COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION
2018/CLE/gen/00597

BETWEEN

JAMES FLECK

Plaintiff

AND

PITTSTOWN POINTS LANDING LIMITED

Defendant

Before: **The Hon. Madam Justice G. Diane Stewart**

Appearances: **Mr. V. Alfred Gray and Mr. Mario Gray for the Plaintiff**
Mr. N. Leroy Smith and Mr. Jonathan Deal for the Defendant

Ruling Date: **Friday 21st January, 2022**

RULING

1. The Defendant, Pittstown Points Landing Limited **(the "Defendant")** made an application to strike out the Plaintiff's, James Fleck **(the "Plaintiff")** action pursuant to Order 18 rule 19 of the Rules of the Supreme Court.

Brief Background

2. The Plaintiff and Mr. David Wishneski, who is not a party to the action **("Mr. Wishneski")**, purchased Lot No. 71 situate in the Sea Horse Subdivision on the Northern end of Crooked Island, one of the islands of the Commonwealth of The Bahamas **("Lot 71")** as joint tenants.

3. While Lot 71 was owned by its previous owner, Saraband Ltd. ("Saraband") Saraband entered into a lease agreement with the Defendant for a lease of a portion of Lot 71 for a period of ninety-nine years **(the "Lease Agreement")**. At the time of the purchase the land was subject to the Lease Agreement

4. The Plaintiff, in his writ claims that the Defendant breached specific covenants of the Lease Agreement, namely Clauses 2 (C) (F) and (G) which provide:

> **"2 (C) To construct the proposed runway extension in accordance with specifications plans and regulations approved by and promulgated by the Department of Civil Aviation of the said Commonwealth or such other Governmental authority of the said Commonwealth as may have jurisdiction in that regard within Three (3) years from the date hereof or such long period as may be agreed between the parties in writing and to keep the proposed runway extension in good repair and condition for the purpose of being used as a runway and at all times during the term hereby created to make good all damage to the land of the Owner occasioned by the construction of or repairs to the proposed runway extension;**

2 (F) Not to do or permit or suffer to be done anything in or upon the demised premises or any part thereof which may be or become a nuisance or annoyance or cause damage or inconvenience to the Owner or the tenants of the Owner or the neighborhood or whereby any insurance for the time being effected on the demised premises may be rendered void or voidable or whereby the rate of premium thereon may be increased.

2 (G) To keep the Owner indemnified against all proceedings costs claims demands and expenses whatsoever in any way arising out of the exercise of the rights and liberties hereby granted." (the "Clauses")

5. The Defendant denies that there were any breaches of the covenants in the Lease Agreement but alternatively seeks relief pursuant to section 16 of the Conveyancing and Law of Property Act if it is found that there was any breach or were any breaches of the Lease Agreement.

The Strike-out Application

6. By Summons filed the 12th July 2018 the Defendant seeks an order pursuant to Order 18 r. 19 (1) (a), (b) and/or (d) of the Rules of the Supreme Court and/or under the inherent jurisdiction of the Court, that the Plaintiff's Writ of Summons filed the 24th May 2018 and his Statement of Claim filed the 11th July 2018 **(the "Plaintiff's Writ and SOC")** be struck out for being frivolous or vexatious or an abuse of the process of the Court.

7. The Defendant also seeks an order that the action be dismissed on the grounds that, *inter alia*, the Plaintiff's current claims lack merit and/or are demonstrably false and arise from the same or substantially the same facts as those in **Pittstown Point Landings Limited v James Fleck and David Wishneski, Supreme Court Action No. 2015/CLE/gen/00747 (the "Initial Action")**, in which the claims were finally adjudicated upon by a court of concurrent jurisdiction. A further ground is that the Plaintiff was barred by the doctrine of res judicata and/or the rule in Henderson v. Henderson **(the "Strike-Out Application")**.

8. The Plaintiff's Writ with the specially endorsed statement of claim states :

"1. At all material times the Plaintiff (Leasor/Owner) was joint owner of a plot/parcel of land being a portion of Lot No. 71 in the "Sea Shores" Subdivision situate on the Northern end of Crooked Island one of the Islands of the Commonwealth of The Bahamas.

2. At all material times the Defendant (Leasee) was a Bahamian company duly incorporated under the laws of The Bahamas and operated a runway which traverses in part on and over the plot/parcel of land owned by the Plaintiff.

3. One of the Plaintiff's predecessors in title (Saraband Ltd.) entered into a lease agreement on the 2nd May 2002, with the Defendant, for a lease over the said plot/parcel of land (being Lot No, 71), for a period of 99 years.

4. On the 6th July, 2008, the Plaintiff, as joint owner/purchaser, purchased a portion of the said parcel or lot of land being Lot 71, the subject to the Lease Agreement referred to in paragraph 3 hereof and to which both parties hereto are bound by its terms.

5. The said Lease agreement contained various covenants and/or obligations, which several covenants and/or obligations, the Defendant has breached, and those breaches continue to this day by its failing, refusing or neglecting to carry out the terms of the several covenants and/or obligations contained in the said Lease Agreement.

6. Paragraph (2) (C), (F) & (G) of the lease reads as follows.

The Lease hereby covenants with the Owner as follows:-

"2 (C) To construct the proposed runway extension in accordance with specifications plans and regulations approved by and promulgated by the Department of Civil Aviation of the said Commonwealth or such other Governmental authority of the said Commonwealth as may have jurisdiction in that regard within Three (3) years from the date hereof or such long period as may be agreed between the parties in writing and to keep the proposed runway extension in good repair and condition for the purpose of being used as a runway and at all times during the term hereby created to make good all damage to the land of the Owner occasioned by the construction of or repairs to the proposed runway extension;

2 (F) Not to do or permit or suffer to be done anything in or upon the demised premises or any part thereof which may be or become a nuisance or annoyance or cause damage or inconvenience to the Owner or the tenants of the Owner or the neighborhood or whereby any insurance for the time being effected on the demised premises may be rendered void or voidable or whereby the rate of premium thereon may be increased.

2 (G) To keep the Owner indemnified against all proceedings costs claims demands and expenses whatsoever in any way arising out of the exercise of the rights and liberties hereby granted."

7. The Defendant by their action and in action has breached those covenants of the Lease Agreement in whole or in part.

PARTICULARS OF BREACH

8. The defendant's have failed or refused to construct the said runway extension in accordance with specification, plans and regulations approved by and promulgated by the Department of Civil Aviation of the Commonwealth of The Bahamas or such other governmental authority within the 3 year time period or at all and have failed to obtain any written extension from the plaintiff as is contemplated by the Lease.

9. The defendant has permitted the continuous landing of aircrafts on the sub-standard runway which may cause damage or create a liability for the plaintiff as well as result in the plaintiff's insurance on the premises being rendered void or voidable or the rate of premiums increased.

10. The defendants have failed or referred to indemnify the Plaintiff (Owner) against all proceedings, costs, claims or demands and expenses whatsoever in any way arising out of the exercise of the rights and liberties granted under the said lease.

11. As a result of the breaches of the express terms of the lease set out above the plaintiff has suffered loss and damage, both liquidated and unliquidated.

THEREFORE THE PLAINTIFF CLAIMS

1) Damages for breach of contract (Liquidated and Unliquidated to be assessed)

2) Interest pursuant to section 3 of the Civil Procedure, (Award of Interest) Act 1992) on any sum found to be due at such rate and for such period as the court may think fit.

3) Further or other relief

4) Costs

Affidavit of Christopher I. Higgs filed 7th October 2019

9. The Defendant filed the Affidavit of Christopher I. Higgs in support of its application. The deponent ("Mr. Higgs"), an employee of the Defendant was the General Manager of the Crooked Island Lodge, which is situate on Crooked Island **(the "Lodge")** sought to give the Court insight on the Initial Action. He avers that the Defendant had commenced the Initial Action in order to seek orders that would prohibit the Plaintiff and Mr. Wishneski from trespassing on its runway, which was a privately owned runway at Pittstown Point Landings, Crooked Island, The Bahamas.

10. The Defendant had begun developing and expanding the Lodge including extending the western end of the runway and establishing a perimeter road around the precincts of the runway. The extension would require bisecting fourteen contiguous, parallel undeveloped lots immediately adjacent to the runway's western boundary.

11. The Defendant had entered into separate agreements with the surrounding lot owners to facilitate the same and became the freehold and/or leasehold owner in respect of portions of the lots. One of the agreements included the Lease Agreement over Lot 71. The runway project was completed.

12. Saraband Ltd. subsequently conveyed Lot 71 to Stephen Craig Ratchford who in turn conveyed the southern portion of Lot 71, including the leased portion, to the Plaintiff and Mr. Wishneski. The Defendant had drafted a form indemnifying it against any claims or damages that might arise as a result of the Plaintiff and other owners utilizing the runway in addition to their agreement to abide by reasonable rules implemented regarding the operation of aircraft and vehicles on the runway **(the "Indemnity Form")**.

13. The Plaintiff and Mr. Wishneshki both refused to sign the Indemnity Form and they were notified by the Defendant that unless and until it was executed they would not be authorized to enter upon or use the runway. Notwithstanding this prohibition, the Plaintiff and Mr. Wishneski in aircraft leased or owned by them continued to use the runway which led to the commencement of the Initial Action. Hilton J, after considering these facts, granted a permanent injunction prohibiting the Plaintiff and Mr. Wishneski from utilizing the runway **(the "Injunction Order")**. The Injunction Order provided:

> **"...IT IS HEREBY DECLARED AND ADJUDGED that:**
>
> **1. The Plaintiff, Pittstown Point Landings Limited ("Pittstown") is the owner of the certain private runway (the "Runway") situated in the 'Sea Horse Shores Subdivision' at Landrail Point, Crooked Island, The Bahamas ("Sea Horse Shores Subdivision") which crosses over and comprises, inter alia, a part of the southern portion of Lot 71 in the Sea Horse Shores Subdivision ("Lot 71");**

2. **(Without limiting the generality of the foregoing) the certain lease agreement dated 2nd May 2020 made as between Saraband Limited and Pittstown in respect of Lot 71 (the 'Lot 71 Lease") is valid and binding upon the parties to these proceedings;**

3. **The First Defendant, James Fleck is restrained whether by himself or his servants, agents or otherwise however from entering, crossing over, encroaching upon or otherwise in any matter whatsoever interfering with Pittstown's enjoyment of the Runway;**

4. **The Second Defendant, David Wishneski is restrained whether by himself or his servants, agents or otherwise however from entering, crossing over, encroaching upon or otherwise in any manner whatsoever interfering with Pittstown's enjoyment of the Runway; and**

5. **The Defendant's shall pay to Pittstown its Costs in and occasioned by this Action, such Costs to be taxed, if not agreed."**

14. Upon appeal of the Initial Action the Court of Appeal dismissed their appeal along with their subsequent application for the restoration of their appeal.

15. The Plaintiff and Mr. Wishneshki breached the Injunction Order by continuing to use the runway and Contempt proceedings were initiated against them by the Defendant. In response, they claimed that the filing of the appeal operated as a stay of the injunction. They were both held in contempt and the Plaintiff was fined ten thousand dollars which he paid. Mr. Wishneski was committed to the Bahamas Department of Corrections **("BDOCs)** for a period of four weeks however, to date, he has not surrendered himself to its custody **(the "First Contempt Proceedings")**.

16. Mr. Higgs avers that the present claims arising out of the Lease Agreement comprised acts that were either raised before or should have been raised before the Court in the Initial Action. Subsequently, in November 2018, the Plaintiff committed even further breaches of the Injunction Order and for a second time he was found to be in contempt. As a result t was ordered that he should stand committed to the BDOCs for a period of six weeks from the date of apprehension **(the "Second Contempt Proceedings")**.

17. Since the making of the order in the Second Contempt Proceedings there has been no indication that the Plaintiff surrendered to the custody of BDOCs and it is believed that he is still 'at large'. The Plaintiff was also ordered to pay the Defendant's costs for the Initial Action. The costs were taxed during a contested taxation at $64,057.00 and to date remain unpaid.

18. Prior to the Plaintiff being held in contempt for a second time, the Defendant's Counsel wrote to the Plaintiff's Counsel and requested Security for Costs. This request was rejected.

Affidavit of Mario Gray filed 28th October 2019

19. In opposition to the Strike-Out Application, Mario Gray, the Managing Partner, of Counsel for the Plaintiff **("Mr. Gray")**, avers that the Plaintiff's action related to matters which were not raised or placed before the Court during the Initial Action. He adds that the Plaintiff's Writ was for breaches of certain clauses of the Lease Agreement.

20. Mr. Gray avers that while the matters relating to the alleged breaches of the Lease Agreement appeared to have been dealt with or should have been raised in the Initial Action, there was new evidence which was unavailable at the time which the Plaintiff intended to produce. One such piece of evidence being a "minute paper" No. CAD/1500/51 dated 1st September 2010 written by Mr. Ivan Cleare, the Deputy Director of the Department of Civil Aviation **(the "Minute Paper")**.

21. He maintains that if the Plaintiff would have been able to produce the Minute Paper, Hilton J may have arrived at a different conclusion than his finding that the runway was duly licensed and approved by the Civil Aviation Department. The Minute Paper suggested that the runway was not approved due to many infractions and could create a liability for the Plaintiff as there would be no other indemnity agreement in place outside of the Lease Agreement.

22. It was not until the Court ruled that the Lease Agreement was binding and enforceable did the Plaintiff acknowledge that it was a valid, enforceable agreement and clause 2(G) became relevant and activated. Clause 2(G) calls for the Defendant to indemnify the Plaintiff against any and all loss in any way arising out of the exercise of the rights and liberties granted under the Lease Agreement. The costs now being sought arise, he alleges, out of those rights and fall within the meaning "whatsoever in any way arising".

23. Mr. Gray was unable to locate any record of a taxation certificate being delivered to his office and claims that the first time he saw it, it was an exhibit to an affidavit in these proceedings. In relation to the Second Contempt Proceedings, he claimed that it was misleading for the Defendant to assert that the Plaintiff was at large as an appeal and a stay application was filed against that decision.

24. In relation to the request for Security for Costs, Mr. Gray averred that any such costs or expenditure should be borne by the Defendant pursuant to the Lease Agreement. He added that the Defendant was unable to show that the action is frivolous, vexatious and/or an abuse of the Court's process and that the Plaintiff's address was inadvertently not included in the Generally Endorsed Writ of Summons.

Affidavit of Sandra Lightbourn ("Ms. Lightbourn") filed 4th November 2019

25. In further support of the Strike-Out Application, the Defendant filed Ms. Lightbourn's affidavit. This affidavit exhibits a letter dated the 20th September 2010 from the Bahamas Civil Aviation Authority **("BCAA")** to the Defendant confirming the license and registration of the runway. It also exhibits a letter dated the 15th March 2018 from the BCAA to the Plaintiff's Counsel confirming that the Pittstown Point aerodrome was registered and presently open and operational.

ISSUE

26. The issue to be resolved by the Court is whether the Court should accede to or dismiss the Defendant's Strike-Out Application.

SUBMISSIONS

DEFENDANT'S SUBMISSIONS

27. The Defendant raises the preliminary objection that the present action is improperly constituted as Lot 71 was conveyed to the Plaintiff and Mr. Wishneshki as joint tenants. The Plaintiff therefore is not entitled to commence and/or litigate these proceedings by himself, as Mr. Wishneshki must be joined.

28. The Defendant also contends that this action is a transparent and patently improper attempt by the Plaintiff to procure a re-trial or to otherwise re-litigate issues directly involving the Lease Agreement, specifically the provisions of Clause 2 which were directly raised in the Initial Action. Accordingly, this action flies in the face of long standing principles of public policy which provided that a person should not be troubled twice for the same reason and that there is a general public interest in the same issue not being litigated again except by means of appeal.

29. This action seeks to advance claims that are untenable and have no realistic prospect of success and should be struck out pursuant to Order 18, rule 19 of the RSC and/or the Court's inherent jurisdiction.

30. **Order 18 rule 19 of the RSC states**

> **"19. (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —**
> **(a) it discloses no reasonable cause of action or defence, as the case may be; or**
> **(b) it is scandalous, frivolous or vexatious; or**
> **(c) it may prejudice, embarrass or delay the fair trial of the action; or**
> **(d) it is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.**
> **(2) No evidence shall be admissible on an application under paragraph (1) (a).**
> **(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading."**

31. The Defendant cites **Tan Swee Wan v Johnny Lian Tian Young [2016] SGHC 206** which provides the guiding principles behind each of the four grounds for strike out under Order 18 of the RSC. George Wei J stated,

> **"...I shall briefly set the out below:**
>
> **(a) O 18 r 19 (1)(a): "it discloses no reasonable cause of action", this involves an action which does not even have "some chance of success when only the allegations in the pleading are considered": Gabirel Peter & Partners (suring as a firm) v Wee Chong Jin and others [1997] 3 SLR® 649 ("Gabriel Peter") at [21].**
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> **(b) O 18 r 19 (1)(b): "it is scandalous, frivolous or vexatious".**
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> **(i) A matter is "scandalous" where it does not even have a "tendency to show" the truth of any allegation material to the relief sought: Law Swee Lin Linda v AG [2006] 2 SLR(R) 565 at [67], citing Christie v Christie (1872)-1973) LR 8 Ch App 499 at 503.**
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> **(ii) "Frivolous or vexatious" means "obviously unsustainable" or "wrong", A case that is "plainly and obviously sustainable" is one which is either legally or factually unsustainable. A case is legally unsustainable if "it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers**

to prove he will not be entitled to the remedy that he seeks". A case is factually unsustainable if it is "possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance, [for example, if it is] clear beyond question that the statement of fats is contradicted by all the documents or other material on which it is based": The "Bunga Melati 5" [2012] 4 SLR 546 at [39].

(iii) **O 18 r 19(1)(b) could also apply to a case where the party bringing an action is not acting bonda fide and merely wishes to annoy or embarrass his opponent, or where there was a lack of purpose or seriousness in the party's conduct of proceedings" The "Osprey" [1999] 3 SLR(R) 1999 at [8].**

(c) **O 18 r 19(1)(c): "it may prejudice, embarrass or delay the fair trial of the action". Pleadings which could be struck out on this ground include those which are unnecessary, which include improper or irrelevant details, or where allegations unrelated to the issues were made for the purpose of embarrassing or vexing the opposing party: see Jeffrey Pinsler SC, Principles of Civil Procedure (Academy Publishing, 2013) at para 9.008.**

(d) **O 18 r 19(1)(d): "it is otherwise an abuse of the process of the Court". An abuse of process of court means using the court machinery as a means of vexation and oppression in the process of litigation. For example, where a claim is brought not for the purposes of relief but for some other collateral or ulterior motive: Gabriel Peter at [22]."**

32. The Defendant contends that it is well established that each joint tenant holds the whole and holds nothing, that is, he holds the whole jointly and nothing separately. They are generally a single owner. As a result of their unity of interest, joint tenants must instigate proceedings together. Relying on **William v British Gas Corporation [1981] 1 EGLR 165 (UK Lands Tribunal)** where the Tribunal held,

> **"It is clear law that, although as between themselves joint tenants (and therefore, joint owners) have separate rights, as against everyone else they are in the position of a single owner. There is absolute unity between them and together they form one person. Apart from equitable remedies inter se one of the joint tenants cannot commence any proceedings without the aid of the other or others.....he has, in our judgment, no locus standi to commence or maintain the proceedings unless the wife be joined with him as claimant.....Mr. Williams' beneficial interest in the property has vested in his trustee in bankruptcy so that his interest at the present time in it is limited to that of a trustee for his wife. One of two trustees cannot act without the other.**
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> **For these reasons we hold that the notice of reference must be struck out unless Mrs. Williams be joined a claimant with her husband....."**

33. The Defendant contends that the Plaintiff should not be heard pursuant to the principle established in **Hadkinson v Hadkinson [1952] P 285** as he is presently in contempt of court and subject to an extant order of a judge of co-ordinate jurisdiction by which he was required to submit himself to custody to the BDOCs and such failure deems him to be a veritable fugitive.

34. Further the Plaintiff's case falls afoul of the principle of res judicata, established in **Henderson v Henderson** which was followed in **Thomas v Attorney-General (No 2) (1988) 39 WIR 372** where Lord Jauncey of Tullichettle states:

> **"It is in the public interest that there should be finality to litigation and that no person should be subjected to action at the instance of the same individual more than once in relation to the same issue. The principle applies not only where the remedy sought and the grounds therefor are the same in the second action as in the first but also where, the subject matter of the two actions being the same, it is sought to raise in the second action matters of fact or law directly related to the subject matter which could have been but were not raised in the first action. The classic statement on the subject is contained in the following passage from the judgment of Sir James Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100 at page 115:**
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> > **' ... 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.'"**
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> **The principles enunciated in that *dictum* have been restated on numerous occasions of which it is sufficient to mention only three. In *Hoystead v Taxation Commissioner* [1926] AC 155 at page 165, Lord Shaw of Dunfermline, in delivering the opinion of the Board, said:**
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> > **'Parties are not permitted to begin fresh litigations because of new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted.'**
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> **In *Greenhalgh v Mallard* [1947] 2 All ER 255 at page 257, Somervell LJ said:**
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> > **'I think that on the authorities to which I will refer it would be accurate to say that *res judicata* for this purpose is not confined to the issues which the court is actually asked to decide, but that it 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.'**
>
> **In *Yat Tung Investment Co v Dao Heng Bank Ltd* [1975] AC 581 at page 590, Lord Kilbrandon, in delivering the opinion of the Board, referred to the above quoted passage in the judgment of Wigram V-C and continued:**
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> > **'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.'

It is clear from these authorities that when a plaintiff seeks to litigate the same issue a second time relying on fresh propositions in law he can only do so if he can demonstrate that special circumstances exist for displacing the normal rules. It is against this background that the appellant's submissions must be examined."

35. The Defendant also contends that the Plaintiff's claim is statute barred under the provisions of the Limitation Act. Any alleged breach of Clause 2(C) and consequent right of action would have accrued on the 2nd May 2005. The limitation period in respect of the Runway Extension Point expired on the 2nd May 2017 and the present action was not commenced until the 24th May 2018. Clause 2(C) stated:-

> **"2 (C) To construct the proposed runway extension in accordance with specifications plans and regulations approved by and promulgated by the Department of Civil Aviation of the said Commonwealth or such other Governmental authority of the said Commonwealth as may have jurisdiction in that regard within Three (3) years from the date hereof or such long period as may be agreed between the parties in writing and to keep the proposed runway extension in good repair and condition for the purpose of being used as a runway and at all times during the term hereby created to make good all damage to the land of the Owner occasioned by the construction of or repairs to the proposed runway extension"**

The Defendant also invoked Clause 2(C) in the Initial Action which gave rise to Hilton J observing:

> "
>
> **"12. With respect to whether the Plaintiff has failed to meet its duties as delineated in the Lease and thereby causing a forfeiture of the lease: The Defendants raise in their submissions the fact that the lease called for completion of the Runway Extension within three (3) years and that the Runway Extension was only completed after five (5) years.There is no evidence that Saraband Limited [i.e. Fleck and Wishneski's predecessor in title] ever accused [Pittstown] of breaching the lease and certainly no evidence that any notice was over [sic] given to [Pittstown] or any alleged breach as a result of any delay."**

.....

.....

> **"13.The issue of whether or not the Runway, Runway Extension and the Aerodrome are duly licensed and approved is a non-starter. They are clearly already licensed and approved by the Civil Aviation Department as has also been ruled upon in the Pittstown case by Isaacs Sr. J. and the third Affidavit of Cameron W. [McRae] exhibits the relevant verification of license and approvals in the present case by way of two letters from the Director of Civil Aviation dated 18th June 2020 and 20th September 2010.**
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> **"15. I find as a fact that the Lot 71 Lease Agreement is valid."**

36. The Plaintiff was seeking to circumvent and obtain a new judgment inconsistent with the decision of Hilton J on identical issues which is prohibited by the issue of estoppel and is an abuse of process. The Plaintiff could have filed a counterclaim with the allegations now being raised in the Initial Action.

37. The claim of a breach of Clause 2(F) is so vague as to be unintelligible and meaningless as there was no pleaded particulars of any breach in respect of any leased portion of Lot 71. Clause 2(F) states: **2 (F) Not to do or permit or suffer to be done anything in or upon the demised premises or any part thereof which may be or become a nuisance or annoyance or cause damage or inconvenience to the Owner or the tenants of the Owner or the neighborhood or whereby any insurance for the time being effected on the demised premises may be rendered void or voidable or whereby the rate of premium thereon may be increased** Clause 2(F) is solely concerned with the activity taking place or being permitted to take place on the demised premises or any part thereof and not the runway in its entirety.

38. Clause 2(C) refers to the physical condition of the runway any purported grievance ought to have been raised and ventilated within the context of the Initial Action.

39. Clause 2(G) is the indemnity clause in the Lease Agreement. They contend that on the true and proper interpretation, the clause is itself an indemnity provision applicable on and according to its terms and does not impose any obligation upon the Defendant to enter into any additional or further obligations or documents. The Defendant previously placed Clause 2(g) in issue in the Initial Action and had acknowledged that the clause was self-contained indemnity provision.

PLAINTIFF'S SUBMISSIONS

40. The Plaintiff contends that while the Lease Agreement is held by him and another as joint tenants, the Court would not dismiss a matter if the other co-tenant could be and were willing to be added to an action.

41. The Plaintiff also contends that the issue of res judicata/Henderson v Henderson should not apply as notwithstanding the similarity of the parties, the Plaintiff's position is different due to the discovery of evidence or information that was not available to the Plaintiff at the time of the Initial Action. The Minute Paper raises not only doubts that the airport was fit for operation but also recommended that the airport should be closed until the items could be addressed. There was still no record to date of the recommended work being done to the airport.

42. The court did not have the benefit of all of the information which was not due to negligence or inadvertence. The Plaintiff submits that the issue goes to the very heart of the entire lease as the Court would hear evidence from the BCAA confirming that the airport is not compliant which could change the current position between the parties.

43. The Plaintiff cites **Thomas v Attorney-General (No 2) [1988] 39 WIR** which refers to the case of **Yat Tung Investment Co v Dao Heng Bank Ltd [1995] AC 581** where Lord Kilbrandon stated,

> **"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."

DECISION

44. The Court apologizes to the parties for the delay in producing this ruling. However, all of the transcripts were reviewed along with the judge's notes.

45. The Court must determine whether the Strike-Out Application should be acceded to or dismissed pursuant to Order 18 rule 19 (1) (a) (b) and/or (d) of the RSC and the principles derived thereunder.

46. In **Trial Farms Investments Limited et al v Pittstown Point Landings Limited SC Action No. 2017/CLE/gen/00389**, the defendant who is also the present Defendant in this action made application to strike out the Plaintiffs' claim against it for breaches of certain agreements concerning the surrounding lots in the Sea Horse Subdivision in Crooked Island where Lot 71 is also located.

47. The Defendant in that action claimed that the plaintiffs' claims stemmed from the same or substantially the same facts which arose in another action which had already been adjudicated upon by the court and as a result they were barred by the doctrine of res judicata and/or the rule in Henderson v. Henderson.

48. This court had the opportunity to consider the law in relation to Order 18 rule 19, the principles of res judicata and an indemnification clause which mirrors clause 2 (g) of the present Lease Agreement. I adopt the same considerations and set them out herein:

> **"45. The issue to be determined here is whether this action is an abuse of the process of the court or falls within any of the other grounds under O18 R19. On the face of the pleading there appears to be causes of action but it must be determined whether they are sustainable in law or whether they are an abuse of the process of the court.**
> **46. Abuse of the process of the Court too has been judicially considered and determined in numerous cases. In Hunter v Chief Constable (1982) AC529 and 536, Lord Diplock defines the power to strike for abuse of the process.**
>
> > **"[abuse of process] concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of it procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied . . . It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."**
>
> **47. Examples of abuse of the process of the court have been judicially determined to include:-**
>
> > **(1) Attacking a final previous decision by way of a new action when the Plaintiff was a party to the same and had the opportunity to raise and contest the issue in the previous decision. Hunter v Chief Constable of the West Midlands Police and others: Ward and others v Fiensilver (as a personal representative of the Estate of Bernard Olcott) 2014 3 BHSJ No.59**

(2) Raising issues which should have and could have been raised in the earlier proceedings.

(3) Evidence being relied on which has no substantial foundation [Don Hager Lawrence v Lord Norreys and others HL1890 210.]

INDEMNITY POINT

48. The Plaintiff seeks to raise an issue with regard to the payment of costs awarded in the Junior Action in favour of Pittstown. They submit that the breach of clause 2(g) only occurred once Pittstown attempted to enforce their right to costs. This argument is an example of the second category of abuse of the process of the as court set out above. I do not accept the interpretation posited by the Plaintiffs as to the meaning of clause 2(g) of the Lease Agreement. To do so would make a nonsense of the order made by Justice Isaacs, but more importantly the interpretation posed by the Plaintiffs should have and could have been raised before Justice Isaacs. Their failure to do so is to their detriment; to do so now is an abuse.

49. Counsel for Pittstown helpfully and clearly sets out the law with regard to the doctrine of Res Judicata which evolves from the locus classicus Henderson v Henderson and which has been accepted in Court of Appeal in West Island Properties Ltd. V Sabre Investments Limited and others [2012] 3BHSJ and which I also accept.

50. In Thomas v Attorney-General (No 2) (1988) 39 WIR 372 , a decision of the Judicial Board of Privy Council (on appeal from the Court of Appeal of Trinidad and Tobago), Lord Jauncey of Tullichettle explained that:

> "...It is in the public interest that there should be finality to litigation and that no person should be subjected to action at the instance of the same individual more than once in relation to the same issue. The principle applies not only where the remedy sought and the grounds therefor are the same in the second action as in the first but also where, the subject matter of the two actions being the same, it is sought to raise in the second action matters of fact or law directly related to the subject matter which could have been but were not raised in the first action. The classic statement on the subject is contained in the following passage from the judgment of Sir James Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100 at page 115:
>
> > ' ... 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.'

51. In *Hoystead v Taxation Commissioner* [1926] AC 155 at page 165, Lord Shaw of Dunfermline, in delivering the opinion of the Board, said:

> 'Parties are not permitted to begin fresh litigation because of new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted.'

52. In *Greenhalgh v Mallard* [1947] 2 All ER 255 at page 257, Somervell LJ said:

"I think that on the authorities to which I will refer it would be accurate to say that *res judicata* for this purpose is not confined to the issues which the court is actually asked to decide, but that it 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.'

53. In *Yat Tung Investment Co v Dao Heng Bank Ltd* [1975] AC 581 at page 590, Lord Kilbrandon, in delivering the opinion of the Board, referred to the above quoted passage in the judgment of Wigram V-C and continued:

'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.'

It is clear from these authorities that when a plaintiff seeks to litigate the same issue a second time relying on fresh propositions in law he can only do so if he can demonstrate that special circumstances exist for displacing the normal rules. It is against this background that the appellant's submissions must be examined."

NEW EVIDENCE POINT

60. As enunciated in Ackerman v Thornhill in order to have a retrial of previously determined issues on the discovery of "fresh evidence" there must be compliance with the following three requirements:-

(1) The fresh evidence was not available or could not with reasonable diligence have been obtained at the time of the original judgment:

(2) There was conscious and deliberate dishonesty in the concealment of the new evidence; and

(3) The fresh evidence is material, in the sense that it was a operative cause of the judge's decision to give the judgment in the way that he did, i.e. it would have entirely changed the way in which the judge approached and came to his decision.

61. Each of these requirements have been the subject of judicial pronouncement. Lord Cairns in Phosphate Sewage Co. v Molleson (1879) 4 App Cs. 801 held:-

"67. As I understand the law with regard to *res judicata,* it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. My Lords, the only way in which that could possibly be admitted would be if the litigant were prepared to say, I will shew you that this is a fact which entirely changes the aspect of the case, and I will shew you further that it was not, and could not by reasonable diligence have been, ascertained by me before."

This speaks to evidence which would entirely change the case.

62. Hunter v Chief Constable of West Midlands [1980] QB 283 speaks to evidence which was not available and could not have been available.

"69. The Court of Appeal unanimously held that a claimant who wished to escape from an estoppel arising out of an earlier decision against him had to adduce evidence that was not available and could not have been obtained by reasonable diligence at the earlier trial. Each of the member of the court referred to such evidence as "fresh evidence": see [1980] QB 283

per Lord Denning at page 318, per Goff LJ at pages 334-335 and per Sir George Baker at page 347. In particular, Lord Denning and Goff LJ expressly affirmed the approach of Lord Carins in Phospate Sewage v Molleson. Goff LJ concluded,

> So, it is not permissible to call further evidence which was available at the trial or could by reasonable diligence have been obtained and the fresh evidence must be likely to be decisive."

63. Finally in Royal Bank of Scotland plc v Highland Financial Partners LP [2013] EWCA Cw. 328 Aikens LJ held:-

> "64. There was no dispute between counsel before us on the legal principles to be applied if one party alleges that a judgment must be set aside because it was obtained by the fraud of another party. The principles are, briefly: first, there has to be a 'conscious and deliberate dishonesty' in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned. Secondly, the relevant evidence, action, statement, or concealment (performed with conscious and deliberate dishonesty) must be 'material'. 'Material' means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement, or concealment was an operative cause of the court's decision to give judgment in the way it did. Put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision. Thus the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was. Thirdly, the question of materiality of the fresh evidence is to be assessed by reference to its impact on what decision might be made if the claim were to be retried on honest evidence."

64. The date of the Minute paper (September 1st, 2010) was after the trial of the action before Justice Isaacs but before his judgment. There is no pleading as to when the evidence was discovered. The document existed at the time of the trial and could have been obtained with reasonable diligence. There is no pleading as to why it could not have been obtained by the Plaintiffs. In fact, the letter of 20th September 2010 was from the same department and was obtained by Pittstown and placed before the judge prior to his judgment.

65. There are no allegations of fraud or dishonest concealment pleaded against the Defendant. The New Evidence was an internal document which the Defendant nor its agent Mr. Butler could have known of the existence. The court also takes notice of the affidavit filed by Mr. Errol Heastie as the President of Kirakis on February 9th, 2017 when the Plaintiffs sought leave to restore the appeal of Justice Isaacs's ruling. In that affidavit, Mr. Heastie averred that he was present at the very same inspection of the runway in August 2010 and accordingly the Plaintiffs by virtue of their own submission and evidence too could have and would have knowledge of the "existence of the document" which they now claim is "new evidence".

66. The letter dated the 20th September 2010 was a document issued by the Department of Civil Aviation to Mr. Cameron McPhee of the Defendant which stated the position held by the Department with regard to the condition of the runway. The memorandum of the 1st September 2010 was an internal memorandum. There is no evidence before this court or at the trial before Justice Isaacs that there is a failure on behalf of the Department of Civil Aviation to consider the memorandum. What is a fact is that Justice Isaacs considered the 20 September 2010 as dispositive of the issue of whether Pittstown required any further regulatory approval to extend the runway and as a consequence not fall afoul of the terms of the lease agreement.

67. I am satisfied that the existence and disclosure of the memorandum would not satisfy the requirements laid down in Ackerman so as to justify a retrial of the

issues previously decided before Justice Isaacs and accordingly, to attempt to do so now is an abuse of the process of the Court.....
70. For the reasons set forth above, I am satisfied that all of the issues pleaded by the Plaintiffs in this action have or could have been litigated before Justice Isaacs and an attempt to do so now is to mount a collateral attack on issues which have been tried and determined and to make a collateral attack on the Isaacs decision which has been upheld through all the courts. Accordingly, I rule that this action be struck out as prayed in the Defendant's Summons with costs to be awarded to the Defendant to be taxed and paid by the Plaintiffs. I thank counsel for the Defendant for their assistance and diligence in providing authorities helpful to the issue to be determined."

49. The Plaintiff asserts that if he had been able to produce the Minute Paper, Hilton J may not have arrived at the conclusion that he did. There was no further explanation on the late production of the document which existed prior to the commencement and disposal of the Initial Action.

50. The document could have been discovered by reasonable diligence of the Plaintiff or his Counsel. Moreover, the letter dated the 20th September 2010 from the Bahamas Civil Aviation Authority to the Defendant confirms that despite the claims set out in the Minute Paper, the Defendant had been given approval to operate the runway.

51. I am satisfied that the existence and disclosure of the memorandum would not satisfy the requirements laid down in **Ackerman,** as previously considered in **Trial Farms Investments Limited et al** so as to justify a retrial of the issues previously decided before Hilton J and accordingly, to attempt to do so now is an abuse of the process of the Court.

52. In relation to the Plaintiff's interpretation that the Defendant was to indemnify the Plaintiff for all costs pursuant to clause 2 (g) of the Lease Agreement, this was also not raised in the Initial Action. This issue is identical to that raised by the plaintiffs in **Trial Farms Investments Limited et al** whereby it was also found that the plaintiffs attempt to raise this after the matter had been adjudicated when it could have been previously raised, was an abuse of the process of the court.

53. Therefore, the attempt by the Plaintiff to raise this issue now is an abuse of the process of the court. The Plaintiff's failure to raise in the Initial Action, that he did not consider the Lease Agreement to be null and void prior to Hilton J declaring it to be valid and enforceable is also an abuse.

54. I have considered the facts and the evidence of both parties. After considering the applicable principles as they pertain to the facts of the present case, I am satisfied that all of the issues pleaded by the Plaintiff in this action could have been litigated before Hilton J. An attempt to do so now is to mount a collateral attack on issues which have been tried and determined by Hilton J. To allow the continued litigation of this action would be an abuse of process, as the action is vexatious.

55. Accordingly, I rule that this action be struck out as prayed in the Defendant's Summons with costs to be awarded to the Defendant to be taxed if not agreed and paid by the Plaintiffs.

56. I need not address the further issues except to say that a further example of abuse is the failure of the Plaintiff to initiate the action without Mr. Wishneski being joined as a party hereto.

57. It must be noted however, that the Court in no way tolerates a litigant blatantly disregarding any order made against him/her by the Court.

Dated this 21st day of January 2022

Hon. G. Diane Stewart
Justice