JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MISS JUSTICE SIMMONS JA

SUPREME COURT CIVIL APPEAL NO COA2020CV00118

APPLICATION NO COA2020APP00118

BETWEEN	**DORRETTA MAY GUTHRIE**	**APPLICANT**
AND	**VINCENT LLOYD GUTHRIE**	**RESPONDENT**

Ms Lisamae Gordon and Ms Tatiana Answer instructed by Malcolm Gordon for the applicant

Ms Tavia Dunn, Ms Deborah Dowding and Mrs Allayndra Thompson instructed by Nunes, Scholefield, Deleon and Co for the respondent

15 March 2021 and 18 February 2022

MCDONALD-BISHOP JA

[1] I have read, in draft, the reasons for judgment of Simmons JA. I endorse the reasons she gave for the decision of the court and there is nothing I could usefully add.

EDWARDS JA

[2] I, too, have read in draft the reasons for judgment of Simmons JA. I agree with them and have nothing to add.

SIMMONS JA

[3] This was an application for leave to appeal and a stay of execution of the decision of Barnaby J made on 3 July 2020, refusing an application filed on 26 February 2018, to

strike out the fixed date claim form filed by the respondent. The application before this court was supported by the affidavit of Lisamae Gordon sworn to on 9 July 2020.

[4] On 15 March 2021, after considering the submissions in this matter, this court made the following orders:

> " 1. The application for leave to appeal the order made by Barnaby, J on 3 July 2020 and filed in this court on 9 July 2020 is refused.
>
> 2. Costs of the application to the respondent to be agreed or taxed."

[5] It was indicated to the parties that the reasons for our decision would be provided, and this judgment is a fulfilment of that promise.

Background

[6] The parties, who were formerly married to each other, had previously sought and obtained orders in respect of the division of certain properties ('the 2009 claim'). That matter was concluded in 2011. Among the properties that were dealt with was one situated at Lot 24, Pitkelleney Sub-Division, West Cliff Estates, in the parish of Westmoreland, registered at Volume 134 Folio 933 of the Register Book of Titles ('the Pitkelleney property').

[7] On 19 July 2011, R Anderson J made orders on the 2009 claim ('Anderson J's orders'). He declared that the parties were each entitled to a 50% share in the Pitkelleney property. The said property was to be valued, and the applicant was given the first option to purchase. In the event that she failed to do so within 120 days, the respondent had the right to purchase it. The order also required the applicant to pay an additional sum of $1,000,000.00 to the respondent, "in reimbursement of the sums borrowed for the construction of the home", if she chose to exercise her option to purchase. In the event that neither party was able to purchase the property, it was to be sold by public auction or private treaty and the proceeds divided in accordance with their respective interests.

[8] On 7 July 2014, a new certificate of title was issued for the Pitkelleney property in the names of the applicant (the defendant in the court below) and the two children of the marriage. It is common ground that by doing so, the applicant breached Anderson J's orders. She also breached the said orders by failing to pay the $1,000,000.00 to the respondent as reimbursement of the sums borrowed for the construction of the house. It was that state of affairs that led to the filing of the fixed date claim form, which was the subject of the proceedings before Barnaby J ('the 2017 claim'). In that claim, the respondent (the claimant in the court below), sought the following orders:

> "1. A Declaration that the property known as Lot 24, part of Pitkelleney, West Cliff, Negril in the parish of Westmoreland, and more particularly registered at Volume 1481 Folio 375, is the same property which is the subject of the Order of the Supreme Court of the 22nd July 2011 in Claim No. 2009HCV 3430.
>
> 2. A Declaration that the Defendant did not comply with the directions for the exercising of the first option to purchase Lot 24, part of Pitkelleney, West Cliff, Negril in the parish of Westmoreland.
>
> 3. A Declaration that the Defendant has not paid to the Claimant the sums due and owing in respect to her acquiring his interest in Lot 24, part of Pitkelleney, West Cliff, Negril in the parish of Westmoreland.
>
> 4. A Declaration that the Defendant has not paid the prescribed sum of One Million Dollars ($1,000,000.00) for reimbursement of the sums borrowed for the constructions [sic].
>
> 5. A Declaration that the Claimant is entitled to be paid the sum of Eight Million Eight Hundred and Twenty-Five Thousand Dollars ($8,825,000.00) by the Claimant for his interest in Pitkelleney and the construction costs.
>
> 6. An Order that [the] Defendant shall forthwith pay, or cause to be paid, to the Claimant the aforementioned sum together with interest from the 7th July 2014.

> 7. Court Fees of $2,000.00 and Attorney's Fixed Costs on issue of $10,000.00.
>
> 8. Such Further and other Reliefs as this Honourable Court deems just."

[9] The applicant applied to strike out the 2017 claim on the ground that it was an abuse of the process of the court as it amounted to a re-litigation of issues that were addressed in the 2009 claim and the enforcement of those orders was statute-barred.

[10] On 3 July 2020, Barnaby J, having heard the application, made the following orders:

> "1. The Application to strike out the Respondent's Claim filed February 26, 2018 is refused.
>
> 2. The Costs of the Application to the Respondent to be taxed if not agreed.
>
> 3. The first hearing of the Fixed Date Claim Form is set for November 24, 2020 at 2:30 pm for ½ hour.
>
> 4. Leave to appeal is refused.
>
> 5. Attorney-at-Law for the Applicant is to prepare, file and serve these orders."

[11] On 9 July 2020, the applicant filed a notice and grounds of appeal seeking the following orders:

> " i. That the Applicant be granted permission to Appeal the Order made by the Honourable Ms Justice C. Barnaby (Ag.) on the 3rd day of July, 2020.
>
> ii. That the Judgement given on the 3rd of July 2020 by the Honourable Ms. Justice C. Barnaby (Ag.) be set aside/reserved.
>
> iii. That the Fixed Date Claim Form filed in Claim No. 2017 HCV 01914 on June 14, 2017 be struck out.

iv. That the Judgment given on the 3rd of July 2020 by the Honourable Ms. Justice C. Barnaby (Ag.) be stayed pending the outcome of the Court of Appeal Proceedings.

v. Any further and other relief that this Honourable Court deems fit.

vi. Costs."

Proceedings in the court below

[12] In the court below, Barnaby J identified four issues:

> "i. Does the Respondent's claim constitute an abuse of the process of the court?
>
> ii. Can enforcement proceedings for breach of the orders on the 2009 claim be initiated by Fixed Date Claim Form?
>
> iii. Is the absence of the history of facts in the 2009 claim likely to obstruct the just disposal of the current claim?
>
> iv. Has the limitation period for enforcing the orders of R. Anderson, J on the 2009 claim expired?"

[13] It was submitted by counsel for the applicant that the filing of the 2017 claim was an abuse of the court's process. Counsel for the respondent, on the other hand, argued that the 2017 claim was necessary as Anderson J's orders were declaratory and, therefore, incapable of being enforced by execution. Consequently, new proceedings had to be initiated to enforce the part of the judgment that the respondent alleged had been breached by the applicant.

[14] Barnaby J, in determining the nature of the said orders, relied on paragraph 1268 of Halsbury's Laws of England, Volume 12A (2015). She stated at paragraph [13] of her judgment:

> "[13] I have also found the following extract from Halsbury's on judgments and orders in civil proceedings useful. It states,
>
> > *Many judgments and orders given or made in civil proceedings do not require to be enforced because the*

> *judgment or order itself is all that the party obtaining it requires. Thus,* ***a judgment which determines status does not call for specific enforcement because it is declaratory of the status of the particular person or thing adjudicated upon, and renders it such as it is declared…Such a judgment does not order recovery or payment of money, delivery or transfer of property, or any specific act or abstinence which may be subject to any of the various methods of enforcement****… A declaratory judgment is complete in itself, since the relief is the declaration*." (Emphasis added)

[15] Barnaby J stated that the 'inescapable' conclusion was that orders one to four of Anderson J's orders were declaratory, as they merely established the parties' interests in the properties set out in the 2007 claim. The orders are set out in paragraph [14] of her judgment as follows:

> "1. The Claimant and the Defendant are each entitled to a fifty per cent (50%) interest in the property at Hopewell and registered at Volume 1313 Folio 776 of the Register Book of Titles.
>
> 2. The Claimant and the Defendant are each entitled to a fifty per cent (50%) interest in the properties at Sheffield and registered at Volume 1214 Folios 792 and 793 of the Register Book of Titles.
>
> 3. The Claimant and the Defendant are each entitled to a fifty per cent (50%) interest in the property at Pitkelleny and registered at Volume 134 Folio 933 of the Register Book of Titles.
>
> 4. The Claimant and the Defendant are each entitled to a fifty per cent (50%) interest in the property located at Lot 93, Nonpariel Land Settlement, Negril in the Parish of Westmoreland."

[16] At paragraph [16], she explained that the remaining orders were supporting orders:

> "[16] The order numbered (5) then goes in aid of those which precede it, and prescribes the method for determining the value of the properties. Orders (6) to (9) direct the parties on how to proceed to realise their declared percentage interests. While those orders offer guidance to the parties, they do not, to borrow Halsbury's phraseology, "order recovery or payment of money, delivery or transfer of property, or any specific act or abstinence which may be subject to any of the various methods of enforcement."

[17] For ease of reference, the remaining or supporting orders are set out below:

> "5. All the properties are to be valued by a valuator agreed by the parties and if no such agreement is arrived within thirty (30) days of the date of this Order, the Registrar of the Supreme Court shall appoint such a valuator, provided that the parties may by agreement in writing entered into within the time set for appointment of a valuator, use valuations of the properties previously obtained and jointly paid for by them.
>
> 6. Upon the properties being valued and valuation reports provided to the attorneys at law for each party, each party shall have the option to purchase the interest of the other party, provided however, that the Claimant shall have the first option in respect of properties at Order[s] (1) and (2) and the Defendant shall have the first option in respect of properties at Orders (3) and (4), such options are to be exercised within one hundred and twenty (120) days of the delivery of the valuations to the parties' attorneys as aforesaid.
>
> 7. In the event of the failure of any party to exercise his or her option within the time limited by Order (6) above, the other party shall have the right to purchase the interest of the person so failing.
>
> 8. In the event that the Defendant exercises her option to purchase the property at Order (3) above, she will pay the Claimant **One Million Dollars ($1,000,000.00)** in reimbursement of the sums borrowed for the construction of the home, such sum is to be added to the cost of the fifty percent (50%) of the valuation for which she would otherwise be liable.

> 9. Where neither party is able to purchase the property as set out herein, such property may be sold at public auction or by private treaty and the proceeds divided in the same proportions as the ownership interests declared.
>
> 10.The Registrar is authorized to sign any document to give effect to the Orders made herein.
>
> 11.The Defendant is not indebted to the Claimant in respect of any sums withdrawn from any of their jointly held accounts.
>
> 12.The Claimant's claim for payment of any other debts other than any dealt with in these orders is denied.
>
> 13.Two-thirds of the Defendant's costs are to be paid by the Claimant, such costs to be taxed if not agreed.
>
> 14. Liberty to Apply." (Emphasis as in the original)

[18] In analysing the 2009 claim, against the 2017 claim, Barnaby J found that the relief sought in the latter claim was confined to the Pitkelleney property. She stated that there was no "collateral attack" on the judgment of Anderson J, as the 2017 claim was seeking declarations that would establish the alleged disobedience of Anderson J's orders. That claim, she said, also sought an order directing compensation for the respondent's alleged loss of his share in the Pitkelleny property. She concluded that the 2017 claim did not involve the re-ligation of issues that were the subject of the 2009 claim, and as such, did not amount to an abuse of process. She also stated that. "…there is nothing on the claim which appears to be manifestly unfair to either party to the action, nor does it otherwise bring the administration of justice into disrepute". She found that the respondent was entitled to "approach the court for the purpose of enforcement" as Anderson J's orders were declaratory.

[19] In respect of issue (ii), it was submitted on behalf of the applicant that a claim for the payment of the alleged debt ought to have been commenced by way of a claim form and not a fixed date claim form. Barnaby J found that there was no merit in that submission. Having referred to rule 8.1(4)(d) of the Civil Procedure Rules, 2002 ('CPR'),

she concluded that the use of the fixed date claim form was appropriate as the 2017 claim was not likely to have had a substantial dispute of facts.

[20] In addressing issue (iii), counsel for the applicant argued that the absence of the history of the facts in the 2009 claim was likely to obstruct the just disposal of the 2017 claim. Barnaby J found that the judgment and orders of Anderson J spoke for themselves and that the issues in the 2009 claim were *res judicata*. She also found that the two claims dealt with separate issues and that the 2017 claim was only seeking coercive orders, which could be enforced in the event that they were breached. In the circumstances, the absence of the history of the facts contained in the 2009 claim was unlikely to obstruct the just disposal of the 2017 claim.

[21] In respect of the final issue, she found that the applicant's submission that the limitation period for enforcing the 2009 claim had expired was without merit. She stated that counsel's reliance on part 46 of the CPR was misguided. In this regard, she stated that rule 46.2(1) provides that no writ of execution may issue without the permission of the court where six years have elapsed since the date of the judgment and that a "writ of execution" is defined as any of the following:

> "(a) an order for the seizure and sale of goods (form 18);
>
> (b) a writ of possession (form 19);
>
> (c) an order for the sale of land;
>
> (d) a writ of delivery (whether it is –
>
> (i) an order for recovery of specified goods in form 20; or
>
> (ii) an order for the recovery of goods or their assessed value in form 21); and
>
> (e) an order for confiscation of assets."

[22] Barnaby J concluded that "[w]hen one looks at the orders being sought by the Respondent on the current claim, it is obvious that no writ of execution within the meaning of rule 46.1 of the CPR is being sought".

[23] As a consequence, she refused the relief sought by the applicant.

The proposed grounds of appeal

[24] The applicant, who was dissatisfied with the ruling of Barnaby J, filed an application for leave to appeal, which was supported by the affidavit of Lisamae Gordon sworn to on 9 July 2020. The proposed grounds of appeal are as follows:

> "1. Pursuant to Rule [sic] Section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act which provides that, in circumstances relevant to the instant matter, no appeal shall lie without the leave of a Supreme Court Judge or of the Court of Appeal from any interlocutory judgement or any interlocutory order given or made by a Judge.
>
> 2. That the Applicant has a good prospect of succeeding on the Appeal.
>
> 3. That if this appeal is disallowed and a stay is not granted this will result in a gross miscarriage of justice to the Applicant.
>
> 4. On the 3rd day of July, 2020 leave to appeal was refused by order of The Honourable Ms. Carole Barnaby (Ag).
>
> 5. [Barnaby J] erred in law and in fact when she refused the orders applied for by the Applicant/Defendant to have a second Fixed Claim Form filed for the declarations for the division of the matrimonial parties involving the same parties and the same property not to be struck out as an abuse of process on the basis that the judgement given at first instance by the Honourable Justice R. Anderson on [sic] delivered July 22, 2011 for the division of the same matrimonial property was merely declaratory in nature and therefore enforcement proceedings had to be undertaken using a second Fixed Date Claim Form.

> 6. The Honourable Ms. C. Barnaby (Ag.) erred in ruling that the orders given by the Hon Justice R. Anderson on July 22, 2011 could not be enforced.
>
> 7. Orders 5-11 of the judgment delivered on July 22, 2011 by the Honourable Justice R. Anderson are clearly executory in nature, compelling and enforceable and requires the parties to undertake certain activities.
>
> 8. [Barnaby J] erred in allowing for the adjudication of Pitkelleney being one of the matrimonial properties, where previous orders were made by the Honourable Justice R. Anderson on July 22, 2011 with respect to a slate of matrimonial properties which included Pitkelleney.
>
> 9. [Barnaby J] erred in keeping [sic] that to claim further reliefs equated to filing further [f]ixed date claim forms as an originating process.
>
> 10. [Barnaby J] failed to acknowledge the principle of liberty to apply and its application in Matrimonial proceedings in that she dismissed the importance of the need/opportunity to rely on this position pursuant to the orders of Honourable Justice R. Anderson delivered July 22, 2011."

Principles relevant to applications for leave to appeal

[25] Where a party makes an application for leave to appeal, regard must be had to rule 1.8(7) of the Court of Appeal Rules, 2002 which provides:

> "The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal **will have a real chance of success**." (Emphasis supplied)

[26] It is trite that in order to satisfy the requirement of 'a real chance of success', the applicant must demonstrate that he has a realistic as opposed to a fanciful prospect of success (see **Swain v Hillman and another** [2001] 1 ALL ER 91).

[27] In considering this application, the following three issues arose for the court's consideration in determining whether the proposed appeal had a realistic chance of success:

A. Whether Anderson J's orders were declaratory or executory.
B. Whether the filing of the 2017 fixed date claim form was the appropriate method for the respondent to seek relief.
C. Whether the filing of the 2017 claim amounted to an abuse of the process of the court and should have been struck out by Barnaby J.

The issues

A. Whether Anderson J's orders were declaratory or executory

Applicant's submissions

[28] Counsel for the applicant, Ms Lisamae Gordon, submitted that Barnaby J erred in finding that Anderson J's orders were declaratory in nature and, therefore, unenforceable. It was submitted that a judgment that contains declarations should not be treated as a declaratory judgment simpliciter, as, in the present case, Anderson J's orders were both declaratory and executory. She stated that in addition to declaring the interest of the parties in the various properties, the orders specified how and when those interests should have been realised. She identified orders 5-12 as being executory. It was submitted that Barnaby J erred in not finding that Anderson J's orders required "any specific act or abstinence" in keeping with the description of non-declaratory orders.

Respondent's submissions

[29] Miss Tavia Dunn, on behalf of the respondent, submitted that Anderson J's orders were purely declaratory in nature, as they were limited to declaring the parties' interests in the respective properties. She stated that Anderson J did not go further to require some coercive action such as the payment of damages or that the respondent refrain from interfering with the applicant's rights, the breach of which could be sanctioned by the enforcement mechanisms of the court.

[30] It was submitted that a declaratory judgment is a judicial decision that involves the declaration of the law in relation to a particular matter and is complete in itself since

the relief is the declaration. In distinguishing between declaratory and executory judgments, counsel placed reliance on the case of **Norman Washington Manley Bowen v Shahine Robinson and Neville Williams** [2010] JMCA App 27 ('**Norman Washington Bowen**'). Specific reference was made to paragraph [10] of the judgment of Morrison JA (as he then was).

Reference was also made to **R (on the application of the National Council for Civil Liberties (Liberty)) v Secretary of State for the Home Department and another** [2018] EWHC 975 (Admin).

[31] Counsel further submitted that compliance with a declaratory order is based upon the will of the parties, given the absence of any provision for enforcement, and was, therefore, not subject to any process of execution. Reliance was placed on the case of **The Attorney General and others v Jeffrey J Prosser and others**, Court of Appeal of Belize AD 2006, Civil Appeal No 7/2006, judgment delivered 8 March 2007, in which the court (citing Agbaje J in **Chief RA Okoya and others v S Santilli and others**, (SC 200/1989) [1990] NGSC 43 (23 March 1990)) stated at paragraph [29], that "a declaratory judgment may be the ground of the subsequent proceedings in which the right having been violated, receives enforcement but in the meantime there is no enforcement nor any claim to it" (see also **Caribbean Consultants and Management Limited v Attorney General and others**, Court of Appeal of Belize AD 2014, Civil Appeal No 46/2011, judgment delivered 5 February 2015 ('**Caribbean Consultants**')). It was submitted that based on these authorities, Anderson J's orders, being declaratory in nature, could not be enforced and that new proceedings had to be initiated to enforce the rights of the parties.

Analysis

[32] In determining what amounts to a declaratory judgment, the oft-cited text, Zamir & Woolf, 'The Declaratory Judgment', 2nd edition, (1993), pages 1-3 ('Zamir & Woolf') is instructive:

> "Declaratory judgments are contrasted with executory judgments. In executory judgments the court declares the respective rights of the parties, and then proceeds to order the defendant to act in a certain way, e.g., to pay damages or to refrain from interfering with the plaintiff's rights. This order, if disregarded may be enforced through official institutions, mainly by execution levied against the defendant's property or by his imprisonment for contempt of court. **Declaratory judgments, on the other hand, merely proclaim the existence of a legal relationship, and do not contain any order which may be enforced against the defendant**. A few examples may help to clarify their nature and scope. The court may issue a declaration that the plaintiff is the owner of certain property, or that he is a British subject, or that a contract to which he is a party has been terminated, or that a notice served on him by an administrative authority is null and void, and so on…**if the defendant subsequently acts contrary to the declaration, his act will be unlawful. The plaintiff may then again resort to the court, this time for damages to compensate him for loss suffered or for a decree to enforce his declared right**." (Emphasis supplied)

[33] This passage was referred to with approval by Morrison JA in **Norman Washington Bowen**, where the applicant sought a stay of execution of the judgment of Jones J, by which the 2007 election for the constituency of Saint Ann North East was declared to be null and void, and the seat declared vacant. The judgment was required to be served on the Speaker of House of Representatives and the Clerk to the Houses of Parliament. Morrison JA, in refusing the application, stated at paragraph [10]:

> "[10] It will immediately be seen that **the judgment is in substance declaratory, rather than executory, by which I mean that although it does make a pronouncement with regard to the 1st defendant's status as a member of the House of Representatives, it does not purport to order the 1st defendant to act in a particular way**, such as to pay damages or to refrain from interfering with the claimant's rights, either of which would be enforceable by execution if disobeyed." (Emphasis supplied)

[34] This issue also arose for consideration in **Caribbean Consultants**. In that case, Arana J made an order declaring that the appellant was entitled to specific performance of an agreement by the Government of Belize to pay the appellant compensation for land which was compulsorily acquired and to return a portion of that land that was available for transfer to the appellant. The Government failed to comply with this order, and the appellant filed a fixed date claim form seeking constitutional relief on the basis that the breach amounted to an arbitrary deprivation of its rights. The application was refused by Awich J on the basis that the appellant ought properly to have filed an application seeking to enforce the Arana J orders. The appellate court, in determining whether the orders made by Arana J were capable of enforcement, made reference at paragraph [80] to the case of **Chief RA Okoya and others v S Santilli and others**. It reads as follows:

> "[80]…**Chief RA Okoya & ors v Santilli & ors**, SC 200/1989, Supreme Court of Nigeria, in which one of the issues considered was 'whether a defendant who has filed an appeal purely against declaratory orders made against him is entitled to apply for a stay of execution of those orders pending the hearing and determination of the appeal.' Agbaje J. who dealt with this issue in the leading judgment referred to the following as being a 'consensus' among academic writers cited by counsel for the plaintiffs:
>
> > 'First: (i) [An] Executory judgment declares the respective rights of the parties and then proceeds to order the defendant to act in a particular way, eg. To pay damages or refrain from interfering with the plaintiff's rights, such order being enforceable by execution if disobeyed.
>
> Declaratory judgments, on the other hand, merely proclaim the existence of a legal relationship and do not contain any order which may be enforced against the defendant.
>
> > Second: A declaratory judgment may be the ground of subsequent proceedings in which the right having been violated, receives enforcement but in the meantime there is no enforcement nor any claim to it.'
>
> Agabje J then had this to say:

> 'It appears to me that the starting point …. is the consensus that **a declaratory judgment may be the ground of subsequent proceedings in which the right …violated receives enforcement but in the meantime there is no enforcement nor any claim to it**. So, until subsequent proceedings have been taken on a declaratory judgment following its violation or threatened violation there cannot on the clear authorities I have referred to above, be a stay of execution of the declaratory judgment because prior to the subsequent proceedings, it merely proclaims the existence of a legal relationship and does not contain any order which may be enforced against the defendant'." (Emphasis supplied)

[35] The court concluded at paragraphs [84]-[85]:

> "[84] In my view, **the appellant could not seek enforcement proceedings in relation to Arana J's judgment and that they correctly issued new proceedings since GOB did not fully honour the declaratory orders. The appellant could not file enforcement proceedings as no coercive orders were made by Arana J.** As shown by the learned authors of Zamir & Wolf, The Declaratory Judgment, an authority relied on by the appellant, if a defendant acts contrary to a declaration, the plaintiff will not be able to challenge the unlawfulness of his conduct in subsequent proceedings. 'By contrast, the plaintiff may then again go to court, this time for damages to compensate for the loss he has suffered or to seek a decree to enforce the rights established by the declaration.' The appellant by the constitutional proceedings before the learned trial judge sought decrees to enforce the rights established by Arana J's declaration.
>
> [85] In my respectful opinion, the learned trial judge erred when he determined that the proper action to take is to apply to court for an enforcement order. If the appellant had made an application for orders of enforcement on the Claim No. 228 of 2006, as suggested by the learned trial judge, that application would have been misconceived as the Arana J judgment was declaratory in nature and could not be enforced on anyone." (Emphasis supplied)

[36] In the instant case, it is clear that Anderson J's orders are, primarily, declaratory in nature, as they do not require any coercive action or stipulate that the applicant is to refrain from doing any act which may be prejudicial to the interests of the respondent. Orders one to four, as referenced earlier, are limited to declaring the parties' interests in various properties, including the Pitkelleney property. Whilst orders five to 10, simply provide for the working out of the declaratory orders in accordance with the parties' respective interests. As is evident from the cases cited above, a declaratory order is not capable of enforcement. Therefore, where, as in this case, there has been a breach of such orders, it was necessary to initiate new proceedings to seek executory orders, the breach of which could be subject to the enforcement processes of the court.

[37] It was on that basis that it was found that this ground had no arguable prospect of success.

B. Whether the filing of the 2017 fixed date claim form was the appropriate method for the applicant to seek relief?

Applicant's submissions

[38] It was submitted by Ms Gordon that the filing of a second fixed date claim form to enforce Anderson J's orders was inappropriate as it is an originating process. Counsel also submitted that the filing of a further fixed date claim form could not be used as a substitute for enforcement proceedings. In addition, Ms Gordon submitted that the 2017 claim pursued declaratory reliefs, which mirrored those sought and obtained in the 2009 claim. Ms Gordon submitted that if, as the respondent alleged, those orders cannot be enforced, the 2017 claim would be of no benefit to the respondent. She argued that in the circumstances, the respondent ought to have filed a notice of application pursuant to the 'liberty to apply' provision in the judgment of Anderson J.

Respondent's submissions

[39] Ms Dunn submitted that 'liberty to apply' provisions are inherent in declaratory orders of the court. However, an application pursuant to that provision must be limited to "working out the judgement or to vary the terms of the order except, possibly, on

proof of change of circumstances" (see **Michael Causwell and another v Dwight Clacken and another** (unreported), Court of Appeal, Supreme Court Civil Appeal No 129/2002, judgment delivered 18 February 2004, page 14 ('**Causwell**')).

[40] Counsel submitted that such a provision does not, therefore, allow a party to broadly seek a variation of the court's orders. She stated that in determining what amounts to a variation, the particulars of the case must be assessed.

[41] Ms Dunn further argued that it would have been inappropriate for the respondent to seek relief pursuant to that provision, as the orders being sought in the 2017 claim do not fall within the scope of the "working out of the judgment". The relief being sought, she said, arose from the applicant's failure to compensate the respondent for his interest in the Pitkelleney property, which required the enforcement of Anderson J's orders. It was submitted that an application pursuant to the 'liberty to apply' provision would, in effect, amount to one for a variation of Anderson J's orders, where there had been no change of circumstances.

[42] Ms Dunn argued that the orders being sought in the 2017 claim did not mirror the Anderson J orders, as was asserted on behalf of the applicant. It was submitted that in the claim form for the 2017 claim, the respondent seeks a set-off between the value of the properties, which were transferred to him, and that of the Pitkelleney property, which was transferred to the applicant. Order six of the fixed date claim form, she said, seeks the payment of this sum. Counsel submitted that if the order were to be granted, it would be executory in nature, which, in the event of a breach, could be enforced by the court.

Analysis

[43] The declaratory relief sought in the 2017 claim concerned the Pitkelleney property solely. Paragraph one sought a declaration that the land registered at Volume 1481 Folio 375 of the Register Book of Titles is one and the same as that which was dealt with in the 2009 claim and registered at Volume 134 Folio 933. Paragraphs two to four sought declarations that the applicant had breached Anderson J's orders pertaining to the

exercise of her option to purchase the said property. Paragraph five sought a declaration that the respondent was entitled to be paid the sum of $8,825,000.00 by the applicant for his interest in the Pitkelleney property and construction costs. Paragraph six sought an order for the immediate payment of that sum.

[44] The parameters within which the 'liberty to apply' provision can be utilised was examined by this court in **Causwell**. In that case, the appellants and the respondents were shareholders in a company. On the respondents' application to wind up the said company, R Anderson J, by consent order made on 29 May 2002, directed the appellants to purchase the shares in the company, which were registered in the name of the respondents. Consequential orders were made to support the transfer of the shares, including the valuation of the shares and the payment of the purchase price. The valuation of the shares was not completed by the specified date, and on 22 August 2002, the time for doing so was extended utilising the 'liberty to apply' provision. The valuation was not done during the extended period and the respondents sought to amend the consent order pursuant to the 'liberty to apply' provision. In November 2002, the learned judge made orders for the valuation of the shares and for payment of the purchase price. On appeal, the appellants complained that the learned judge had no authority to grant the relief on the second application. This was because the orders were said to have fundamentally altered the terms of the original consent order.

[45] Smith JA, in his analysis of the scope of the 'liberty to apply' provision, explained at page 17 of the judgment:

> "The insertion of 'liberty to apply' does not enable the court to deal with matters which do not arise in the course of the working out of the judgment or to vary the terms of the order except possibly, on proof of change of circumstances."

At page 18, he further explained, that the 'liberty to apply' provision:

> "…give[s] each party the right to apply to the court for further directions in relation to any part of the order in so far as the working out of the order is concerned. The critical question

> for this court, therefore, is whether the order made by Anderson J on the 20th November, 2002 was for the working out of the May Consent Order which was varied with the consent of the parties by the August 22 Order."

[46] The court found, in that case, that with the exception of one order, there was no fundamental change to the May 2002 order. The court was also of the view that the new orders that were included in the November order allowed for the proper administration of the orders by inserting timelines for the valuation of the shares and making certain provisions if there was a failure to comply with the said order. In other words, it was geared at ensuring the timely execution of the order. At page 22 of the judgment, Smith JA stated:

> "It is in our view quite clear that by their agreement the parties contemplated that, if necessary, the court should have, and exercise the power to amend the time frames set out in the May Consent Order so as not to render that Order meaningless or unfair."

[47] In the circumstances, the court concluded that the learned judge had the jurisdiction to make the orders he did, pursuant to the 'liberty to apply' provision.

[48] In **Koh Ewe Chee v Koh Hua Leong and Another** [2002] SGHC 100, the plaintiff and the two defendants were partners in a firm known as Sin Wah Seng. Disagreements developed between them, and the defendants, by way of originating summons, applied to dissolve the partnership. Shortly thereafter, the defendants served a notice of dissolution on the partnership and applied to amend the originating summons by the addition of a prayer for a declaration that the firm was dissolved as at the date of the notice. The application was withdrawn, and a notice of discontinuance was filed. The next day, an originating summons for an order to appoint two named receivers and managers of the partnership was filed. The application was granted. The receivers were unable to determine the partners' shares in six of the firm's seven properties. Consequently, the plaintiff made an application pursuant to the 'liberty to apply' provision of the order for a declaration that the firm was a sole proprietorship and for the discharge

of the receivers and managers. Additionally, he sought a declaration that the defendants were holding seven properties on trust for him and that they be ordered to transfer title to him.

[49] Choo Han Teck JC, having referred to **Christel v Christel** [1951] 2 KB 725, stated at paragraph five:

> "…the 'liberty to apply' order, which is really a judicial device not dissimilar to its procedural cousin the "slip rule", is intended to supplement the main orders in form and convenience only so that the main orders may be carried out. To this end, errors and omissions that do not affect the substance of the main orders may be corrected or augmented, but nothing must be done to vary or change the nature or substance of the main orders because the variation of orders are governed by other rules, depending on the context of the individual case. For example, in a matrimonial matter, the court may have no power to vary unless there is a change of circumstances, or if it was made with the consent of the other party. It is true that sometimes solicitors may be confused as to the ambit of a 'liberty to apply' order. There are, in my view, two main reasons for this. First, as I have just said, what amounts to a supplemental order to give effect to the main orders can only be appreciated in the context of the individual case. Thus, what appears to be a further order to give effect to the original order in one case may appear as a variation in a different context. Secondly, parties often, by consent, apply for a variation of the original order under a 'liberty to apply' order. But where substantial changes are intended to be made to the original or main orders the proper mode and procedure must be adopted. An application under a 'liberty to apply' order is, therefore, not the way. This present case before me is a clear example of why that is so."

[50] The court found, in that case, that the orders that were being sought were not minor as they were based on fundamentally different assertions from those advanced when the original order was granted. Choo Han Teck JC concluded at paragraph 6:

> "[6] To correct so fundamental a premise, the entire order of the court … must be overturned and set aside and fresh pleadings be drawn up. It is not a minor improvement to be

> dealt with, least of all, under a 'liberty to apply' appendage. The present cause was therefore irremediably lost from the outset."

[51] The respondent in the present case is not seeking a 'working out' of Anderson J's orders. He is seeking declarations that the applicant had breached those orders and owed a certain sum. Such relief could not be obtained by utilising the 'liberty to apply' provision. The 2017 claim was, therefore, not one for enforcement of the 2009 orders but, rather, a precursor to enforcement if the orders sought were granted.

[52] Based on the above, this ground had no realistic prospect of success.

C. Whether the filing of the 2017 claim amounted to an abuse of the process of the court and should have been struck out by Barnaby J?

Applicant's submissions

[53] Ms Gordon submitted that the 2017 claim was an abuse of process, as, firstly, it was an attempt to re-litigate the issues concerning the Pitkelleney property by seeking additional declarations. This, it was said, would amount to the existence of two fixed date claim forms dealing with the same issues. Secondly, the fixed date claim form for the 2017 claim did not include crucial evidence, which was assessed in the 2009 claim. This information, counsel submitted, was necessary for Barnaby J to understand in treating with the 2017 claim, which concerned property that had already been the subject of adjudication.

[54] Counsel relied on the supporting affidavit referenced in paragraphs (14) and (15) of Anderson J's judgment. It states:

> "(14) The Affidavits filed by both parties contain numerous allegations and denials in respect of the arrangements which existed between the parties….The Court finds that the Defendant was a more credible witness and that her demeanour was more consistent with one telling the truth.
>
> (15) In that regard the Court was struck forcibly by the admission of the Claimant in cross-examination, that he does not know anything about the school fess of his own son…nor

> has he contributed to the costs of medical treatment for his daughter. This is in spite of his own averment referred to above that throughout the marriage he 'supported our household and educated our children who are now young professionals'."

[55] It was further submitted that the respondent breached Anderson J's orders in respect of properties, other than Pitkelleney, in transferring all the interest to himself and selling the property known as Sheffield. This, it was said, has affected how the applicant has had to treat with the Pitkelleney property, as she had nowhere else to live. Counsel stated, that based on the supporting affidavit, the applicant, with the assistance of her children, had to acquire a mortgage on the Pitkelleney property, and as such, their names had to be added to the certificate of title.

[56] Ms Gordon also submitted that the appellant's ownership of the Pitkelleney property was by way of a trade-off for another property with the respondent. This agreement, was, however, not put in writing. These circumstances, it was submitted, were all relevant considerations that had not been disclosed in the 2017 claim. It was submitted that in the circumstances, Barnaby J ought to have struck out the 2017 claim as an abuse of process, pursuant to section 26.3 of the CPR, on the basis that the filing of it, was an inappropriate attempt to resolve issues already disposed of by the 2009 claim. Reliance was placed on the case of **Hunter v Chief Constable of the West Indies Midlands Police and others** [1982] AC 529 ('**Hunter**').

Respondent's submissions

[57] Ms Dunn accepted that where judgment is given in a matter, the cause of action therein ceases to exist, and as such, a second action cannot be brought on the same grounds. This second action, if initiated, would amount to an abuse of process as conflicting judicial decisions could arise (see **Stephenson v Garnett** [1898] 1 QB 677 at 680-681).

[58] It was, however, submitted that this does not bar the enforcement of any judgment (see **Rukhmin Balgobin v South West Regional Health Authority** [2012]

UKPC 11). In the circumstances, the initiation of the 2017 claim was not being utilised to re-litigate 'dead' issues but to seek enforcement of Anderson J's orders.

Analysis

[59] It was submitted on the applicant's behalf that the filing of the 2017 claim amounted to an abuse of the process of the court and, as such, Barnaby J ought to have struck out the claim. The jurisdiction of the court to strike out a claim lies in rule 26.3 of the CPR, which provides that:

> "26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court - (a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings; (b) **that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings**…" (Emphasis supplied)

[60] In addition to the above rule, the court has an inherent jurisdiction to strike out statements of case, which are shown to be an abuse of its process. This power is a discretionary one, and the relevant case law indicates that it is only to be exercised in exceptional circumstances, that is, in plain and obvious cases.

[61] It must, therefore, be assessed whether the filing of the fixed date claim form by the respondent amounted to an abuse of process. In this regard, the case of **Stephenson v Garnett** is useful. In that case, a judgment was obtained for a sum of money and costs against S. S asserted that he was impecunious and G, out of sympathy for him, agreed to accept a smaller sum than that for which judgment was given. G executed a deed releasing S from the judgment debt and the payment of costs. G subsequently sought to tax his bill of costs, having alleged that the release had been obtained as a result of misrepresentation. The county court judge found in G's favour and ordered that the remainder of the judgment debt be paid together with the taxed costs. S then brought subsequent proceedings for a declaration that he had been released from the judgment

debt and from the payment of costs. In response, G brought a summons to stay the action and for the statement of claim to be struck out on the ground that they were frivolous and vexatious, and an abuse of the process of the court. The district registrar ruled in his favour. S appealed and the court of appeal found that the action brought by S was:

> "…frivolous and vexatious and an abuse of the process of the Court…o**n the ground that the identical question raised in [the] action was raised before the county court judge upon an application for an order to tax the costs of the action in the county court, and was heard and determined by him**" (Emphasis supplied)

[62] The court also stated that:

> "…it [was] perfectly clear from the evidence …that the question there was the same as that now raised in [the] action, namely whether the deed of release was obtained by fraud."

[63] The term abuse of process was described by Lord Diplock in **Hunter**, at page 536 as:

> "…[the] misuse of [the court's] procedure in a way which, although not inconsistent with the literal application of its 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."

His Lordship further stated:

> "…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."

[64] In considering whether the filing of the 2017 claim was an abuse of process, the relief being sought had to be scrutinised. As already stated above in addressing issue (B),

the relief sought in the 2009 and the 2017 claims were distinguishable. The applicant in the 2017 claim was not seeking to address the issues which arose on the 2009 claim, but was seeking the grant of coercive orders which are capable of enforcement, if breached by the respondent.

[65] In light of the above, this ground also had no reasonable prospect of success.

Conclusion

[66] The application to strike out the 2017 claim was based on the premise that it sought the same reliefs that were granted by Anderson J in the 2009 claim. Barnaby J found that the former claim was not an attempt to re-litigate the 2009 claim, as Anderson J's orders were declaratory. We agreed with her reasoning and conclusion. In the circumstances, we refused the application for leave to appeal the judgment of Barnaby J and made the orders set out at paragraph [2] above. In light of that decision, there was no need for the court to consider whether an order for stay of Barnaby J's order should be granted pending appeal.