory duties amounting to abuse of power in 2009 proceedings, when in 2007 proceedings the same claimant had alleged against the BPA a neglect of statutory duties facilitating a contravention of the Constitution by Fort Street Tourism Village but failed at the same time to allege that it amounted to an abuse of power and to seek the Court's determination thereon.
>
> 3. The learned trial judge accepted that it would be an abuse of process to raise in the 2009 proceedings an issue already raised and determined in the 2007 proceedings. (Paragraph 33 of judgment). However, having already erred in misconstruing

BPA's complaint, the learned trial judge fell into error when he found that the issue had not been raised and determined in the previous litigation, when in fact the learned Chief Justice had made a finding on [sic] in Claim No. 29 of 2007 on the allegation against BPA of neglect of statutory duties and that finding was impliedly overruled by the Court of Appeal when it upheld the submissions of Fort Street Tourism Village in Civil Appeals Nos. 4 and 7 of 2008.

4. Having already erred in misconstruing BPA's complaint the learned trial judge fell into further error when he found that the principle in Henderson v. Henderson has no application, and in finding that the case before him was not an abuse of process (paragraphs 40 – 41 of judgment)

5. The learned trial judge erred in law when he found that the mere fact that a new wall was built after June 2008 meant that a challenge to the legality of that wall was a completely new issue from that raised in respect of the wall which was the subject of the 2007 proceedings (paragraph 42 of judgment)

6. The decision of the trial judge is against the weight of the evidence."

[27] The issue raised by these grounds, which is in substance the same as that raised in the court below, is whether the 2009 action should be dismissed on the ground of *res judicata*, in either the strict or the extended sense in which that doctrine has come to be understood and applied. We were treated by all three leading counsel who appeared in the appeal to a careful and extremely helpful review of the relevant authorities, from which it emerged that there was in fact no disagreement between them as to the applicable principles. It may therefore be convenient, before going to the rival submissions on the facts, to consider what those principles are.

***Res judicata* – what the authorities say**

[28] In his influential judgment in **Thoday v Thoday [1964] P. 181, 197**, Diplock LJ (as he then was) described the principle of *res judicata* in this way:

"The particular type of estoppel relied upon by the husband is estoppel per rem judicatam. This is a generic term which in modern law

> includes two species. The first species, which I will call 'cause of action estoppel', is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, i.e., judgment was given upon it, it is said to be merged in the judgment, or, for those who prefer Latin, transit in rem judicatam. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam. This is simply an application of the rule of public policy expressed in the Latin maxim "Nemo debet bis vexari pro una et eadem causa." In this application of the maxim "causa" bears its literal Latin meaning. The second species, which I will call 'issue estoppel', is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was."

[29] Therefore, as it was put by Lord Keith of Kinkel in the subsequent case of **Arnold v National Westminster Bank PLC [1991] 2 AC 93, 104**, cause of action estoppel arises "where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter". Cause of action estoppel, where it applies, is an absolute bar to subsequent proceedings, "in relation to the points decided, unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment". Issue estoppel, on the other hand, may arise "where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue". Where applicable, issue estoppel also prevents the reopening of particular points which have been raised and specifically

determined in previous litigation between the parties, but is subject to an exception in special circumstances where further material becomes available, whether factual or arising from a subsequent change in the law, which could not by reasonable diligence have been deployed in the previous litigation (per Lord Keith, at pages 109–111).

[30] But there is yet a third – and a wider – sense in which the doctrine of *res judicata* may be invoked. This derives from the well-known judgment of Wigram VC in **Henderson v Henderson (1843) 3 Hare 100**, **115**, where the learned judge said this:

> "…where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of 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. The plea of *res judicata* applies, except in special cases, 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." [Emphasis supplied]

[31] In **Greenhalgh v Mallard [1947] 2 All ER 255**, as a result of a dispute between parties to certain commercial agreements, the plaintiff sued successfully for a declaration that a collateral agreement made between the parties was valid and enforceable. After the delivery of judgment by Morton J in the plaintiff's favour in those proceedings, he then sought to take certain steps, to which the defendants objected, causing them to retaliate in a manner which led the plaintiff to commence further proceedings against them. In those proceedings, the plaintiff alleged that the defendants "wrongfully and fraudulently conspired together" to defeat the judgment of Morton J, and to deprive the plaintiff of the benefits of the judgment and of his rights under the collateral agreement which had been the subject of the original litigation. The case was therefore put on the basis that this was an unlawful conspiracy to injure the plaintiff. The trial judge found that the predominant purpose

of the defendants' actions was not to damage the plaintiff or his property and, on the basis of binding authority on the requirements of the tort of conspiracy (**Crofter Hand Woven Harris Tweed Co Ltd v Veitch [1942] 1 All ER 142)**, the plaintiff's action failed.

[32] After appealing unsuccessfully against this judgment, the plaintiff launched a third action, covering the same factual ground as the second, but now alleging that the defendants had conspired to deprive him of the benefit of the judgment in the first action and of his rights under the collateral agreement by means of fraud. Thus in the second action, the case was put on the basis that it was an unlawful conspiracy because its purpose was unlawful, viz, to injure the plaintiff, while, in the third action, it was put on the basis that the means used were unlawful, that is, fraudulent. The master struck out the new action on the basis of the principle of *res judicata* in the **Henderson v Henderson** sense.

[33] The plaintiff's appeal to a judge from the master's decision succeeded but the Court of Appeal restored the master's decision, primarily on the ground that the matter was *res judicata*, conspiracy having been the cause of action in both suits, irrespective of the way in which the case was put. Somervell LJ said this (at page 257):

> "… a conspiracy may give rise to a claim for damages if either the end or the means, or both, are wrongful, but, in my opinion, a plaintiff who believes he has a cause of action in conspiracy must make up his mind whether he is going to rely on one or the other or both of these allegations – whether he is going to say that the purpose was unlawful, but he does not suggest that the means are unlawful, or that both are unlawful. But if he has chosen to rely on, and put his case in, one of those ways, he cannot, in my view, thereafter bring the same transactions before the court and say he is relying on a new cause of action."

[34] Although Somervell LJ considered that conclusion to be sufficient to dispose of the case, he nevertheless went on to deal with the alternative argument put forward by counsel for the defendants, which was that it would be vexatious and an abuse of the process of the court to allow the transaction to be brought before the court again. In that learned judge's view, the authorities also established that *res judicata* "is not

confined to the issues which the court is actually asked to decide, but…covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them" (page 257).

[35] And, in a brief concurring judgment, Evershed LJ (as he then was) said as follows (at pages 259–60):

> "…if in one action for damages for conspiracy acts done in combination are alleged, it is an abuse of the process of the court, and contrary to the principle that in the public interest there should be an end to litigation which may be regarded as an extension of the strict rule of *res judicata*, to rely in the second action on the same concerted acts, even though in the first action the claim was formulated on the basis of absence of justification in the end only, without regard, or particular regard, to the means, and in the second action the means are impugned as unlawful without challenge to the legitimacy of the end or purpose."

[36] **Henderson v Henderson** and **Greenhalgh v Mallard** were applied by the Privy Council in **Yat Tung Investment Co Ltd v Dao Heng Bank Ltd and another [1975] AC 581**, in which it was held to be an abuse of process to raise in subsequent proceedings a matter which might have been pleaded by way of defence to a counterclaim in earlier proceedings. Delivering the judgment of the Board, Lord Kilbrandon referred (at page 590) to "a wider sense" in which the doctrine of res judicata may be appealed to, "so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings". After referring to Wigram VC's dictum in **Henderson v Henderson**, Lord Kilbrandon went on to say this (at page 590):

> "The shutting out of a 'subject of litigation' – a power which no court should exercise but after a scrupulous examination of all the circumstances – is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless 'special circumstances' are reserved in case justice should be found to require the non-application of the rule. For example, if it had been suggested that when the counterclaim in [the earlier proceedings] came to be answered [the plaintiff] was unaware,

> and could not reasonably have been expected to be aware, of the circumstances…it may be that the present plea against him would not have been maintainable. But no such averment has been made."

[37] Although not doubting the correctness of the decision in **Yat Tung Investment Co Ltd** on its facts, Spencer Bower and Handley, 'Res Judicata' (4th edn, para. 26.05) consider that "the Kilbrandon principle that would bar proceedings in respect of all matters which could have been litigated in earlier proceedings was far too wide". The learned editor in fact describes **Brisbane City Council and another v Attorney General for Queensland [1979] AC 411**, also a decision of the Privy Council, as the beginning of "[t]he retreat from the Kilbrandon Principle" (para. 26.06). In that case, Lord Wilberforce, while endorsing the extension of *res judicata* in the sense described by Somervell LJ in **Greenhalgh v Mallard**, was nevertheless careful to observe (at page 425) that abuse of process "is the true basis of the doctrine and it ought only to be applied when the facts are such as to amount to an abuse: otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation".

[38] Finally, in this brief survey of some of the authorities to which we were referred by counsel, I would refer to **Johnson v Gore Wood & Co (a firm) [2001] 1 All ER 481,** which must now be considered to be the leading authority on the scope of **Henderson v Henderson** abuse of process (in the subsequent case of **Aldi Stores Ltd v WSP Group Ltd** [2008] 1 WLR 748, 756-7, Thomas LJ commented that it was "generally neither necessary nor helpful to refer to the accretion of authority before that decision...). In that case, the plaintiff, who was a property developer, and a company controlled by him, retained the defendants as their solicitors in certain transactions. Problems having arisen, the company filed action against the solicitors for damages for negligence and this action was settled in the company's favour for a substantial sum. The plaintiff then brought proceedings to recover his personal losses, having made a deliberate decision, for financial reasons, to defer his personal claims until the company's claim had been disposed of. The defendants were well aware that a personal action was contemplated by the plaintiff when they settled the company's action and in fact the possibility of an overall settlement of both the company's and the plaintiff's personal claims had been discussed during the settlement negotiations, but were not pursued because of a

paucity of information at that time as regards the quantification of the latter. After the personal action had been pending for over four years, the solicitors applied for its summary dismissal as an abuse of process.

[39] The Court of Appeal having ordered summary dismissal of the action, the plaintiff's appeal to the House of Lords succeeded and the order dismissing the action for abuse of process was reversed. After a full review of all the relevant authorities, Lord Bingham of Cornhill, who delivered the leading judgment, concluded as follows (at pages 498-9):

> "…*Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and

> then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

[40] In the result, the House of Lords held that, taking into account all the circumstances, the plaintiff's action to recover his personal losses was not abusive and it was accordingly allowed to proceed. Lord Bingham reiterated (at page 490) Lord Kilbrandon's view (see para. [36] above) that "[l]itigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court". Lord Bingham went on to pose the question for the court as, "whether the parties to the settlement of [the company's] action…proceeded on the basis of an underlying assumption that a further proceeding by [the plaintiff] would not be an abuse of process and whether, if they did, it would be unjust or unfair to allow [the solicitors] to go back on that assumption" (page 501). His conclusion was that, on the facts of the case, both these conditions were satisfied and that the terms of the settlement agreement and the exchanges which preceded it pointed strongly "toward acceptance by both parties that it was open to [the plaintiff] to issue proceedings to enforce a personal claim, which could then be tried or settled on its merits". It would therefore be unjust to allow the solicitors to resile from that assumption. But, in any event, the failure of the solicitors to take action to strike out over a long period of time was "potent evidence not only that the plaintiff's action was not seen as abusive at the time but also that, on the facts, it was not abusive" (pages 501-502).

[41] In his concurring judgment, Lord Cooke of Thorndon considered (at page 509) that, on the facts of the case, the course adopted by the parties of settling the company's claim, but leaving open the plaintiff's personal claim against the same solicitors, was a "sensible one". Lord Millett, who also concurred in the result, was careful to distinguish between the application of the strict doctrine of *res judicata* and **Henderson v Henderson** abuse of process, observing (at page 525) that it is "one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon". Therefore, while "the doctrine of res judicata in all its branches may properly be regarded as a rule of

substantive law, applicable in all save exceptional circumstances, the doctrine now under consideration can be no more than a procedural rule based on the need to protect the process of the court from abuse and the defendant from oppression".

[42] Before passing on from the authorities referred to by the parties, I must make also mention of **Toth v Ledger [2000] EWCA Civ 388**, (to which Muria J referred twice, with obvious approval in his judgment in the instant case), in which the Court of Appeal considered the impact of **Johnson v Gore Wood (a firm)** on the principle enunciated in **Henderson v Henderson**. After quoting the passage from Lord Bingham's judgment set out at paragraph [39] above, Laws LJ (with whom Kennedy LJ and Jacob J both agreed) expressed the view (at para. 16) that, in order to reach a decision on whether the particular claim in question should be struck out as an abuse of process, "we are required…to look somewhat more closely at the facts then might have been the case before **Johnson v Gore Wood & Co** ..." On that basis, the court considered that, on the facts of the case before it, the impugned action could not be regarded as abusive.

[43] On the basis of these authorities, I would therefore conclude that the doctrine of *res judicata* in the modern law comprehends three distinct components, which nevertheless share the same underlying public interest that there should be finality in litigation and that a party should not be twice vexed in the same matter. The three components are: (i) cause of action estoppel, which, where applicable, is an absolute bar to relitigation between the same parties or their privies; (ii) issue estoppel, which, where applicable, also prevents the reopening of particular points which have been raised and specifically determined in previous litigation between the parties, but is subject to an exception in special circumstances; and (iii) **Henderson v Henderson** abuse of process, which gives rise to a discretionary bar to subsequent proceedings, depending on whether in all the circumstances, taking into account all the relevant facts and the various interests involved, "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" (per Lord Bingham, in **Johnson v Gore Wood & Co (a firm)**, at page 499). There can be no doubt, in my view, that, in **Johnson v Gore Wood (a firm)**, the House of Lords was concerned to circumscribe somewhat more closely

the limits of **Henderson v Henderson** abuse of process and to confine its applicability to cases of real misuse or abuse of the court's processes, or oppression.

The submissions

[44] In comprehensive written submissions, supplemented by his oral arguments before us, Mr Barrow SC advanced detailed arguments in support of each of the grounds of appeal, but I hope that I will do them no disservice by taking them all together and attempting to summarise them in this way. The strike out application was expressly grounded in the doctrine of *res judicata* giving rise to issue estoppel and/or the "overlapping" principle of **Henderson v Henderson** abuse of process. BPA's position was that Eurocaribe could and should have put its whole case forward in the 2007 proceedings and so was prevented from seeking to litigate the issues arising out of the allegation of abuse of statutory duties in the 2009 action. The learned judge wrongly identified the issues arising from the application and as a result misled himself in determining the application by reference to those issues. The issues identified and determined by the judge were relevant only to *res judicata* in the narrow sense of cause of action estoppel and he therefore failed to give effect to the wider application of the doctrine. The judge fell into further error by holding that the principle of **Henderson v Henderson** abuse of privilege was not applicable because of special circumstances, but failed to identify or find any special circumstances in the instant case. The 2009 action did not give rise to new issues because it concerned a wall different from the original wall: the question is not whether the walls are the same, but whether or not the issues arising upon the causes of action relied on in both the 2007 proceedings and the 2009 action are the same.

[45] But in any event, it was submitted, Conteh CJ did make specific and clear findings of breaches of statutory duties by BPA and these findings were in fact critical to his conclusion that the Eurocaribe's fundamental rights had been contravened. In its written submissions, BPA submitted that the reversal of Conteh CJ's decision by the court "impliedly overturned all decisions in the claim which in any way relied upon that finding".

[46] Mr Barrow formulated the "correct issues" for resolution by the judge on this application as, (i) whether the issues arising out of whether or not BPA abused its statutory powers by allowing a wall restricting Eurocaribe's access to the boardwalk could have and should have been raised in the 2007 proceedings; (ii) if so, whether Eurocaribe was estopped from now raising those issues, and (iii) alternatively, whether or not allowing the issues to be raised in the 2009 action in relation to the wall amounts to an abuse of process.

[47] BPA was supported on the appeal by FSTV, which also contended that Eurocaribe could and should have put its whole case forward in the 2007 proceedings. In his skeleton arguments on behalf of FSTV, Mr Williams SC formulated the issues that arose for determination by the judge in this way:

> "Whether [Eurocaribe] should be permitted to maintain the 2009 proceedings alleging abuse of powers based on breach and neglect of statutory duties against [BPA]…for failing to prevent and or allowing the erection of a wall across the boardwalk, it having alleged argued and claimed in the 2007 proceedings that [BPA and other defendants] had neglected and breached their statutory duties by failing to prevent or allowing the construction of a wall on the boardwalk, thereby resulting in a violation of [Eurocaribe's] constitutional rights."

[48] Mr Williams submitted further that the notion that the fact that the 2009 action relates to a new wall creates an exception or some kind of new circumstances is misconceived. The issue was and has always been "alleged breach and omission to fulfill statutory duties regarding the wall on the boardwalk …"

[49] Mr Courtenay SC for Eurocaribe was careful to make two points at the very outset of his submissions. Firstly, that BPA was the only party to the 2009 action to have taken a preliminary objection; and secondly, while he had raised no objection to Mr Williams being heard on this appeal, FSTV was not a party to the appeal. Thus, if it should turn out that Muria J was wrong in his disposal of the preliminary objection, the other parties to the action could not take the benefit of this court's decision in favour of BPA and the trial of the 2009 action would perforce proceed against them.

[50] Turning to the substantive issues raised on the appeal, Mr Courtenay submitted that *res judicata* is not a sledge hammer designed to turn away litigants, but rather was a scalpel to permit courts to do justice. Having regard to the facts of this matter, Conteh CJ's decision and that of the Court of Appeal, there had been a change of circumstances and the institution of the 2009 action was not an abuse of process. In the light of the decision of the Court of Appeal in the 2007 proceedings, in which no comment had been made on the legality of the original wall, Conteh CJ's findings are of no moment and cannot be relied on to bar Eurocaribe in the present proceedings. In any event, it was submitted, those findings, when properly analysed, related primarily to the other state entities involved in the litigation and not to BPA. The court should avoid the danger, recognised in the authorities, of shutting out a party from the courts and, as mandated by Lord Bingham in **Johnson v Gore Wood (a firm)**, the court should take a broad, merits based approach to the question of abuse.

[51] Mr Courtenay also subjected a selection of the authorities to close analysis and submitted that in all the circumstances a claim for breach of statutory duties against BPA in respect of the second wall could not have been brought forward in the 2007 proceedings, "as the basis for complaint had not yet arisen". It was accordingly submitted that Muria J was correct in his conclusion that **Henderson v Henderson** abuse of process was inapplicable to the instant case.

[52] After the conclusion of the hearing of the appeal, the court having reserved its judgment, the decision of the Court of Appeal in **P & Co Nedlloyd B.V. v Arab Metals Co and others (No 2) [2006] EWCA Civ 1717**, **[2007] WLR 2288**, was brought to the attention of counsel, through the industry of the learned President. One of the issues in that case was whether a decision of Colman J at first instance on a limitation point, at an earlier stage of the proceedings, remained binding on the parties by the operation of the doctrine of issue estoppel, despite the fact that the appeal against the judgment itself was allowed on other grounds, the court having made it clear, in allowing the appeal, that it was neither indorsing nor disapproving Colman J's decision on the limitation point.

[53] Moore-Bick LJ (with whom Jonathan Parker and Buxton LJJ agreed) held that the order made by the Court of Appeal against Colman J's judgment rendered it incapable of giving rise to an estoppel on the limitation issue, notwithstanding that it was not specifically overturned on appeal. Moore-Bick LJ explained the rationale for that conclusion in this way:

> "As a matter of principle, when an appellate court sets aside the order of a lower court that order ceased to have any effect and the decision of the appellate court alone is determinative of the issue between the parties. That is sufficient to determine the present case. Although the decision of Colman J. was originally capable of giving rise to an issue estoppel, it could no longer do so once it had been set aside on appeal, regardless of the grounds on which this court made its order. Issue estoppel is a form of estoppel by record and depends, as the cases mentioned earlier demonstrate, on a decision of the court disposing of a substantive dispute between the parties. On a purely formal level it may be said that the setting aside of the order below expunges the only record from which an estoppel was capable of deriving its force. At s substantive level the setting aside of the order means that there is no longer any disposal to which the decision on the issue in question can be regarded as fundamental."

[54] Counsel were invited to make, if they saw fit, further submissions on **P & O Nedlloyd**. While accepting that the case establishes that "when an appellate court sets aside the order of a lower court that order ceased to have any effect and the decision of the appellate court alone is determinative of the issue between the parties," Mr Barrow maintained that, since BPA did not appeal from the judgment of Conteh CJ and was not a party to the proceedings in this court, "the judgment of Conteh CJ remain[s] in full force against – but also in favour of – [BPA]". The judgment was therefore *res judicata* "as between [BPA] and Eurocaribe". In any event, it was submitted further, nothing in the decision of this court on the appeal conflicts with the operation of issue estoppel arising from the decision of Conteh CJ, which therefore remains binding on BPA.

[55] On the other hand, Mr Courtenay submitted that **P & O Nedlloyd** provided support for his earlier submission during oral argument that, in light of the fact that it was set aside on appeal, Conteh CJ's judgment and all the issues contained in it "do not constitute findings capable of operating as estoppels". It was therefore submitted that it is not now open to BPA to rely on anything in Conteh CJ's judgment to found

an estoppel, regardless of the *ratio decidendi* of the Court of Appeal's contrary decision.

Applying the principles

[56] It is common ground between the parties that cause of action estoppel does not apply to the instant case: the 2007 proceedings were founded on an alleged right to constitutional relief, while the 2009 action is based on an alleged abuse of statutory powers by public authorities.

[57] Whether issue estoppel applies in respect of any issue decided as part of Conteh CJ's judgment in the 2007 proceedings turns essentially on the question of the status of that judgment, in the light of its reversal on appeal. In this regard, both Messrs Barrow and Courtenay appear to accept that, on the basis of the decision in **P & O Nedlloyd**, the effect of the decision of this court on appeal from Conteh CJ's judgment was to deprive that judgment of any efficacy, certainly in relation to FSTV, the only appellant in that appeal. The current edition of Spencer Bower and Handley, citing in support, among other cases, **P & O Nedlloyd**, state the principle in this way (4th edn, para. 2.33):

> "When an appellate court reverses the judgment below, the former decision, until then conclusive, is avoided *ab initio* and replaced by the appellate decision, which becomes the *res judicata* between the parties. Even if the appeal fails, the decision of the appellate court becomes the source of any estoppels."

[58] But, says Mr Barrow, this can have no bearing on Conteh CJ's judgment in respect of BPA, which did not appeal against it. The judgment therefore remains in full force and effect in respect of BPA and is therefore fully capable of giving rise to an issue estoppel against – and in favour of – it. While this submission might not ordinarily be regarded as problematic, the order of this court in allowing FSTV's appeal in the 2007 proceedings was that the appeal should be allowed and, "The orders made by the Honourable Chief Justice in Consolidated Claim Nos. 28 and 29 of 2007, are hereby SET ASIDE" (emphasis in the original - see the perfected final order of the Court of Appeal dated 26 June 2008).

[59] The intention behind and the true scope of this order are nowhere discussed in any of the judgments of the court and it is a possibility that the reference to the "orders" of Conteh CJ was intended to reflect no more than the fact that the court was dealing with orders made by him in each of the consolidated claims. But it could also be that, by this order, the court was reflecting the reality that, having decided that the judgment against FSTV, which was the entity responsible for the erection of the original wall, could not stand, it was unrealistic – and probably unjust – to leave untouched the orders in respect of BPA and the other defendants, whose liability as found by the Chief Justice plainly derived from his primary finding in respect of FSTV. It appears to me that the subsistence of a judgment against BPA that it wrongly "allowed" FSTV to erect the original wall would have the clear appearance of anomaly – and perhaps absurdity - in the light of the conclusion of the Court of Appeal that the judgment against FSTV for having constructed the wall in the first place could not stand.

[60] I am therefore content to approach the matter on the basis stated in **P & O Nedlloyd**, which is to say that the judgment of Conteh CJ, although "originally capable of giving rise to an issue estoppel…could no longer do so once it had been set aside on appeal, regardless of the grounds on which this court made its order".

[61] Which brings me then to the issue on which both Messrs Barrow and Williams directed most of their energies; that is, whether the 2009 action should be struck out as an abuse of the process of the court. In considering this issue, I propose to approach the matter on the basis set out at para. [43] above, by asking whether, taking all the circumstances into account, Eurocaribe, by instituting the 2009 action against BPA for abuse of powers, is abusing or misusing the process of the court by putting before it an issue which could and should have been brought forward for adjudication in the 2007 proceedings.

[62] There can be no question that, as BPA asserts, there is a virtual identity between the material relied on by Eurocaribe in its claim against BPA and others in the 2007 proceedings and that relied on in the 2009 action. That this is so is, in my view amply borne out by a comparison of the affidavit sworn to by Mrs Williams in support of the fixed date claim form in the 2007 proceedings and the statement in

support of the application for a declaration filed on Eurocaribe's behalf in the 2007 action (see paras [11] and [19] above). In both instances, the section which particularised the basis of BPA's alleged liability to Eurocaribe is set out in virtually identically numbered sub-paragraphs, ending in a conclusion different in each case only as necessary to reflect the differences in the two causes of action. Thus, in the 2007 proceedings, the complaint against BPA concluded that "…BPA has neglected to perform its statutory duties or functions in relation to the FSTV in accordance with the above laws and regulations and as a result the FSTV has acted in violations [sic] of the laws and regulations of the BPA and in so doing has contravened the fundamental rights of the Claimants guaranteed in [the Constitution]". While, in the 2009 action, the equivalent section of the statement in support of the application for a declaration concluded that "…BPA neglected to perform its statutory duties or functions by failing to regulate developments in the port and harbour of Belize City or in the Fort George wharf by allowing FSTV to erect illegally a structure on the boardwalk, the concrete wall, in the Belize Harbour or in the Belize City Port or in the Fort George Wharf in contravention of the relevant Acts and Regulations...In the circumstances, the unlawful and illegal decisions of the Defendants in allowing and condoning the acts of FSTV amount to an abuse of power on the part of the Defendants."

[63] What this comparison demonstrates, in my view, is that the material upon which Eurocaribe relies in the 2009 action was plainly available to it at the time of commencement of the 2007 proceedings. In addition, the extracts from the transcript of the trial in the 2007 proceedings also suggest that counsel for Eurocaribe had no difficulty in deploying the argument that BPA had been neglectful of its statutory duties. And further still, there are numerous references to the issue of breach of statutory duties in Conteh's CJ's judgment. It clearly cannot therefore be said that the claim of abuse of powers arising out of a failure to perform its statutory duties (leaving aside for the moment the question of the 'new wall', to which I will shortly come) could not have been mounted in the earlier action. This may be compared and contrasted with **Brisbane City Council**, for example, where the subject matter of the allegedly abusive second action was a trust. The strike out application failed because the Board considered (at page 425) that, in the circumstances of the case, the assertion of "the existence of a trust (even assuming

that it was known to exist) in the [earlier action] would have been entirely out of place". The Board also regarded it (at page 426) as "doubtful whether in these circumstances the necessary identity of parties between the two proceedings exists".

[64] The further question in the instant case is therefore whether Eurocaribe's claim against BPA based on abuse of powers should have been made in the 2007 proceedings, in addition, or as an alternative, to the claim for constitutional relief. No reason has been put forward by Eurocaribe for not having done so and it is not therefore possible for the court to make an assessment of those reasons, as it was possible to do in **Johnson v Gore Wood & Co**, for instance, where Lord Bingham considered (at page 501) that the evidence pointed strongly "towards acceptance by both parties that it was open to [the plaintiff] to issue proceedings to enforce a personal claim" after the company's claim had been resolved.

[65] In the instant case, the BPA has been obliged to defend the 2009 action on essentially similar grounds to those put forward on its behalf in the 2007 proceedings, viz, a denial of any breach of statutory duties to Eurocaribe and a reliance on its - and Belize's – obligations pursuant to the ISPS Code and international security imperatives, as justification for the existence of the wall on the boundary between FSTV's and Eurocaribe's properties. In these circumstances, there being no discernible reason for Eurocaribe not having brought forward the claim based on abuse of powers in the 2007 proceedings, I would therefore conclude that, in my view, it should have done so.

[66] But this still leaves for consideration Muria J's view that, the new wall having been erected after June 2008, any challenge to its legality "must surely be…a completely new issue from that raised in respect of the wall which was the subject of the 2007 proceedings" (para. 42 of the judgment). Mr Courtenay strongly supports this reasoning, pointing out that, factually, Eurocaribe could not have challenged the existence of the new wall, built in 2008, in the 2007 proceedings.

[67] With the greatest of respect to the learned judge, I do not find this argument at all persuasive. While in point of form the 2009 action is necessarily directed at the wall constructed in or after June 2008, the new wall, in my view the substance of the

claim is, as a perusal of Mrs Williams' first affidavit in the 2009 action amply demonstrates, that BPA has abused its statutory powers by allowing FSTV to obstruct the boardwalk in breach of the conditions of the licence given to the City Council to construct the boardwalk in the first place. That was also the substance of Eurocaribe's claim in the 2007 proceedings and, to that extent, I consider that a claim relying on this breach to ground an action for abuse of powers could and should have been brought forward in those proceedings. The fact is that the erection of the new wall in 2008 was only made necessary because, as it turned out as a result of the decision of this court in the 2007 proceedings, the original wall had been wrongly removed in the aftermath of Conteh CJ's decision at first instance.

Conclusion

[68] In considering this matter, I have, as I must, borne in mind the natural reluctance in any proceedings to shut out a party from ventilating a genuine subject of litigation. However, despite careful – even anxious – scrutiny of the 2009 claim, I find myself unable to resist the view that it is in fact no more than a repetition, in thinly veiled new guise, of the claim in the 2007 proceedings. Taking all the facts and other surrounding circumstances into account, therefore, it is clear that it could have been brought forward in those proceedings and, in all the circumstances, it seems to me that it should have been. I therefore consider that BPA has made good its contention that the institution against it by Eurocaribe of the 2009 claim is an abuse of the process of the court.

Disposal of the appeal

[69] I would accordingly allow the appeal and make the order which BPA seeks, which is an order striking out the 2009 action as against it. I would also order that the costs of this appeal and of the proceedings in the court below should be paid by Eurocaribe to BPA, on the basis either of agreement between the parties or taxation.

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MORRISON JA

AWICH JA

[70] I have read the draft judgment prepared by Morrison JA. I concur in the judgment.

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AWICH JA