IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2024] (18 December 2024)

SCA MA 18/2024 AND SCA 10/2024

(Arising in CS 119/2022)

In the matter Between

Laura Berlouis **Appellants**

Jonathan Berlouis

(rep. by Ms V Gill)

And

The Estate of the Late Ogilvy Berlouis **Respondent**

(rep. by Mr. B. Hoareau)

Neutral Citation: *Berlouis & Anor v The Estate of the Late Ogilvy Berlouis* (SCA 10/2024) [2024] (arising in CS 119/2022) (18 December 2024)

Before: Fernando President, Robinson, Andre JJA

Summary: **Res-judicata – Distinct causes of action – The Right party to sue – Abuse of process – Rules 3 (1) and 31 (5) of the Court of Appeal of Seychelles Rules 2023.**

Heard: 2 December 2024

Delivered: 18 December 2024

ORDERS

The Court makes the following Orders:

(i) The Appeal is allowed in its entirety.

(ii) The decision of the Supreme Court is set aside and the matter is remitted back to the Supreme Court for hearing on the merits by another Judge.

(iii) In pursuance to Rules 3(1) and 31(5) of the Court of Appeal Rules, I hereby remit this matter to the Supreme Court with directions to join the beneficiary as a party to ensure the "full, effectual, and final determination of the matter."

(iv) No Order is made as to costs.

JUDGMENT

ANDRE, JA

(Fernando President concurring)

INTRODUCTION

[1] The plaintiffs, Jonathan and Laura Berlouis (now appellants), initiated an action against the estate of the late Ogilvy Berlouis, represented by its executor (respondent), seeking a reduction of alleged gratuitous dispositions made by the deceased in his will dated 20 December 2017. The appellants contended that these dispositions exceeded the disposable portion under Articles 920 and 913 of the former Civil Code of Seychelles and sought a redistribution of the estate.

[2] This suit was the third in a series of related cases.

[3] The first case, *CS 146/2018*, was initiated by the Appellants however, they subsequently withdrew the case before any final judgment or substantive determination was rendered by the Court.

[4] In the second case, *CS 74/2020*, the Appellants sought to invalidate the entirety of the deceased's will and testament. This second suit was dismissed by the Supreme Court on the grounds that the relief sought - complete nullification of the will - was not permissible

under the applicable law, which only allows for the reduction or variation of dispositions exceeding the lawful disposable portion.

[5] Following the dismissal of *CS 74/2020*, the appellants brought the current suit, which is presently the subject of this appeal. In that suit, the Appellants altered their legal approach and sought an order for the variation of the specific dispositions within the will that were alleged to exceed the permissible limits set by law under Articles 920 and 913 of the former Civil Code.

[6] Consequently, this led to the Respondent raising pleas in limine. The Respondent argued that the present case was frivolous, vexatious, an abuse of the court process, and barred by the doctrine of *res judicata*. The respondent submitted that the current suit was identical in subject matter, cause of action, and parties to *CS 74/2020*, invoking the principle that issues already adjudicated cannot be re-litigated.

[7] The Respondent further contended that the repetitive nature of the appellants' actions rendered the suit frivolous and vexatious and amounted to an abuse of the judicial process, causing unnecessary costs and harassment for the Respondent.

[8] The court upheld the respondent's pleas in limine, finding that the threefold identity of subject matter, cause of action, and parties between the present suit and *CS 74/2020* satisfied the criteria for *res judicata* under Article 1351 of the Civil Code. The court determined that the earlier dismissal of *CS 74/2020* constituted a final judgment on the merits. It further agreed that the appellants' repeated attempts to re-litigate the same issues constituted harassment, lacked sufficient grounds, and disrupted judicial efficiency and fairness, amounting to an abuse of process. Consequently, the court dismissed the case.

GROUNDS OF THE APPEAL

[9] The Appellants now challenge that dismissal, contending that the third suit was improperly barred by *res judicata*, given the distinct relief and legal grounds advanced in the proceedings as seen in the initial grounds of appeal.

a. ***The Learned Trial Judge erred in finding that the matter was res judicata in that the threefold identity of parties, cause of action and subject-matter related had not been made out between the matter under appeal and the previous one filed.***
b. ***The Learned Trial Judge erred in finding that the matter was an abuse of process in that the previous matter had resulted in her finding that the deceased could not have gifted the entirety of his estate to the Respondent and only dismissed the plaint because it had not been brought in a proper manner.***

[10] The Appellants subsequently amended their grounds of appeal to make them more elaborative as follows

Ground One:

a. ***The Learned Trial Judge erred in finding that the matter was res judicata in that the threefold identity of parties, cause of action and subject-matter related had not been made out between the matter under appeal and the previous one filed in that the parties in all three cases were different and were not acting in the same capacities, and the causes of action, being the avoidance of the Will and the reduction of the dispositions therein, were not identical. There was thus no congruence of the same claim over the same thing between the same persons acting in the same capacities to amount to res judicata or authorite de la chose jugee***

Ground Two

b. ***The Learned Trial Judge erred in finding that the matter was an abuse of process in that the previous matter had resulted in her finding that the deceased could not have gifted the entirety of his estate to the Respondent and only dismissed the plaint because it had not been brought in a proper manner. The finding of the Learned Trial Judge ignored the legal principle that there is no absolute bar to pursuing in a later cause a subject which could have been advanced in earlier proceedings and, on a merits-based approach, it was just for***

Plaintiffs then to pursue an action which the Trial Court had previously found to be a 'genuine claim'.

Reliefs sought

[11] The appeal be allowed setting aside the judgment of the Supreme Court and ordering the reduction of the dispositions in the Will of the deceased according to the provisions of the law.

Appellants submissions

[12] The Appellants challenge the Supreme Court's decision dismissing their claim for reduction of the gratuitous dispositions made in the Will of the late Ogilvy Berlouis. They argue that the dispositions exceeded the disposable portion allowed under Articles 913 and 920 of the Civil Code of Seychelles and infringed upon their reserved rights as heirs. The Appellants emphasize that their claim is distinct from prior proceedings and grounded in substantive rights guaranteed by law.

[13] In addressing the issue of res judicata, the Appellants submit that the present claim is neither identical in subject matter nor cause of action to the previous cases. They argue that the earlier cases concerned challenges to the validity of the Will (CS 74/2020) and a request for variation of the dispositions (CS 119/2022). The current suit, in contrast, focuses solely on the reduction of excessive dispositions to safeguard their reserved shares. Furthermore, the Appellants assert that the parties in this case are different, as the current suit is brought against the Estate in its representative capacity, whereas the earlier cases involved the Executor personally. They rely on the authority of ***Cable and Wireless Seychelles Ltd v Gangadoo (SCA 14/2015)***, which outlines the requirement for a threefold identity of subject matter, cause, and parties to establish res judicata. Additionally, they reference ***Beetier de Sauvigny v Courbevoie Ltd (1955 MR 215)***, which reinforces the principle that for res judicata to apply, the issues must have been conclusively adjudicated on their merits.

[14] On the question of abuse of process, the Appellants contend that their action is neither frivolous nor vexatious but arises from a legitimate grievance concerning their reserved inheritance rights. They maintain that the previous dismissals of their claims were based on procedural grounds and did not address the substantive issues of their reserved shares under Article 913 of the Civil Code. They argue that their current action seeks to enforce rights that were not considered in the prior cases. Citing ***Johnson v Gore Wood & Co [2002] AC 29,*** the Appellants assert that subsequent proceedings are not an abuse of process when earlier cases failed to resolve the core issues. They also rely on ***Brisbane City Council v Attorney-General for Queensland [1979] AC 411***, which supports the principle that parties should not be precluded from pursuing a genuine subject of litigation simply because of prior procedural failures. In further support of their position, they cite ***Lo Lai Shui v HSBC International Trustee Ltd [2021] HKCFI 1539***, which advocates a merits-based approach to assessing whether subsequent litigation constitutes abuse of process. That since the trial judge previously found that they had a 'genuine claim', they then cannot be barred from pursuing the same and such pursuit should not be seen as an abuse of process.

[15] The Appellants conclude that their action is properly brought to enforce their rights as reserved heirs and ensure compliance with Articles 913 and 920 of the Civil Code. They maintain that neither res judicata nor abuse of process applies to bar their claim, as the substantive issues of reduction and reserved rights remain unresolved.

Respondent's submissions

[16] The Respondents submit that the trial court correctly dismissed the Appellants' suit on two principal grounds: res judicata and abuse of process. They contend that the matter was adequately adjudicated in earlier cases and the current claim represents a misuse of judicial processes.

[17] Regarding res judicata, the Respondents argue that the threefold identity of subject matter, cause of action, and parties is satisfied under Article 1351 of the Civil Code. They emphasize that the prior suits, particularly CS 74/2020, addressed the same core issue:

the alleged excessive dispositions made in the Will of Ogilvy Berlouis. The Respondents point out that the relief sought in both the second and third suits is essentially identical - a redistribution of the estate in compliance with Articles 913 and 920 of the Civil Code. Furthermore, they argue that the identity of parties exists, as the estate of Ogilvy Berlouis was a defendant in both cases, and the Appellants brought the claims in their capacities as heirs. The Respondents rely on ***Bertier de Sauvigny v Courbevoie Ltd (1955 MR 215)*** and ***Soobhany v Salamath (1966 MR 43)*** to support their contention that the identity of subject matter and cause of action can exist even if there are nuanced differences in how the claims are framed.

[18] On the issue of abuse of process, the Respondents argue that the repeated litigation of claims that could and should have been addressed in prior suits amounts to harassment. They emphasize that the Supreme Court in CS 74/2020 already made findings on the validity of the dispositions in the Will and the Appellants' reserved rights. The Respondents rely on ***Johnson v Gore Wood & Co [2001] 2 WLR 72*** to support their assertion that raising the same issues in successive proceedings without justification is an abuse of process. They further cite ***Michael Wilson & Partners Ltd v Sinclair [2017] EWCA Civ 3*** and ***Lo Lai Shui v HSBC International Trustee Ltd [2021] HKCFI 1539,*** which affirm the need for a merits-based analysis to determine whether repeated claims unjustly harass the opposing party.

[19] The Respondents also argue that the suit was frivolous and vexatious, as it was brought against an improper party. They contend that under Articles 920 and 718 of the Civil Code, a claim for reduction of excessive dispositions must be directed at the beneficiaries of the dispositions, not the estate itself. They cite ***Contoret v Contoret [1971] SLR 257*** to emphasize that the action for reduction arises upon the death of the testator and must be maintained against those who benefit from the excessive dispositions. Additionally, they argue that suing the "estate" as a non-existent legal entity is procedurally defective, referencing ***Lazard Brothers & Co. v Midland Bank [1933] AC 269*** to underscore that a claim against a non-existent party is a nullity.

[20] In conclusion, the Respondents submit that the Appellants' current suit constitutes an impermissible relitigation of matters already resolved, improperly targets the estate rather than the beneficiary, and seeks to misuse judicial resources. They urge the court to uphold the trial court's findings and dismiss the appeal with costs.

A. Resolution of Ground One - *Res Judicata*

[21] This suit on appeal CS119 was filed in 2022 and as such is governed by the New Civil Code 2021. The plea of *res judicata* was at the material time governed by Article 1351 of the Civil Code which reads thus

1. *A final judgment has the effect of res judicata only in respect of the subject matter of the judgment.*
2. *It is necessary that the demand relate to the same subject matter, that it relate to the same cause of action, that it be between the same parties and that it be brought by them or against them in the same capacities.*

[22] From this provision, Seychellois Courts have derived four essential elements for *res judicata:* See ***Nourice v Assary SLR [1991] 80: Attorney-General v Marzorcchi (1996 – 1997) SCAR 225: Lesperance v Ernestine Anor (SCA 15 of 2020) 2023 SCCA 14.***

1. The subject-matter should be the same
2. The cause of action should be the same
3. The parties should be the same (and in the same capacities)
4. The previous judgment should be a final judgment of a court of competent jurisdiction.

[23] The learned Judge in the impugned Ruling in concluding that the matter was precluded by *res judicata* said the following at paragraphs [45] [46] and [47]:

> *[45] In all three matters the Plaintiffs sought and seeks a re-distribution of the succession of the Late Ogilvy Berlouis.*

> *[46] All three matters arise from the same set of facts, the dispositions made by the Late Oglivy Berlouis albeit the first matter related to a transfer effected before his death whereas the second matter and the current matter concerns the dispositions made in his last Will and Testament dated 20th December 2017 and seeking a reduction of same*
>
> *[47] The first matter was filed by the first Plaintiff as the daughter and heir of the deceased. The second matter and simillarly the third matter was filed by the Plaintiff and second Plaintiff as children and heirs of the deceased. All three matters were filed with the Estate of the Late Ogilvy Berlouis represented by its Executor Maryse Berlouis as a party or the sole party.*

[24] With due respect, the Learned Judge appears to conflate some key issues regarding the application of the principle of *res judicata*. Upon examining the elements of *res judicata* discussed earlier - namely, the identity of subject matter, cause of action, and parties in the same capacity - it is evident that the judge may have oversimplified or overlooked important distinctions between the three cases.

[25] In paragraph [45], the judge emphasizes that in all three matters, the Plaintiffs sought a redistribution of the deceased's estate. However, the mere fact that the Plaintiffs aimed to achieve redistribution does not automatically establish the identity of the subject matter or cause of action.

[26] In the first case, the Plaintiffs initially sought the return or redistribution of a transfer made during the deceased's lifetime. However, this suit was voluntarily withdrawn before any judgment on the merits could be rendered. The withdrawal, in the absence of a final determination on the substantive issues, precludes this case from satisfying the requirement of a "final judgment" under the doctrine of res judicata. This principle is well-established in Seychellois jurisprudence, as illustrated in cases such as ***Lesperance v Ernestine & Anor (Civil Appeal SCA 16/2021)*** **[2023] SCCA 14,** ***Nourrice v Assary (1991) SLR 80,*** **and** ***Attorney-General v Marzorcchi (1996-1997) SCAR 225.*** These authorities reaffirm that for res judicata to apply, the previous judgment must be

conclusive and final, resolving the substantive rights of the parties. This is also well in line with Article 1351 of the Civil Code of Seychelles which provides in relevant part:

> *"1. The authority of a final judgment shall only be binding in respect of the subject-matter of the judgment.*

[27] As a result, the withdrawn case cannot constitute a valid basis for a plea of res judicata. Therefore, for the purposes of evaluating whether res judicata applies, I will limit my analysis to the two subsequent cases, CS72/2020 and CS119/2022, which involve adjudicated issues with final determinations.

CS74/2020

[28] In the second case, CS74/2020 the Plaintiffs who are the current Appellants sought the following prayers as can be observed in their amended plaint;

a) That the Will of the 1st Defendant is declared void to the extent that it leaves the entirety of the 1st Defendant's estate to the 2nd Defendant;
b) That the Plaintiffs and the other heirs listed in paragraph 2 of the Plaint are declared heirs under the Will;
c) That the 1st Defendant provides all heirs with an inventory of the 1st Defendant's estate and that any dispositions to the 2nd Defendant are declared null and void and brought back to the hotchpot;
d) That the 1st Defendant is ordered to distribute the estate of the 1st Defendant amongst all the heirs;
e) That the 1st Defendant is to pay to the Plaintiffs the sum of SCR100,000.00 as moral damages

[29] From a perusal of these grounds, it is clear the cause was for a complete voidance of the deceased's Will. The trial judge in that matter indeed agrees with this conclusion and holds that

[30] The pleadings disclose that the Plaintiffs firstly seek a declaration that the Will is void, secondly that they be declared heirs and provided with an inventory and thirdly that they be awarded damages.

[30] In paragraph 33 of that CS74/2020 judgment, on guidance from the Defendant, the trial judge again highlights that this cause was indeed one for voidance of the will and not reduction of the disposition

[33] …(I)ndeed as Learned Counsel for the Defendants points out, if this Court orders a reduction in favour of the Plaintiffs which would morally be the right thing to do, this Court would be acting in excess of its powers as in the current matter there was no prayer for a reduction but a declaration that the Will is void.

[31] The trial judge in that CS74/2020 judgment then concludes that the Plaintiffs' cause of action should have been one of reduction of disposition under Article 920 of the Civil Code 1976 and not voidance of the Will. This conclusion further highlights that in the trial judge's mind, there existed two distinct causes of action - voidance of the Will on one hand (which the Plaintiffs erroneously pursued) and reduction of disposition on the other.

*[42] ...**the Plaintiffs in the instant case do indeed have a genuine claim but sadly it was not brought in the proper manner.***

CS119/2022

[32] In the third case, the Plaintiffs modified their legal strategy to seek a variation of the dispositions in the Will, not its entire voidance as concluded in CS74/2020. This is revealed in their Plaint where they pray for a judgment to -

1. *Declare that the dispositions in the Will of Ogilvy Berlouis dated 20 December 2017 be varied in accordance with the law;*

2. *Order the estate of the late Ogilvy Berlouis to be distributed by his executor in accordance with the law in order that the Plaintiffs obtain their rightful share thereof."*

[33] Indeed when probed during the hearing of this appeal, Counsel for the Appellants (Plaintiffs in CS119/2022) insisted that they instituted this third case prompted by the trial judge's comments *the Plaintiffs in the instant case do indeed have a genuine claim but sadly it was not brought in the proper manner".* That this case was now the proper manner advised.

Distinct Causes of Action

[34] Against the above background, the key issue is whether the second and third suits involve materially distinct causes of action - voidance of the Will *versus* variation of specific dispositions.

[35] Counsel for the Respondent agrees with the learned trial judge in CS119/2022 that in all three matters, the Plaintiffs sight and seek a re-distribution of the succession of the late Ogilvy Berlouis. That since the ultimate relief sought is the same in all cases - redistribution of the estate - then r*es judicata* arises.

[36] I disagree with this conclusion. Varying/reducing specific depositions in a Will is a far cry from voiding the entire Will.

[37] A person's Will encompasses much more than just specific bequests of assets to particular beneficiaries. It also includes critical instructions, such as the appointment of guardians for minor children (if any), specifying who will care for them in the event of the testator's passing. Additionally, it reflects the testator's preferences for funeral arrangements, including burial or cremation, and may outline conditions under which beneficiaries are entitled to their inheritance, such as reaching a certain age or achieving a specific milestone.

[38] When a court voids a Will, all these carefully articulated wishes are rendered null and void, leaving the estate to be distributed according to intestacy laws. This disregards the testator's explicit intentions, potentially causing outcomes that may differ significantly from their original wishes. By contrast, when a court modifies only a specific clause in a Will - such as adjusting the portion of the estate allocated to a particular beneficiary - it preserves the overall validity of the document.

[39] To further illustrate, if a Will includes a clause granting a property to Beneficiary A, and a court finds that this clause was included under undue influence, the court may invalidate just that specific provision while upholding the rest of the Will. On the other hand, if the entire Will is challenged on the grounds of the testator's mental incapacity at the time of execution, and the court finds the claim valid, the entire Will is rendered void, and none of its provisions take effect.

[40] Thus, varying a specific deposition aligns with targeted rectification, preserving the broader intent of the testator, whereas voiding the will extinguishes all intentions expressed within the document.

[41] The idea forwarded by both Counsel for the Respondent and the trial judge focusing on the ultimate relief and general aim of redistribution oversimplifies and potentially ignores this crucial distinction.

[42] If, in the future, it were revealed that the late Berlouis was under some form of mental incapacity at the time of writing the Will, should the Court hold that any subsequent cause of action is barred by res judicata merely because the cause for the reduction of the disposition has already been adjudicated? Such an approach would be problematic and unjust. Mental incapacity directly challenges the validity of the entire Will, presenting a distinct cause of action fundamentally different from a claim seeking the reduction of a particular disposition. Res judicata applies only when the cause of action, the facts, and the relief sought are identical. To conflate these issues and bar a claim of incapacity under res judicata would deny litigants the opportunity to address a legitimate legal grievance that was never adjudicated, thus undermining the principles of justice and fairness inherent in the doctrine.

[43] Both parties have cited ***Bertier de Sauvigny v Courbevoie Ltee [1955] M.R 215***, wherein the Supreme Court of Mauritius dealt with res judicata. Herein, the court found that the 'cause' in the first case was the alleged fact that an impugned company resolution was ultravires, <u>fraudulent</u> and oppressive to the minority shareholders. In the second case, the

cause consisted of allegations of the majority being unfair and fraudulent in their conduct. The court failed to countenance the idea that the two cases had different causes.

[44] The Court in relevant part posited that

> *"The "objet" is what is claimed (il faut que la chose demandée soit la même). It is due to the necessity of keeping very distinct "la cause de la demande" and "les moyens de la demande". "Les moyens are the arguments and submissions which can be advanced in support of the claims. It stands to reason that a party could not start an action anew simply because he failed to present to the court all the arguments which were available to him at the time of the trial. So that the identity of "moyens" is indifferent; the presumption of "l'autorité de la chose jugée" may well apply, notwithstanding the non-identity of moyens: la cause is the fact, or the act, whence the right springs. It might be shortly described as the right which has been violated".*

[45] Therefore even if the arguments (*moyens*) presented in the two cases are identical, if the *cause de la demande* (the legal basis or cause of action) and the *objet* (the claim itself), are different in the two cases, the plea of res judicata must fail on this account. This means that while a party cannot relitigate a claim simply by introducing new arguments or evidence that could have been presented in the original case, they can litigate a new cause of action and claim.

[46] To that extent, I conclude that while the two cases CS74/2020 and CS119/2022 may involve similar arguments, they hold distinct causes of action and subject matter. Consequently, the doctrine of res judicata does not apply in this instance.

[47] Further, the learned Judge's 2021 judgment in CS 74/2020 (the second case) holds that there was no cause of action disclosed by the suit. A dismissal on the grounds of failing to disclose a cause of action is inherently procedural and does not result in a final determination of the substantive issues between the parties. As seen, the second case ruling was on pre-limine grounds and as such the learned trial Judge's application of *res judicata* in this third case reveals cannot be legally maintained since there must have been

a conclusive judgment on the merits in the previous case. (see ***Nourrice v Assary (1991) SLR 80: Thyroomooldy v Nanon (SCA 1 of 2015) [2017] SCCA 15 (21 April 2017))***

[48] Secondly, the learned trial judge's application of *res judicata* in this case reveals a significant inconsistency with her prior ruling.

[49] By dismissing the first suit on procedural grounds, the learned judge effectively indicated that the court had not engaged with the substantive rights or liabilities of the parties. Consequently, it was erroneous to later assert that *res judicata* barred a subsequent suit which was premised on a revised legal claim.

[50] The Court of Appeal has previously addressed this issue in the case of ***Thyroomooldy v Nanon (SCA 1 of 2015) [2017] SCCA 15 (21 April 2017)***, where it relied on the dictum of Domah J in ***Chez Deenu Pty Ltd v Seychelles Breweries Limited (unreported) SCA 22/2011***. In that case, Domah J held that when a court finds an action untenable in law, it may be more appropriate to declare the matter non-suited rather than dismissing it. Domah J stated:

> *"The appropriate order to make in a case where the court gives the option to a litigant to bring a proper case because the decision is based only in law and the evidence has not been heard on the merits of the case is* ***to non-suit the action. This enables the litigant unsuccessful in law but with a possible success in another cause of action to bring a proper fresh action."*** Emphasis mine

[51] During the Court of Appeal hearing, Counsel for the Respondents argued that the concept of non-suit does not exist under Seychelles law; however, this assertion is incorrect. This Court would refer him to the case of ***Finesse v Cesar (SCA 47 of 2019) [2022] SCCA 21 (29 April 2022)***. In that case, Bertha Cesar alleged fraud in the transfer of her land to Jimmy Finesse, claiming her thumbprint was placed on a blank document without her consent and no consideration was paid. Finesse admitted no payment was made but asserted Cesar approved the transfer. The trial court declared the sale void due to non-compliance with the Land Registration Act and Cesar's lack of understanding of the transaction. On appeal, this Court found significant procedural defects, including the fact

that both the plaint and defence were incoherent and failed to meet legal requirements; there was non-joinder of key parties as the attorney and Land Registrar, were not included in the suit and the suit improperly combined elements of delict and contract.

[52] The Court ordered a non-suit, allowing Cesar to refile her case with corrected pleadings and necessary parties. This decision reaffirms Seychelles' recognition of non-suit as a remedy to ensure justice when procedural shortcomings impede substantive adjudication.

> *it must be noted that in Mein v Chetty (No 1),9 it was queried whether our procedural laws provided for the remedy of non-suit. The remedy was abolished in England in the late 19th century and was replaced by the rules of court relating to the discontinuance of suits. Our Code of Civil Procedure is silent on non-suit but also provides for discontinuance of suits. Hence, section 182 provides for a plaintiff to give notice to discontinue a suit he has filed before a defence is filed or with leave of the court at any time until judgment is given in the matter. There are limits to this procedure however and it does not cater for other non-suit circumstances such as the present case.*
>
> *In the present appeal, the peculiar circumstances do not lend themselves to either an order for dismissal or one for the confirmation of the court a quo's decision.*
>
> *I note however that Rule 31 (5) of the Seychelles Court of Appeal Rules provides as follows:*
>
> > *"In its judgment, the Court may confirm, reverse or vary the decision of the trial court with or without an order as to costs, or may order a re-trial or may remit the matter with the opinion of the Court thereon to the trial court, or may make such other order in the matter as to it may seem just…" (emphasis added)*
>
> *As this court is empowered to make any order that seems just and given the most peculiar circumstances of this case, it is my belief that the most just order is an order for non-suit. Subsequent to this order, the Respondent would be therefore*

> *free to file a suit appropriately. In football parlance, this is neither a win nor a lose situation for either party in the present case - it is a draw.*

[53] In the second case CS74/2020 dated 31st December 2021, the learned Judge should have followed this rationale. She observed:

> *"[42] ...**the Plaintiffs in the instant case do indeed have a genuine claim but sadly it was not brought in the proper manner.***
>
> *[43] The plea in limine having succeeded on the basis that there is no cause of action disclosed against the 2nd Defendant and reasonable cause of action disclosed against the 1st Defendant. The plaint is hereby dismissed."*

[54] In light of these findings, where the Judge should have practically non-suited the second case and explicitly held that no cause of action was disclosed, it is perplexing that she subsequently ruled the third case was barred by *res judicata* because it involved the same cause of action as the second case. This is contradictory because *res judicata* requires a final determination on the merits of the claim, and the finding of "no cause of action" in that second case was procedural, not substantive. The prior decision did not involve a resolution on the merits of the Plaintiffs' claims, making it legally unsound to invoke *res judicata* in the third case. While the court acknowledged the existence of the Plaintiffs' potential substantive rights under Articles 913 and 920 of the Civil Code (reserved rights of heirs), the judgment did not delve deeply into whether those rights were actually infringed. Instead, the court focused on procedural and technical deficiencies in the Plaintiffs' claim. The court simply acknowledged that the Plaintiffs might have had a "genuine claim", but it did not delve deeply into adjudicating whether those rights were actually infringed.

[55] What then the Learned Judge ought to have done in the third case, was to recognize that since the second case was dismissed due to a procedural deficiency and not on the merits, *res judicata* did not apply. Instead, she should have allowed the Plaintiffs to proceed with the third case, which sought to rectify the legal and procedural shortcomings of the second case. The correct approach would have been to permit the litigation to continue on

its substantive merits, as the plaintiffs were entitled to have their revised claim properly adjudicated.

[56] This is also supported by the dictum of Lord Millett of the United Kingdom House of Lords, in the case of ***Johnson v Gore Wood & Co [2002] 2 A.C. 1 (14 December 2000)***, wherein he expressed the following:

> *"It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon. This latter (though not the former) is prima facie a denial of the citizen's right of access to the court….While, therefore, the doctrine of res judicata in all its branches may properly be regarded as a rule of substantive law, applicable in all save exceptional circumstances, the doctrine now under consideration can be no more than a procedural rule based on the need to protect the process of the court from abuse and the defendant from oppression…"*

[57] As such, the matter should be remitted to the Supreme Court for a full hearing on the merits, as the claim of *res judicata* cannot stand. The prior procedural dismissal does not preclude the Plaintiffs from having their case properly adjudicated.

The Right Party To Sue

[58] Furthermore, is the issue raised by the Respondent that the plaint in CS119/2022 is null in as much as it is brought against the estate and not the beneficiary.

[59] A similar concern was noted in ***Chetty v Chetty and Another (14 of 2008) [2010] SCSC 6 (14 February 2010)***, where the defendants raised a *plea in limine* asserting that the action for the reduction of the succession had been improperly brought against them. They argued that the suit should have included the heirs whose portions would be reduced if the claim succeeded, as the outcome would directly impact their rights. The defendants contended that this omission rendered the plaint fatally defective and that it disclosed no valid cause of action against the executors.

[60] Chief Justice Egonda-Ntende (as he then was), presiding over the case, clarified the criteria for determining whether a plaint discloses a cause of action. Specifically, a plaint must demonstrate:

a) That the plaintiff held a right.
b) That the right had been violated.
c) That the plaintiff was entitled to relief against the defendants.

[61] The court observed that the plaintiff's requests, such as the preparation of an inventory and the suspension of the estate's distribution, were directed at the executors in their legal capacity under Article 1027 of the Civil Code. These requests aligned with the executors' statutory obligations, including preparing an inventory, settling debts, and distributing the estate according to the will or intestacy rules. As such, the court concluded that the plaint disclosed a valid cause of action against the executors in their official capacity.

[62] However, the court emphasized that the heirs whose portions would be reduced by the action must be joined as parties to the suit. While the heirs were not initially named in the plaint, their inclusion was deemed essential to enable the "***full, effectual, and final determination of the matter***," as their rights would be directly affected by any reduction of the succession. The court differentiated between the necessity of joining these heirs and whether the plaint disclosed a cause of action against the executors, clarifying that these were distinct issues with separate legal implications.

[63] Ultimately, the court ruled that the omission of the heirs was not fatal to the plaint at its current stage. The plaint validly disclosed a cause of action against the executors, and the plea in limine was dismissed with costs. Nevertheless, the judgment underscored the critical importance of including all affected parties in succession disputes to ensure comprehensive adjudication.

[64] Thus, while an action for reduction can proceed against executors for their statutory duties, the proper parties to include are the beneficiaries (heirs) whose rights would be directly impacted by the reduction. Failure to join these heirs does not invalidate the action initially but must be rectified to allow the court to fully resolve the matter.

[65] This is also in line with s**ection 112 of the Code of Civil Procedure** which provides

"*Misjoinder, adding of parties, etc*

112. No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties and the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the names of any persons improperly joined, whether as plaintiffs or defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, ***be added.****"*

[66] Further reference is made to the case of ***Wilmot v W&C French*** **(1971) SLR 326** in which Sauzier J re-echoed the sentiments of Devlin J in ***Amon v Raphael Tuck & Sons (1956) 1 QB 357***

> *"What makes a person a necessary party? it is not, of course, merely that he has relevant evidence to give on some of the questions involved; that would only him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and that has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately. That would mean that on the construction of a clause in a common form contract, many parties would claim to be heard, and if there were power to admit any, there is no principle of discretion by which some would be admitted and others refused. The court might often think it convenient or desirable that some of such persons should be heard so that they could be sure that it had found the complete answer, but no one would suggest that it is necessary to hear them for that purpose.* ***The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the***

question to be settled therefore must be a question in the action which cannot be effectually and completely settled unless he is a party."

[67] Sauzier J in the ***Wilmot*** case then concluded that the only reason which makes it necessary to make a person party to an action is so that he or she should be bound by the result of the action which cannot be effectually and completely settled unless he or she is a party.

[68] These two cases were also cited with approval by the Court of Appeal of Seychelles in ***Omath v Lesperance (SCA 24 of 2017) [2019] SCCA 41 (16 December 2019)*** wherein court handled a property dispute involving a house and land which was part of the government's home ownership scheme. The property was owned by Property Management Corporation (PMC) but it was to be transferred to the parties after they paid off the loan. The Supreme Court had made an order for the transfer of the property without adding PMC as a party. The Court of Appeal held that under Section 112 of the Seychelles Code of Civil Procedure, PMC's presence was essential, as the court's orders regarding the property transfer would not be binding without PMC being a party. The Court of Appeal highlighted that the Supreme Court should have used its discretion and added PMC to ensure the complete resolution of the matter and proper enforcement of any transfer orders.

[69] The Court of Appeal however recalled that section 112 of the Seychelles Code of Civil Procedure provides that no cause shall be defeated by reason of non-joinder of a party, and the Court restricted its orders to the rights and interests of the parties before the Court. As such, a legal case will not be dismissed or invalidated simply because a necessary party was not included in the proceedings (non-joinder).

[70] In the instant case, the appropriate party to sue should have included the beneficiary. Pursuant to Rule 3(1) of the Court of Appeal Rules, which permits the Court to depart from procedural rules in the interest of justice, the Court of Appeal has the discretion to directly join a party if their presence is deemed essential for the fair adjudication of the appeal and the effective enforcement of any subsequent orders.

[71] Alternatively, the Court may exercise its broad discretion under Rule 31(5) of the Court of Appeal Rules to remit the case to the Supreme Court with specific directions to include the necessary party, ensuring procedural compliance and a just resolution of the matter.

[72] Pursuant to the aforementioned Rules, I hereby remit this matter to the Supreme Court with directions to join the beneficiary as a party to ensure the "full, effectual, and final determination of the matter."

B. Resolution of Ground Two - Abuse of process

[73] Having determined that the doctrine of *res judicata* is inapplicable to this case, it follows that the subsequent filing of a different case cannot, under the circumstances, constitute an abuse of process.

[74] This Court has held this position before in ***Lesperance v Ernestine & Anor (Civil Appeal SCA 16/2021) [2023] SCCA*** concluded that

> *[54] …In my opinion, and provided that the case is not res judicata, it is not an abuse of process where a party who deems himself to have suffered loss peruses a fresh suit where there is an opportunity to do so. The Appellant considers himself to have suffered a loss.… Thus, in bringing suit CS 133/19 on the failure of suit CC 69/2015, the Appellant is simply making use of the avenues available to him.*

[75] In the same light, the distinction between the Appellants' suit to void the Will and the subsequent suit to vary the disposition becomes clear. Provided that the claim is not barred by *res judicata*, it cannot be considered an abuse of process for the Appellants to pursue a fresh suit seeking a variation of the Will's dispositions after the failure of the suit seeking to void the Will. The Appellants, having recognized a different legal avenue available to them (the same avenue directed to them by the learned judge in the second case), are entitled to make use of it, especially where they believe they have suffered a loss as long as it is not in conflict with the established principles of *res judicata*. Therefore, having concluded that the subsequent suit to vary the disposition is distinct

from the previous suit to void the will and should not be barred on grounds of *res judicata* and any subsequent suit filed is not an abuse of process.

[76] In ***Brisbane City Council v Attorney General for Queensland [1979] AC 411, 425*** Lord Wilberforce, advising the Judicial Committee of the Privy Council, explained that the abuse of process rule in ***Henderson v Henderson 3 Hare 100***

> *"ought only to be applied when the facts are such as to amount to an abuse: otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation".*

[77] Again both parties have cited the case of ***Johnson v Gore Wood & Co [2002] 2 A.C. 1 (14 December 2000)***, wherein the House of Lords held as follows:

> *"I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not".*
>
> *"There is, therefore, only one question to be considered in the present case: whether it was oppressive or otherwise an abuse of the process of the court*

> *for [the Plaintiff] to bring his own proceedings against the firm when he could have brought them as part of or at the same time as the company's action. This question must be determined as at the time when [the Plaintiff] brought the present proceedings and in the light of everything that had then happened. <u>There is, of course, no doubt that [the Plaintiff] could have brought his action as part of or at the same time as the company's action. But it does not at all follow that he should have done so or that his failure to do so renders the present action oppressive to the firm or an abuse of the process of the court."</u>*

[78] This Honorable Court has also dealt with a similar case before in ***Lesperance v Ernestine Anor (SCA 15 of 2020) 2023 SCCA 14*** that arose from a Supreme Court decision dismissing the Appellant's plaint on the basis of res judicata and abuse of process. The Court of Appeal quashed the trial court's ruling, holding that the claims were not barred by res judicata nor did they amount to abuse of process. The case was remitted to the Supreme Court for a fresh hearing on its merits, to be conducted by a different judge, ensuring a fair and impartial reconsideration of the issues.

[79] The Court noted that;

> *"In my opinion, and provided that the case is not res judicata, <u>it is not an abuse of process where a party who deems himself to have suffered loss peruses a fresh suit where there is an opportunity to do so. The Appellant considers himself to have suffered a loss. In suit CC 69/2015 he failed because according to the learned Judge, the suited party was not bound by the agreement because the same was signed by the 1st Defendant in his personal capacity.</u> Thus, in bringing suit CS 133/19 on the failure of suit CC 69/2015, the Appellant is simply making use of the avenues available to him".*

[80] Similarly and analogously, in the present case, although both causes of action may arise from the same set of facts (e.g., the execution and contents of the will), the distinct legal objectives and issues involved in each action mean they do not necessarily share the same

cause or **objet**. Like in **Lesperance**, where the court found that while the subject matter in both suits was related to the share transfer agreement, the causes of action differed - one addressed liability as directors, and the other focused on liability in a personal capacity. Therefore the existence of separate causes of action should prevent the application of res judicata, as each claim addresses a unique legal question.

[81] Likewise for abuse of process, in **Lesperance**, the court found that filing a fresh suit after the earlier one failed was not an abuse of process because the Appellant was pursuing a legitimate legal avenue available to them. The earlier case clarified certain issues but left unresolved questions that the Appellant was entitled to litigate.

[82] Applying this principle to this instant appeal case, pursuing an action for the reduction of dispositions after an unsuccessful attempt to void the will is not necessarily an abuse of process. If the earlier action did not resolve the substantive issue of whether the dispositions infringed on reserved rights, filing a fresh suit to address that question should not be considered abusive.

[83] Furthermore in ***Cable and Wireless Seychelles Ltd v Gangadoo (SCA 14/2015),*** court found as follows;

> *With regard to the plea relating to abuse of the legal and judiciary process, we note that the Respondent was encouraged in her first case to seek an alternative legal remedy (vide page 11 of the decision of the judge a quo). We are not therefore unconvinced that the present suit qualifies as an abuse of process.*

[84] As earlier discussed, the Appellants were encouraged to initiate the third case. The trial Judge's comments that *"the Plaintiffs in the instant case do indeed have a genuine claim but sadly it was not brought in the proper manner"* definitely underscores the Plaintiffs' bona fide intentions in pursuing their claim.

[85] In light of the discussed authorities, I find that the Appellants' decision to bring a third suit after the failure of the second was neither oppressive nor an abuse of process. The circumstances under which the third suit was initiated must be assessed independently,

recognizing the procedural and substantive differences between the claims. As the Appellants are pursuing a distinct and valid cause of action, the third suit does not violate the principles of *res judicata* nor does it amount to an abuse of the court's process.

[86] Indeed while the Appellants could have brought this claim earlier, it does not necessarily follow that their failure to do so renders the subsequent suit oppressive or an abuse of process. The matter must be judged based on the circumstances existing at the time the third suit was initiated, and given the distinction between the causes of action, their pursuit of the fresh claim should not be considered an abuse of the court's process.

CONCLUSION

[87] In light of the foregoing analysis, it is evident that the doctrine of res judicata does not apply to the Appellants' third suit seeking to vary the dispositions in the will, nor does the initiation of the third suit amount to an abuse of process. The claims pursued in the third suit are distinct and represent a valid cause of action separate from the second suit, which sought to void the will.

[88] The Appellants were within their rights to explore this new legal avenue, especially in response to the directions provided by the learned judge in the second case and their belief in having suffered a loss. The procedural and substantive differences between the suits must be recognized, and the third suit should be assessed independently on its merits.

[89] Accordingly, this matter is remitted to the Supreme Court for consideration and adjudication of the Appellants' claim on its merits disregarding the objections based on res judicata or alleged abuse of process.

DECISION

[90] Having found merits in both amended grounds of appeal, we would proceed to make the following orders as prayed for by the Appellant:

(i) The Appeal is allowed in its entirety.

(ii) The decision of the Supreme Court is set aside and the matter is remitted back to the Supreme Court for hearing on the merits by another Judge.

(iii) In pursuance to Rules 3(1) and 31(5) of the Court of Appeal Rules, we hereby remit this matter to the Supreme Court with directions to join the beneficiary as a party to ensure the "full, effectual, and final determination of the matter."

(v) No order as to costs.

_____

S. Andre, JA

Signed, dated, and delivered at Ile du Port on 18 December 2024

Fernando President

[1] I have read the judgments of Justice Andre and Justice Robinson and agree with both of them that res judicata does not apply in relation to case numbered CS119/2022.

[2] I agree with Justice Andre that there was no abuse of process in the Appellants filing case numbered CS119/2022. I therefore allow the appeal on both grounds and agree with the orders made by Justice Andre.

[3] I adopt the facts of this case and the circumstances leading to this appeal as set out in the judgments of Justice Robinson and Justice Andre.

[4] I am of the view that in cases of this nature, where it is not in dispute that the Appellants are the children of Ogilvy Berlouis and no provision had been made for them by their father Ogilvy Berlouis and where the Court in CS 74/2020 had held that the Appellants "do indeed have a genuine claim but sadly it was not brought in the proper manner" shows there was no abuse of process in the Appellants filing case CS119/2022. It is to be noted with respect to the merits of the case CS 74/2020, the learned Judge concluded that if the Court were to make an order for the reduction of the dispositions, such an order would be ultra petita, as the Plaintiffs, the present Appellants, had not prayed for that order.

[5] It is correct that the statement by the learned Trial Judge that the Appellants in case CS 74/2020 "do indeed have a genuine claim" did not create a right of action in favour of the Appellants but at the same time it cannot per se be said that the re-litigation on a matter which could have been raised in CS 74/2020 by way of a prayer for an order for the reduction of the dispositions, renders the raising of it in CS 119/2022 necessarily abusive.

[6] The decided authorities referred to by both Justice Robinson and Justice Andre in their respective judgments show that the courts should not attempt to define or categorise fully what may amount to an abuse of process and that the doctrine should not be circumscribed by unnecessarily restrictive rules since its purpose was not to endanger the maintenance of genuine claims but only the prevention of abuse. In the repetitive actions there needs to be some additional element, such as collateral attack on a previous decision, some dishonesty or unjust harassment, if it is to be considered as an abuse of process. I am of the view that it is not manifest on the facts before the court in CS119/2022 that the lawyers were indulging in strategies to perpetuate litigation at the instance of the Appellants who have an ulterior motive to harass the Respondent. As has been held in earlier cases the onus is on the person alleging unjust harassment to prove abuse of process. Cases of this nature where children of a deceased father who are making a claim for their share of the property under the sincere belief of their entitlement to it or in disputes over matrimonial property by divorced couples, have to be viewed differently from disputes in purely commercial cases where unjust harassment could

possibly be made out. Taking into consideration all the facts and circumstances it certainly cannot be said that the Appellants in case CS119/2022 are misusing or abusing the process of the court. The jurisdiction to strike out proceedings as an abuse of process is an exceptional one which should not be tightly circumscribed by rules or formal categorisation.

[7] Bingham LJ in Johnson stated in Johnson v Gore Wood & Co [2002] 2 A.C. 1 (14 December 2000):

*"…**there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive.** That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question **whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.** As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not… **While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances**."*

_____

Fernando President

Signed, dated, and delivered at Ile du Port on 18 December 2024

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable
[2024] (18 December 2024)
SCA 10/2024
(Arising in CS119/2022)

In the Matter Between

Laura Berlouis — First Appellant
(rep. by Miss Vanessa Gill)

Jonathan Berlouis — Second Appellant
(rep. by Miss Vanessa Gill)

And

The Estate of the Late Ogilvy Berlouis
Herein represented by its Executrix
Maryse Berlouis, La Misere, Mahe, Seychelles — Respondent

(rep. by Mr. Basil Hoareau)

Neutral Citation: *Berlouis and Another v The Estate of the late Ogilvy* Berlouis (SCA 10/2024) [2024] (Arising in CS 119/2022) (18 December 2024)
Before: Fernando President, Robinson, Andre, JJA
Summary: **Striking out or dismissal — *Res judicata* or *"L'autorité de la chose jugée"* — Question of *res judicata* to be decided on the presence of the triple identities — Abuse of process of the Court — Question of abuse of process of the Court to be decided broadly on merits — *Civil Code of Seychelles (Act 1 of 2021), article 1351 (1) and (2) — Inherent Power of the Court***
Heard: 2 December 2024
Delivered: 18 December 2024

MINORITY JUDGMENT

Robinson JA

1. With due respect to the judgments delivered by Fernando President and Andre JA., allowing the appeal, I conclude that the learned Judge has correctly dismissed the Appellants' plaint instituting the action number CS119/2022. This dismissal is based on the conclusion that the plaint instituting the action number CS199/2022 is an abuse of the process of the Court. I provide reasons to support my conclusion in this minority judgment.

2. This is an appeal against a ruling of a learned Judge of the Supreme Court delivered on 4 June 2024 (hereinafter referred to as the "*Ruling-2024*"). The learned Judge upheld the points of law raised on the pleadings by the Respondent (the Defendant then) to the Appellants' plaint (CS119/2022) and dismissed the same.

3. The points of law were set down for hearing and disposed of before the trial. The first point of law sought the dismissal of the plaint under section 92 of the Seychelles Code of Civil Procedure on the ground that it is frivolous or vexatious or discloses no reasonable cause of action.

4. The second point of law sought the dismissal of the plaint under the inherent power of the Court on the ground that it is frivolous or vexatious or an abuse of the process of the Court.

5. The third point of law sought the dismissal of the plaint on the ground of *res judicata* or "*autorité de la chose jugée*" based on article 1351 (1) and (2) of the Civil Code 2021[1]. The third point of law reads as follows —

> "3. *The judgment rendered by the Supreme Court in case number 74/20 (sic) has the authority of a final judgment and the effect of res judicata in relation to the present suit, as the present suit and the one in CS74/20 (sic) relate to the same subject matter, the same cause and between the same parties and brought by the same Plaintiff against the same Defendant, in the same capacities."*

THE AMENDED GROUNDS OF APPEAL

6. The Appellants, dissatisfied with the learned Judge's decision upholding the objections in point of law, have challenged it on two grounds of appeal. These two grounds of appeal were subsequently amended, and the amended notice of appeal was filed on 21 October 2024. The two amended grounds of appeal are reproduced verbatim hereunder —

> *"1. The Learned trial Judge erred in finding that the matter was res judicata in that the threefold identity of parties, cause of action and subject matter had not been made out between the matter under appeal and a previous one filed in that the parties in all three cases were different and were not acting in the same capacities, and the causes of action, being the avoidance of the Will and reduction of the dispositions therein, were not identical. There was thus no congruence of the same claim over the same thing between the same persons acting in the same capacities to amount to res judicata or autorité de la chose jugée.*
>
> *2. The Learned trial Judge erred in finding that the matter appealed against was an abuse of process in that the previous matter had resulted in her finding that the deceased could not have gifted the entirety of his estate to the Respondent and only dismissed the plaint because it had not been brought in the proper manner. The finding of the learned Judge ignored the legal principle that there is no absolute bar to pursuing in a later case a subject which could have been advanced in earlier proceedings and, on*

[1] The Civil Code of Seychelles came into operation on 1 July 2021 following the coming into operation of the Civil Code of Seychelles Act on the same date, hereinafter referred to as the "***Civil Code 2021***".

a merits-based approach, it was just for the Appellants to pursue an action which the Trial Court had previously found to be a "genuine action".

7. The Appellants have prayed that the Court of Appeal should grant their appeal, set aside the Ruling-2024, and order the "*reduction of the dispositions in the Will of the deceased*" in accordance with the law.

8. I find it appropriate at this juncture to set out the essential provisions of the Civil Code 2021 and the Civil Code 1976[2], which are relevant to this appeal.

9. Article 1351 (1) and (2) of the Civil Code 2021 articulates the principle of *res judicata* as follows —

> *"1351(1) A final judgment has the effect of res judicata only in respect of the subject matter of the judgment.*
>
> *(2) It is necessary that the demand relate to the same subject matter, that it relate to the same cause of action, that it be between the same parties and that it be brought by them or against them in the same capacities."*

10. Articles 913 and 920 of the Civil Code 1976 are relevant to the proceedings. Article 913 stipulates —

> *"The Portion of Disposable Property*
>
> *Article 913*
>
> *Gift inter vivos or by will shall not exceed one half of the property of the donor, if he leaves at death one child; one third, if he leaves two children; one fourth, if he leaves three or more children; there shall be no distinction between legitimate and natural children except as provided by article 915 -1.*
>
> *Nothing in this Article shall be construed as preventing a person making a gift inter vivos or by will in the terms of article 1048 of this Code."*

11. Article 920 of the Civil Code 1976 stipulates —

[2] The Civil Code of Seychelles [CAP 33] (since repealed) came into operation on 1 January 1976 following the coming into operation of the Civil Code of Seychelles Act on the same date hereinafter referred to as the "***Civil Code 1976***".

"The Reduction of Gifts and Legacies

Article 920

Dispositions either inter vivos or by will which exceed the disposable portion shall be liable to be reduced to the size of that portion at the opening of the succession."

THE QUESTIONS AT ISSUE IN THE APPEAL

12. Upon considering the two amended grounds of appeal, the two issues for determination are as follows —

(a) with respect to the amended ground 1, whether or not the learned Judge was correct in determining that the final judgment delivered by the Supreme Court on 4 June 2021 in the action number CS74/2020 (hereinafter referred to as the "*Judgment-2021*") has the effect of *res judicata* or "*l'autorité de la chose jugée" vis-à-vis* the action number CS119/2022 based on article 1351 (1) and (2) of the Civil Code 2021.

(b) with respect to the amended ground 2, whether or not the learned Judge was correct in determining that the plaint instituting action number CS119/2022 is an abuse of the process of the Court.

13. In determining the two questions at issue, I will first set out the relevant matters from the actions CS74/2020 and CS119/2022. Following this, I will deal with each ground of appeal individually.

THE JUDGMENT-2021 - CS74/2020

14. Laura Berlouis and Jonathan Berlouis were the First and Second Plaintiffs in the amended plaint (CS74/2020), respectively. In the same amended plaint, *"The Estate of the late Ogilvy Berlouis Herein represented by its Executrix Maryse Berlouis"* and *"Maryse Berlouis"* were the First and Second Defendants, respectively.

15. Both Plaintiffs gave evidence at the trial, and the Second Defendant gave evidence on her behalf. Counsel of record for the Plaintiffs was Miss Edith Young. Mr. Basil Hoareau, Counsel of record for the Defendant/Respondent in this case, represented the Defendants in the action number CS74/2020. In the Judgment-2021, after hearing the evidence, the learned Judge dismissed the action based on the points of law raised on the pleadings by the Defendants.

16. The Defendants admitted the following matters in their amended defence to the amended plaint —

(a) the Plaintiffs are the children of the *"late Ogilvy Berlouis, the 1st Defendant"*, who passed away on 3 April 2018;

(b) at all material times, the Second Defendant was married to the First Defendant;

(c) the First Defendant had four children, namely *(i)* one Olivia Barbara Anne Berlouis, born on 19 October 1994; *(ii)* the First Plaintiff, born on 2 September 1983; *(iii)* the Second Plaintiff, born on 8 November 1974; and *(iv)* one Mervin Morel, who was declared the son of the First Defendant in the action number CS04/2019;

(d) the First Defendant made a will before a Notary, Mr. Basil Hoareau, which, upon the former's demise, was transcribed on 4 June 2018 in *"Volume 87 259"*;

(e) by virtue of the will, the First Defendant bequeathed his entire estate to the Second Defendant.

17. Exhibit A2 is the "***LAST WILL AND TESTAMENT OF OGILVY YVON BERLOUIS***", which was dictated by the late Ogilvy Berlouis on 20 December 2018 and was registered on 4 June 2018 in Register B35 No. 1531 and transcribed on the same date in Volume 87 No. 259, **hereinafter referred to as the** "***Last Will and Testament of Ogilvy Berlouis***". I quote the dispositions made in the Last Will and Testament of Ogilvy Berlouis, with particular focus on the first and second dispositions —

> *"**1.** **I hereby appoint Josephine Claude Marise Berlouis, upon my death, as the testamentary executor of my estate**.*
>
> ***2.** **I give, bequeath and devise all my properties whatsoever, whether movables and immovable and wherever situated, solely to Josephine Claude Marise Berlouis**.*
>
> *3. I hereby revoke all wills and other testamentary acts and dispositions previously made by me."*

18. The learned Judge considered the claims pleaded by the Plaintiffs in paragraph [6], [7], [8] and [9] of the amended plaint.

19. In paragraph [6] of the amended plaint, it was averred that the First Defendant is allowed to dispose of only a quarter of his estate under the law. It was further averred in the same paragraph that the dispositions of the First Defendant's entire estate to the Second Defendant, *"to the extent that it disposes of more than three quarter of the 1st Defendant's estate"*, is void.

20. It was averred in paragraph [7] of the amended plaint that the Plaintiffs, who are not heirs under the Last Will and Testament of Ogilvy Berlouis, are not entitled to receive an inventory from the First Defendant unless they are declared heirs under the same. The Plaintiffs also averred in the same paragraph that they are unaware of the extent of the remainder of the First Defendant's estate and the dispositions that may have been made to the Second Defendant.

21. The Plaintiffs averred in paragraphs [8] and [9] of the amended plaint that, as a result of the First Defendant's actions, they have suffered moral damage in the sum of 100,000/- rupees for which the First Defendant is liable.

22. The Plaintiffs pleaded the following claims in their prayer —

> "*a)* [t]*hat the Will of the 1st Defendant is declared void to the extent that it leaves the entirety of the 1st Defendant's estate to the 2nd Defendant;*
>
> *b)* [t]*hat the Plaintiffs and the other heirs listed in paragraph 2 of the Plaint are declared heirs under the Will;*

c) [t]*hat the 1st Defendant provides all the heirs with an inventory of the 1st Defendant's estate and that any dispositions to the 2nd Defendant are declared null and void and brought back to the hotch pot;*

d) [t]*hat the 1st Defendant is ordered to distribute the estate of the 1st Defendant amongst all the heirs;*

e) [t]*hat the 1st Defendant is to pay to the Plaintiffs the sum of SR 100,000.00 as moral damages; and*

f) [c]*osts*."

23. The three points of law raised by the Defendants on the pleadings were as follows —

> *"**1. The Plaintiff has wrongly and illegally joined different causes of action in the same suit despite the different causes of action being against different Defendants and/or the Defendants are not being sued in the same capacities, and consequently, the plaint ought to be struck out or set aside.***
>
> ***2. The Plaint ought to be dismissed – in accordance with Section 92 of the Seychelles Code of Civil Procedure – as it is frivolous or vexatious and does not disclose any reasonable cause of action.***
>
> ***3. Further the Plaint ought to be dismissed – under the inherent power of the Court – on the ground that it is frivolous or vexatious or an abuse of the Court's process****".* [Emphasis is mine]

24. The learned Judge did not uphold the first and third points of law rehearsed in paragraph [23] hereof. However, she did uphold the second point of law.

First point of law: Striking out of the action for misjoinder of causes of action

25. Regarding the first point of law raised on the pleadings, Counsel for the Defendants argued that the action cannot be maintained on the ground of misjoinder of parties. According to Counsel for the Defendants, the first cause of action challenged the validity of the Last Will and Testament of Ogilvy Berlouis, which bequeathed the entire estate of the First Defendant to the Second Defendant and sought an order declaring the same null (paragraph [6] of the amended plaint and prayers (a) and (c) refer). The second cause of action was a claim for damages against the First Defendant due to the First Defendant's

action in disposing of more than three quarters of the First Defendant's estate (paragraph [7] of the amended plaint refers). He explained that the joinder of the two different causes of action against different parties (the Defendants) contravened section 105 of the Seychelles Code of Civil Procedure.

26. Suffice it to say that the learned Judge disagreed with the submissions made by Counsel for the Defendants about the misjoinder of causes of action. In paragraph [26] of the Judgment-2021, the learned Judge concluded, *"in the circumstances it is wrong to say that there was a misjoinder of actions. The two causes of action are against the first Defendant"*. The learned Judge also expressed the view that *"the issue is not so much misjoinder as whether there is a cause of action against the second Defendant" in* the same paragraph.

Second point of law: Dismissal of the plaint where no reasonable cause of action is disclosed and action is frivolous or vexatious

27. Regarding the second point of law, the learned Judge considered the argument presented by Counsel for the Defendants, contending that the amended plaint disclosed no reasonable cause of action and should be dismissed under section 92 of the Seychelles Code of Civil Procedure.

28. Counsel for the Defendants argued that since the Plaintiffs have brought forward an action of reduction of the dispositions in the Last Will and Testament of Ogilvy Berlouis under article 920 of the Civil Code 1976, they were required to demand in their amended plaint that the dispositions which exceed the disposable portion should be reduced to the size of that portion. It was argued that since the cause of action in the amended plaint was on the basis that the Last Will and Testament of Ogilvy Berlouis is void, it failed to disclose a reasonable cause of action and should, therefore, be dismissed. He argued that the Plaintiffs have pleaded the following claims in their prayer —

> "*a)* [t]*hat the Will of the 1st Defendant is declared void to the extent that it leaves the entirety of the 1st Defendant's estate to the 2nd Defendant;*

> *(c)* [t]*hat the 1st Defendant provides all the heirs with an inventory of the 1st Defendant's estate and that any dispositions to the 2nd Defendant are declared null and void and brought back to the hotchpot;*"

29. Counsel for the Defendants argued that if the Court were to make an order to reduce the dispositions, the order would be *ultra petita*, as the Plaintiffs had not prayed for that order.

30. Counsel for the Plaintiffs, in refuting the arguments presented on behalf of the Defendants, based her position essentially on the argument that the Plaintiffs' claim was for the reduction of the testamentary dispositions in the Last Will and Testament of Ogilvy Berlouis made in excess of the disposable portion, in accordance with article 913 of the Civil Code 1976, in conjunction with article 920 of the same Code. She argued that the Plaintiffs' prayer sought an order declaring that the Last Will and Testament of Ogilvy Berlouis is null to the extent that the dispositions made in the same exceed the disposable portion, *inter alia*.

31. However, the learned Judge did not accept the Plaintiffs' arguments. The learned Judge concluded that although the dispositions in the Last Will and Testament of Ogilvy Berlouis exceeded the disposable portion, the same cannot be declared null. Instead, the Plaintiffs, as reserved heirs, should have brought an action of reduction under article 920 of the Civil Code 1976.

32. The learned Judge upheld the arguments of Counsel for the Defendants and concluded that *"there is no cause of action disclosed against the 2nd Defendant and no reasonable cause of action disclosed against the 1st Defendant"* (at paragraph [43] of the Judgment-2021). The learned Judge reasoned as follows in paragraphs [32], [34] and [36] of the Judgment-2021 —

> *"[32] Indeed … in line with Contoret v Contoret that in circumstances where dispositions exceed the amount provided in law, the only solution is to reduce the gift made in excess.*
>
> *[34] The Plaintiffs by virtue of Article 913 of the Civil Code are reserved heirs. With respect, the Plaintiffs at paragraph 6 have not pleaded that the gift to the second Defendant is subject to reduction but, on the contrary, have*

> *pleaded that the gift is void… Indeed as Learned Counsel for the Defendants points out, if this Court orders a reduction in favour of the Plaintiffs, which would be the morally right thing to do, this Court would be acting in excess of its powers as in the current matter there was no prayer for a reduction but for a declaration that the Will is void.*
>
> *[36] In line with Contoret and Desaubin there is no issue of declaring a Will void on the basis that the dispositions are not in accordance with Article 913. Any dispositions in a Will that are contrary to Article 913 is subject to reduction only."*

Third point of law: Dismissal of the plaint where it is frivolous, vexatious or an abuse of process

33. I now turn to the third point of law addressed by the learned Judge, which contended that the plaint ought to be dismissed under the inherent power of the Court on the ground that it was frivolous or vexatious or an abuse of the process of the Court.

34. Suffice it to say that the learned Judge did not uphold the third point of law, stating that the facts of the case cannot be said to amount to an abuse, in paragraph [42] of the judgment. In the same paragraph, she went on to state, *"*[i]*t is beyond doubt that the deceased could not have gifted the entirety of his estate to the second Defendant due to Article 913"*. Additionally, the learned Judge acknowledged that *"the Plaintiffs in the instant case do indeed have a genuine claim but sadly it was not brought in the proper manner"*, in the same paragraph. This statement by the learned Judge, indicating that the claim of the Plaintiffs in the plaint CS (74/2020) was genuine, has been used by the Appellants to base their argument with respect to the amended ground 2 of the appeal, which, as previously mentioned, contended that the learned Judge erred in concluding that the action number CS119/2022 was an abuse of process.

THE PROCEEDINGS IN THE ACTION NUMBER CS199/2022

35. Laura Berlouis and Jonathan Berlouis are the First and Second Plaintiffs (the Appellants now), respectively, in the plaint commencing the action number CS119/2022. *"The Estate of the Late Ogilvy Berlouis Defendant Herein represented by its executor Josephine Glaude Marise Berlouis"* is the Defendant in the same plaint.

36. It is not in dispute in the action that —

(a) the Appellants are the children of the Deceased;

(b) the Last Will and Testament of Ogilvy Berlouis bequeathed the entire estate of the late Ogilvy Berlouis to Josephine Claude Marise Berlouis and appointed her as his testamentary executrix.

37. In addition to the undisputed facts, the Appellants averred, in paragraphs [4] to [6] of the plaint, that —

(a) the dispositions made in the Last Will and Testament of Ogilvy Berlouis contravened the law because no provision has been made in the same for the Appellants, who were the reserved heirs at the time the same was executed and of his death;

(b) the late Ogilvy Berlouis made no other provision for the Appellants either by gift *inter vivos* or otherwise;

(c) the Appellants are entitled to share in the succession of the late Ogilvy Berlouis; and

(d) the dispositions made in the Last Will and Testament of Ogilvy Berlouis have to be amended to ensure that the Appellants receive their respective shares.

38. The Appellants are, therefore, praying for a judgment —

> *"1.* [d]*eclar*[ing] *that the dispositions in the Will of Ogilvy Berlouis dated 20 December 2017 be varied in accordance with the law;*
>
> *2.* [o]*rder*[ing] *the estate of the late Ogilvy Berlouis to be distributed by his executor in accordance with the law so that the Plaintiffs obtain their rightful share thereof."*

39. The Respondent, through Counsel, raised three objections in point of law seeking the dismissal of the plaint, which I have already reproduced in paragraphs [3], [4] and [5] hereof.

40. The Respondent denied paragraphs [4] to [6] of the plaint and put the Appellants to the strict proof thereof. By way of further answer to the plaint, the Respondent averred —

> *"(a) the suit is the second suit instituted by the Plaintiffs in respect of the testamentary disposition made by the late Ogilvy Berlouis to Josephine Claude Marise Berlouis;*
>
> *(b) the first suit instituted by the Plaintiffs in respect of the testamentary disposition made in favour of Mrs Josephine Claude Marise Berlouis was instituted in case number CS 74/2020, before the Supreme Court, which case was dismissed by the Supreme Court; and*
>
> *(c) the judgment rendered by the Supreme Court in case number 74/2020 has the authority of a final judgment and the effect of res judicata in relation to the present suit, as the present suit and the one in CS 74/2020 relate to the same subject matter, the same cause and between the same parties and brought by the same Plaintiff against the same Defendant, in the same capacities".* [Emphasis is mine]

41. As stated in paragraph [2] hereof, the learned Judge upheld the three points of law raised on the pleadings. However, it is noteworthy that the learned Judge did not consider the arguments presented by both Counsel with respect to the first point of law. The main issue regarding the first point of law is whether or not the plaint instituting the action number CS119/2022 is a nullity. Suffice it to say that Counsel for the Respondent argued in support of the said issue that *(i)* the Appellants had instituted the action against the wrong party: "*The Estate of the Late Ogilvy Berlouis Herein represented by its executor Josephine Glaude Marise Berlouis Defendant*", and *(ii)* the action had been instituted against a non-existent party.

42. In paragraph [60] of the Ruling-2024, the learned Judge stated, *"*[…]*I decline to consider whether the Estate can be sued as it would be purely academic".* I pause here to state that Counsel for the Respondent has raised the issue of whether or not "*the Estate*" could be sued in his skeleton heads of argument and argued this point at the hearing of the appeal.

Second point of law: Whether the plaint (CS 119/2022) is frivolous or vexatious and an abuse of process

43. In the Ruling-2024, the learned Judge addressed the second point of law: whether the plaint is an abuse of process and frivolous or vexatious. Counsel for the Respondent argued that the action constitutes an abuse of process because the plaint instituting it is null for the reasons stated in paragraph [41] hereof. As I have indicated in paragraph [42] hereof, the learned Judge did not address this argument in the Ruling-2024.

44. Counsel for the Respondent also argued that the action constitutes an abuse of process as it is the third action brought by the Appellants aimed at challenging the alleged dispositions made in the Last Will and Testament of Ogilvy Berlouis, exceeding the reserved portion under article 920 of the Civil Code 1976.

45. Counsel for the Respondent also argued that if the Court were to find that the matters raised in the plaint (CS119/2022) differed from those in the amended plaint (CS74/2020), then the matters raised in the plaint (CS119/2022) could and should have been raised and litigated in the action number CS74/2020. In this respect, Counsel for the Respondent argued that the Appellants were abusing the process of the Court by raising new matters in the plaint (CS119/2022), which could and should have been raised and litigated in the action number CS74/2020.

46. Counsel for the Appellants, in her counter submissions, made the point that the Court will strike out or dismiss an action on the ground that it constitutes an abuse of process where the facts are such as to amount to an abuse. She pointed out that, otherwise, a party might be shut out from bringing a genuine subject of litigation. She asserted that the Appellants have brought a genuine subject of litigation. She argued that the Appellants' claim challenged the testamentary dispositions made in the Last Will and Testament of Ogilvy Berlouis under article 920 of the Civil Code 1976, in conjunction with article 913 of the same Code, hence disclosing a reasonable cause of action. She also argued that the plaint is not frivolous or vexatious but had been brought in good faith.

47. Counsel for the Appellants also argued that the matters raised in the amended plaint (CS74/2020) were distinct from those raised in the plaint (CS119/2022). In the amended plaint (CS74/2020), the Appellants, as reserved heirs, challenged the validity of the dispositions made to Josephine Claude Marise Berlouis in the Last Will and Testament of Ogilvy Berlouis and sought an order declaring that the same is null. Conversely, in the plaint (CS119/2022), the Appellants, as reserved heirs, are seeking a reduction in respect of three quarters of the testamentary dispositions, representing the portion exceeding the disposable portion.

48. The learned Judge did not accept the Appellants' arguments. She concluded that the plaint (CS119/2022) constitutes an abuse of the process of the Court and is frivolous or vexatious, thereby accepting the arguments made by Counsel for the Respondent presented in paragraphs [44] and [45] above.

49. The learned Judge reasoned as follows —

> *"[57]* […]. *The gift, by the deceased, of the entirety of his estate, gave rise to a cause of action for reduction. The said cause of action existed from the time the succession opened and was in existence when the first case was filed. The findings of this Court in CS 74/2020 [2021] have not created a new cause of action that was not available to the Plaintiffs in 2018 when the first case was filed or in 2020 when the second case was filed.*
>
> *[58] To my mind this matter falls squarely within the realm of abuse of process of the Court. CS 146/2018 was filed in 2018 and subsequently withdrawn. Thereafter, CS74/2020 was filed. The matter proceeded to hearing and was subsequently dismissed on the basis that there was no cause of action against the Defendant. It is noted that the findings made by the Court in CS74/2020 that "It is beyond doubt that the deceased could not have gifted the entirety of his estate to the second Defendant in view of the provisions of Article 913" was made on the basis of evidence that had been led in the case during the trial. Such finding could not have been made otherwise. Therefore, in filing the matter a third time, it amounts to the Plaintiffs abusing the process of the Court.*
>
> *[59] However much I may sympathise with the position of the Plaintiffs, on the basis of the above discussion I find that the matter is an abuse of process of the Court. So being it is frivolous and vexatious bordering on harassment of the Defendant."*

50. In describing the plaint brought as an abuse of process and being frivolous or vexatious or bordering on harassment, the learned Judge sought guidance from and applied several Seychellois and English authorities. Both Counsel cited some of these authorities, including **Gomme**, **Vijay Construction (Proprietary) Limited v Eastern European Engineering Limited (SCA 28 of 2020) [2022] SCCA 58 (21 October 2022) and Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd [1982] 2 Lloyd's Rep 132**. This minority judgment considers these authorities but does not expressly mention all of them.

Third point of law: Whether or not the Judgment-2021 has the authority of a final judgment and the effect of res judicata in relation to the action number CS 119/2022

51. The learned Judge also upheld the plea that the matter was *res judicata* based on article 1351 (1) and (2) of the Civil Code 2021. Counsel for the Respondent contended that the triple identity of parties (in the same capacities), subject matter or *"objet"* and "*cause*" between the two actions (CS74/2020 and CS119/2022) was present. Meanwhile, Counsel for the Appellants contended that no triple identity was present. To avoid repeating myself, I have provided a summary of the arguments submitted in the skeleton heads of argument of both parties, together with those presented during the Supreme Court's proceedings with respect to the plea of *res judicata*. Both Counsel have adopted their respective submissions made during the Supreme Court's proceedings.

52. Suffice it to say that the learned Judge accepted the submissions of Counsel for the Respondent. In paragraph [48] of the Ruling-2024, she concluded that the *"rule of res judicata applies in that there is a threefold identity of subject matter, cause of action and parties between the second and current matter before the Court."*

53. The learned Judge reasoned as follows —

> *"[45] In all three matters the Plaintiffs sought and seek a re-distribution of the succession of the late Ogilvy Berlouis.*

[46] All three matters arise from the same set of facts, the dispositions made by the Late Ogilvy Berlouis, albeit the first matter related to a transfer effected before his death, whereas the second matter and the current matter concern the dispositions made in the last Will and Testament dated 20th December 2017 and seeking a reduction of same.

[47] The first matter was filed by the first Plaintiff, as the daughter and an heir of the deceased. The second matter, and similarly the third matter, was filed by the first Plaintiff and second Plaintiff as children and heirs of the deceased. All three matters were filed with the Estate of the late Ogilvy Berlouis represented by its executor Maryse Berlouis as a party or the sole party.

[48] From the above I find that the rule of res judicata applies in that there is a threefold identy of subject matter, cause of action and parties between the second and current matter before the Court."

SUBMISSIONS AND ANALYSIS OF THE CONTENTIONS OF THE PARTIES

54. Counsel for the Appellants and Respondent presented several arguments in their respective skeleton heads of argument, addressing the two questions at issue. They reiterated the same arguments during the hearing of the appeal. I have considered with care the arguments of both Counsel and relevant materials contained in the record of appeal.

Amended Ground 1 of the appeal

55. With respect to the amended ground 1 of the appeal, the question to determine is whether or not the learned Judge was correct to conclude that the final Judgment-2021 has the effect of *res judicata vis-à-vis* the action number CS119/2022 based on article 1351 (1) and (2) of the Civil Code 2021. Article 1351 (1) and (2) of the Civil Code 2021 refers to the triple identity: the identity of parties (in the same capacities), subject matter or "*objet*" and "*cause*".

Submissions on behalf of the parties:

(A) Identity of parties

56. Counsel for the Appellants argued, without more, that in the action number CS74/2020 there were two Defendants, namely *"The Estate of the late Ogilvy Berlouis Herein represented by its Executrix Maryse Berlouis"* and *"Maryse Berlouis"*. Whereas, in the action number CS119/2022, there is only one Defendant: *"The Estate of the late Ogilvy Berlouis Herein represented by its Executrix, Maryse Berlouis"*.

57. Counsel for the Respondent refuted the arguments presented on behalf of the Appellants. He argued that the Appellants were the same Plaintiffs in the three actions, namely CS146/2018, CS74/2020 and CS119/2022. Furthermore, he argued that the parties were suing and being sued in both actions (CS119/2022 and CS74/2020) in the same capacities. In other words, he pointed out that what matters is that there was identity of parties between the two actions (CS74/2020 and CS119/2022), as far as the Appellants and the Respondent were concerned. In support of his arguments, he relied on various authorities, including **Jurisclasseur Civil - Art, 1349 – 1353 -** "***Les présomptions (Suite) Autorité de la chose jugée au civil sur le Civil***" and **Soobhany and Ors v Salamath and Soobhany and Or [1966] MR 43**.

(B) Identity of subject matter

58. With respect to the identity of subject matter, Counsel for the Appellants argued essentially that the desired outcomes in the two cases are different. In the action number CS74/2020, the Appellants sought an order declaring that the Last Will and Testament of Ogilvy Berlouis is void. Additionally, the Appellants sought an order for the re-distribution of the estate of the late Ogilvy Berlouis by the testamentary executrix, in accordance with the law. Whereas, in the action number CS119/2022, the focus is only on obtaining an order for the re-distribution of the dispositions made in the Last Will and Testament of Ogilvy Berlouis, in accordance with the law.

59. Counsel for the Appellants based her arguments on French case-law and doctrine concerning the identity of subject matter in the context of *res judicata*. Instead of quoting the French authority cited by Counsel for the Appellants, which I have examined with care, I present the following excerpt from **JurisClasseur Procédure civile, b) Identité**

des droits réclamés sur la même chose [or Identity of rights claimed over the same thing] at **§ 161**[3]. **§ 161** states that for there to be authority of *res judicata*, it is indispensable that an identical right is claimed over the same thing.

60. On the other hand, Counsel for the Respondent argued that the analysis should go beyond the arguments presented by Counsel for the Appellants. He pointed out that what constitutes the identity of subject matter in the context of *res judicata* has been explored in both case-law and doctrine in France and Quebec.

61. I will not quote the French authority referred to by Counsel for the Respondent with respect to the identity of subject matter, which I have carefully considered. Instead, I will refer to **JurisClasseur Procédure civile**[4] **c) Identité des questions à résourdre [**or Identity of questions to be resolved], at **§ 165** and **§166**, which provides a clearer explanation of the principles with respect to the identity of subject matter. **§ 165** and **§166** of **JurisClasseur Procédure civile**[5] read as follows (the emphasis in bold is mine, highlighting the principle relied upon by Counsel for the Respondent) —

> *"§ 165 Sous ces réserves, la jurisprudence considère que l'autorité de la chose jugée ne peut pas être opposée, même si la nouvelle demande oblige le juge à résoudre les mêmes questions que la précédente, dès lors que l'objet finalement réclamé n'est pas identique (Cass. req., 10 févr. 1863 : DP 1863, 1, p. 300. - Cass. req., 6 févr. 1883 : DP 1883, 1, p. 451. - Cass. soc., 18 juin 1948 : Bull. civ. V, n° 620 ; RTD civ. 1949, p. 553 , obs. Hébraud. - Cass. com., 25 oct. 1948 : S. 1949, 1, p. 5). Ainsi, la décision qui statue sur les dommages occasionnés à un tiers par le propriétaire d'une automobile lors d'une collision et qui déclare le vendeur du véhicule tenu à garantir ce propriétaire de la condamnation prononcée contre lui, n'a pas autorité dans l'instance engagée par l'assureur du même propriétaire agissant contre le vendeur en remboursement du montant des*

[3] *"§ 161 Il est indispensable, pour qu'il y ait autorité de la chose jugée, que le demandeur réclame la consécration d'un même droit sur la même chose (V. notamment, Cass. req., 6 nov. 1888 : DP 1889, 1, 230. - Cass. civ., 14 mai 1935 : DH 1935, p. 427. - Cass. 3e civ., 30 oct. 1969 : Bull. civ. III, n° 702 . - Cass. 1re civ., 27 déc. 1963 : Bull. civ. I, n° 570 . - Cass. com., 23 nov. 1970 : Bull. civ. IV, n° 272 . - Cass. soc., 30 juin 1982 : Bull. civ. V, n° 428 . - Cass. 2e civ., 29 avr. 1997, n° 95-16.724 : JurisData n° 1997-001912):* [**Fasc. 900-30 : AUTORITÉ DE LA CHOSE JUGÉE. – Autorité de la chose jugée au civil sur le civil, JurisClasseur Procédure civile, Première publication : 16 août 2022, Dernière mise à jour : 25 avril 2023, Mélina Douchy-Oudot Professeur à l'université du Sud Toulon-Var, Membre du Centre de droit et de politique comparés (UMR 73-18 DICE)**]

[4] JurisClasseur Procédure civile, op.cit., § 165 and § 166.

[5] JurisClasseur Procédure civile, loc. cit.

dommages subis par son assuré (Cass. 1re civ., 23 mai 1973 : Bull. civ. I, n° 177 ; RGAT 1974, p. 371).

De même, saisis par un vendeur d'immeuble d'une demande tendant au remboursement par l'acquéreur de l'indemnité d'éviction payée au locataire, les juges ne peuvent, pour rejeter cette demande, se fonder sur l'autorité de la chose jugée par un précédent arrêt fixant l'indemnité d'éviction et déclarant irrecevable une demande en intervention forcée dirigée contre l'acquéreur de l'immeuble (Cass. 3e civ., 16 juin 1971 : Bull. civ. II, n° 382). Dans le même ordre d'idées, si un arrêt statue sur la recevabilité de l'action au regard de la qualité pour agir du tuteur ad hoc, il n'a pas autorité de la chose jugée en ce qui concerne la contestation relative à la prescription (Cass. 1re civ., 16 juill. 1997 : JCP G 1997, IV, 1992, p. 311) ; la décision qui statue sur la réhabilitation d'un notaire n'a pas autorité de chose jugée en ce qui concerne le caractère contraire à la probité et à l'honneur des manquements reprochés (Cass. 1re civ., 25 nov. 1997, n° 96-10.217 : JurisData n° 1997-004800).

Dans toutes ces situations, l'identité des questions à résoudre n'équivaut pas à l'identité des demandes au sens de l'article 1355 du Code civil : la chose jugée une première fois sur un point déterminé ne s'impose nullement au juge appelé à connaître une seconde fois de cette question.

§ 166 Toutefois, cette solution ne peut avoir une portée absolue. En effet, un courant jurisprudentiel important admet que si un point litigieux a déjà été affirmé ou nié, à l'occasion d'une instance précédente, il ne peut plus faire l'objet d'un nouveau débat, alors même que le demandeur intenterait un nouveau procès pour en déduire des conséquences différentes de celles qui l'avaient conduit à former la première demande *(Cass. civ., 29 juin 1948 : JCP G 1949, II, 4689 , note A. Besson ; D. 1948, p. 469, note P.L.P. ; RTD civ. 1949, p. 553 , obs. Hébraud. - Cass. com., 5 nov. 1952 : Bull. civ. III, n° 338 . - Cass. 1re civ., 10 févr. 1953 : JCP G 1953, II, 7636 , note R. Perrot. - Cass. com., 16 nov. 1964 : Gaz. Pal. 1965, 1, p. 147 . - Cass. soc., 8 janv. 1976 : Bull. civ. V, n° 9 . - Cass. 1re civ., 18 juill. 1995 : Bull. civ. I, n° 330 ; Gaz. Pal. 1996, 1, pan. jurispr. p. 84).*

62. The French authority states that if a disputed question has previously been affirmed or denied in an earlier proceeding, it cannot be the subject of a new debate, even if the claimant pursues a new proceeding aimed at achieving different results from those resulting from the initial claim.

63. Counsel for the Respondent also referred to **Ungava Mineral Exploration Inc. c. Mullan 2008 QCCA 1354**, from the Quebec Court of Appeal, with respect to the identity

of subject matter in the context of *res judicata*. **Ungava Mineral Exploration Inc.** referred to and quoted with approval the Supreme Court of Canada case of **Pesant v Langevin (1926), 41 Que. K.B. 412**, with respect to the identity of subject matter in the context of *res judicata*. The irrebuttable presumption of *res judicata* is articulated in Article 2848 of the Civil Code of Quebec, which closely resembles article 1351 (1) and (2) of the Civil Code 2021. The said Article 2848 stipulates —

> *"L'autorité de la chose jugée est une présomption absolue; elle n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement, lorsque la demande est fondée sur la même cause et mue entre les mêmes parties, agissant dans les mêmes qualités, et que la chose demandée est la même."*

64. The Court of Appeal of Quebec in **Ungava Mineral Exploration Inc.** addressed the issue of the identity of subject matter in the context of *res judicata*, as follows —

> *"[76] A mon avis on doit au contraire, à l'instar de la juge de première instance, conclude à identité d'ojet.*
>
> *[77]* ***Dans Pesant c. Langevin, affaire que la cour Suprême qualifie d'arrêt de principe sur la question de l'identité d'objet", le juge Rivard écrit que: L'identité d'objet est toujours plus difficile à determiner. L'objet d'une demande, c'est le bénéfice que l'on se propose d'obtenir en la formulant. L'identité matérielle, c'est-à-dire l'identité d'une même chose corporelle, n'est pas nécessairement exigée. Peut-être force-t-on un peu le sens du mot « objet », mais on admet comme suffisante une identité abstraite de droit. « Cette identité de droit existe non seulement lorsque c'est exactement le même droit qui est réclamé sur la même chose ou sur quelqu'une de ses parties, mais encore lorsque le droit qui fait le sujet de la nouvelle demande ou de la nouvelle exception, sans être absolument identique à celui qui a fait l'objet du premier jugement, en forme néanmoins une partie nécessaire, y est virtuellement compris, comme en étant un démembrement, une suite ou une conséquence essentielle ». Supra (3). En d'autres termes, si deux objets sont tellement connexes que les deux débats qui se font à leur sujet soulèvent la même question concernant l'accomplissement de la même obligation, entre les mêmes parties, il y a chose jugée.*** *C'est ainsi qu'il y a des cas « où le mot "objet" désigne la question débattue dans le procès plutôt que la conséquence sur laquelle prononce en définitive le jugement; où cette question se présente identique dans deux demandes, la diversité des conséquences n'empêche pas la chose jugée ». Supra (3). L'identité de question peut donc suppléer au défaut d'identité corporelle de l'objet,*

> *lorsque l'intime liaison qui unit entre elles les deux instances est telle que le juge a pu prévoir, en décidant la question une première fois, la conséquence à propos de laquelle elle est soulevée une seconde fois. Supra (3). Ainsi, « si un droit a été affirmé ou nié dans un procès, il y aura identité d'objet, si dans un nouveau procès on remet en question le même droit, alors même que ce serait pour en tirer une autre conséquence ». Supra (3). […]*[53]
>
> *[78] Le jugement de la Cour suprême dans Roberge c. Bolduc confirme cette approche, ajoutant cependant ceci, qui indique la voie à suivre en l'occurrence :*
>
> > *Si l'on veut, par conséquent, déterminer s'il y a identité d'objet, il faut examiner non seulement la forme de la demande, mais encore sa substance.*[54]
>
> *[79] En l'espèce, et selon ces enseignements, on doit conclure à l'identité d'objet dans la mesure où, en substance, l'appelante demande ici la sanction des mêmes droits, c'est-à-dire, d'une part, la sanction du dol commis par CRI et les intimés au regard de l'Entente et de la Cession et, d'autre part, la sanction de la violation de l'obligation de bonne foi qui leur incombait au regard de l'arbitrage Bisson, violation sans laquelle l'annulation de l'Entente et de la Cession aurait été obtenue par l'appelante. Les remèdes recherchés, quoique différents, sont donc les deux volets de l'affirmation des mêmes droits et, en ce sens, on doit conclure à l'identité d'objet, l'action en justice cherchant ici à remettre en question les droits qui, en substance, ont déjà été invoqués dans le recours arbitral, bien que ce soit pour en tirer une autre conséquence. Autrement dit, et pour paraphraser le juge Rivard dans l'arrêt Pesant c. Langevin, précité, on remet ici en question le même droit, bien que ce soit pour en tirer une autre conséquence. En réalité, et paraphrasant toujours, les deux objets sont tellement connexes que les deux débats qui se font à leur sujet soulèvent la même question concernant l'accomplissement de la même obligation, entre les mêmes parties, comme on le verra ci-dessous, et il y a donc chose jugée."* [Emphasis is mine]

65. In **Roberge v. Bolduc**, **[1991] 1 S.C.R. 374**, the Supreme Court of Canada referred to and quoted with approval the case of **Pesant** with respect to the identity of subject matter in the context of *res judicata* as follows —

> *"[TRANSLATION] The object of an action is the benefit to be obtained in bringing it. Material identity, that is identity of the same physical thing, is not necessarily required. This perhaps forces the meaning of subject matter (or "objet") somewhat, but an abstract identity of right is taken to be sufficient. "**This identity of right exists not only when it is exactly the same right that is claimed over the same thing***

> ***or over one of its parts, but also when the right which is the subject of the new action or the new exception, though not absolutely identical to that which was the subject of the first judgment, nevertheless forms a necessary part of it, is essentially included in it, as by being a subdivision or a necessary sequel or consequence". In other words, if two objects are so related that the two arguments carried on about them raise the same question regarding performance of the same obligation between the same parties, there is res judicata****.** *[References omitted]."* [Emphasis is mine]

66. According to the argument of Counsel for the Respondent, in order, therefore, to decide whether or not there is identity of subject matter, the substance of the claim must be examined, not only its form.

67. Based on the principles established in case-law and doctrine, Counsel for the Respondent presented the following arguments. He argued essentially that there is identity of subject matter because the ultimate relief sought in both actions related to the distribution of the estate of the late Ogilvy Berlouis among his heirs. According to Counsel for the Respondent, the ultimate relief concerning the distribution of the estate of the late Ogilvy Berlouis is found in paragraph (d) of the prayer in the action number CS74/2020. With respect to the action number CS119/2022, the ultimate relief for the distribution of the same is found in paragraph (2) of the prayer. Counsel argued that in both actions, the Appellants, as reserved heirs, were essentially challenging the testamentary dispositions and seeking a re-distribution of them.

68. He went on to argue that the "*subject matter (or "objet ") of the two actions (CS74/2020 and CS119/2022) are so closely related that the two debates and arguments on them raise the same question – namely the issue of redistribution of the testamentary dispositions made by the late Ogilvy Berlouis – between the same parties."* (in paragraph 2.41 of the skeleton heads of argument presented on behalf of the Respondent).

69. As a result, he argued that the learned Judge came to the correct finding when she held, "[i]*n all the three matters the Plaintiffs sought and seeks a re-distribution of the succession of the late Ogilvy Berlouis*".

(C) Identity of "*cause*"

70. With respect to the identity of "*cause*", Counsel for the Appellants argued that the two causes of action in question are different from one another. She agreed with Counsel for the Respondent that the cause of action in the plaint (CS119/2022) concerned the excessive dispositions made in the Last Will and Testament of Ogilvy Berlouis. However, she claimed that the cause of action in the amended plaint (CS74/2020) pertained to the validity of the Last Will and Testament of Ogilvy Berlouis. Counsel for the Appellants also submitted that additional causes of action were pleaded in the amended plaint (CS74/2020), which were not pleaded in the plaint (CS119/2022).

71. Counsel for the Appellants also argued that the learned Judge in the action number CS74/2020 determined that there was no cause of action disclosed against either Defendant. As a result, Counsel for the Appellants argued that there cannot be a congruence of causes of action if none existed in the proceedings of action number CS74/2020. Furthermore, even if a valid cause of action had been disclosed on the pleadings in CS74/2020, the causes of action pleaded (but not established) in the action number CS74/2020 were different from the cause of action pleaded in the plaint CS119/2022. Hence, according to Counsel for the Appellants, there is no identity of cause of action between the two actions.

72. With regard to the identity of "*cause*", Counsel for the Respondent argued that the Appellants' argument that the causes of action in the two cases are different overlooks the fact that both actions (CS74/2020 and CS119/2022) arose from the same set of facts and provisions of the law, namely articles 913 and 920 of the Civil Code 1976.

73. He argued that the learned Judge was correct to find that, "*[46]* [a]*ll three matters arise from the same set of facts, the dispositions made by the late Ogilvy Berlouis albeit the first matter related to a transfer effected before his death, whereas the second matter and the current matter concerns the dispositions made in his last Will and Testament dated 20th December 2017 and seeking a reduction of the same."*

ANALYSIS OF THE CONTENTIONS OF THE PARTIES:

74. The Courts of Seychelles look to French case-law and doctrine for persuasive guidance in matters borrowed from French law. The law of Seychelles regarding the principle of *res judicata* or "*l'autorité de la chose jugée"* is based on French law. Therefore, the interpretation of article 1351 of the Civil Code 1976–which has since been repealed and the Civil Code 2021 relies on French case-law and doctrine. English law does not apply to this article. Therefore, the suggestion in **Commercial House One (Seychelles) Ltd v/s Eden Island Development Company Ltd & Anor SCA 92/2023 (17 April 2024)** that the concept of "*cause*" could be interpreted in accordance with English law should not be followed.

75. I quote from **Dalloz Encyclopédie Juridique 2e Édition** with respect to the definition and role of the *"**chose jugée***", at note 1 —

> *"1. Définition et role de la chose jugée. — Les decisions de justice ou tout au moins certaines d'entre elles …on l'autorité de la chose jugée, ce qui signifie qu'il est interdit aux parties de remettre en cause ce qui a été définitivement jugé. Pratiquement, l'autorité de la chose jugée peut se manifester sous deux aspect differents, qui témoignent, l'un et l'autre, du double role qu'elle est destinée à remplir. 1º La chose jugée peut avoir, en premier lieu, une function négative. Le plaideur qui a succombé ne peut plus engager une nouvelle instance pour obtenir, d'une manière directe ou indirecte, ce qu'un premier jugement lui a refusé ; s'il le faisait, son adversaire ne manquerait pas de lui opposer une fin de non-recevoir tirée de la chose jugée*[…]*."*

76. **Planiol and Ripert**, in their **Traité pratique de droit civil français (2nd ed. 1954), t. VII, at No. 1552, p. 1015**, observe that in reality, this legal presumption amounts to a rule of substance. The judgment, once delivered, will finally terminate the proceeding if the rights of appeal were exercised in vain or if no use was made of them. It is a social necessity of the first order that legal proceedings should not be started over and over again on the same matter. Stability in social relationships requires that decisions of the Courts be observed in the same way as legislation.

77. In **Gomme**, the Court of Appeal considered the principle of *res judicata, inter alia*, in light of its underlying public policy that there should be a finality to litigation. The Court of Appeal in **Gomme** remarked —

> *"We consider that it is apposite that at this stage, we state a few things about the multiplicity of litigation. The plea of res judicata provided for in article 1351 of the Civil Code was designed to stop such abuses.* […]. *For interpretation one may refer to the cases of Heirs Rouillon v Alderick Tirant (1983) SLR 169, Pouponneau and others v Janisch (1979 (SLR 139, Seychelles Housing Development Corporation v Fernandez Supreme Court (Civil Side) No 131 of 1989, Julienne v Julienne Supreme Court (Civil Side) No 68 of 1991, and Hoareau v Hemrick (1973) SLR 272."*

78. The established case-law of the Courts of Seychelles holds that for a plea of *res judicata* to succeed under article 1351, the three identities must be present: identity of parties (in the same capacities), the identity of subject matter and the identity of "*cause*", upon which **Bertier de Sauvigny v Courbevoie Ltee [1955] M.R 215**, in interpreting article 1351 of the Mauritius Civil Code, explains as follows —

> *"*[T]*he "objet" is what is claimed (il faut que la chose demandée soit la même). It is due to the necessity of keeping very distinct "la cause de la demande" and "les moyens de la demande". "Les moyens are the arguments and submissions which can be advanced in support of the claims. It stands to reason that a party could not start an action anew simply because he failed to present to the court all the arguments which were available to him at the time of the trial. So that the identity of "moyens" is indifferent; the presumption of "l'autorité de la chose jugée" may well apply, notwithstanding the non-identity of moyens: la cause is the fact, or the act, whence the right springs. It might be shortly described as the right which has been violated".*

79. It is noted that neither the Plaintiffs, nor the Defendants appealed from the Judgment-2021, which is now a final judgment for all intents and purposes. I pause here to state that a necessary consequence of the presumption of the validity of judgments is that a judgment no matter how serious the irregularity committed, still carries the authority of *res judicata,* as long as it has not been challenged through a recourse available under the law. I read from **Dalloz Encyclopédie Juridique 2ᵉ Édition CHOSE JUGÉE** at note 14 —

> "***§ 2. —*** *L' autorité de la chose jugée est indépendante des vices dont le jugement est entaché.*
>
> *14. Un jugement, si grave que soit l'irrégularité commise, n'en a pas moins l'autorité de la chose jugée, aussi longtemps qu'il n'a pas été attaqué par une voie de recours*[…]*[References omitted]".*

80. I also read from **Dalloz Code Civil 1974-75, SECTION III Des présomptions Art. 1351** —

> *"1. Aussi longtemps qu'un jugement en premier resort n'est point attaqué par la voie de l'appel, celui contre lequel il a été rendu n'est pas recevable à élever en justice une pretention contraire à ce qui a été jugé. – Civ. 16 juin 1937, D. H. 1937. 517."*

81. In light of the above, I consider whether or not the learned Judge was correct in determining that the three identities were satisfied.

(A) Identity of parties

82. The text of article 1351 (1) and (2) of the Civil Code 2021 is clear: the presumption of *res judicata* applies only when the demand is between the same parties acting in the same capacities, upon which **Jurisclasseur Civil Art 1349-1353**, **Les présomptions (Suite) Autorité de la chose jugée au civil sur le Civil,** at note 133, explains as follows —

> ***"133. — 1º PARTIE A L'INSTANCE. — Les personnes qui à titre de demandeur ou de défenseur ont conclu ou ont été appelées à conclure soit au fond, soit sur des exceptions (cass. Civ. 3 mai 1886 ; D. P. 86, 1, 437) ont très certainment la qualité de parties à l'instance. Elles peuvent donc invoquer à leur profit ou se voir opposé la chose jugée par la décision qui a clos cette instance[6].***
>
> *Ont également la qualité de parties les personnes qui sont intervenues dans le débat, sur une intervention volontaire ou forcée, alors même que le le jugement aurait été rendu sur un point litigieux auquel ells seraient restées étrangères ; leur simple presence ou leaur vocation à intervenir dans le litige suffit à considerer qu'elles ont été en mesure de faire valoir leurs droits (Cass. Req. 21 mai 1855 : D. P. 56, 1, 258).* [Emphasis is mine]

[6] The relevant extract from note 133 states that persons who, as plaintiffs or defendants, have concluded or have been called to conclude either on the merits or on exceptions (cass. Civ. 3 May 1886; D. P. 86, 1, 437) most certainly have the status of parties to the proceedings. They can, therefore, invoke for their benefit, or have opposed to them, the *res judicata* established by the decision which has concluded these proceedings.

83. I have also considered the case of **Soobhany and Ors**, referred to by Counsel for the Respondent, on the question of the identity of parties. In **Soobhany and Ors** several plaintiffs sued one defendant in respect of the ownership of a portion of land. The defendant subsequently instituted a counterclaim against the plaintiffs on the basis of the tender of payments in respect of the purchase of the portion of land in dispute. There was a previous judgment which had been entered by the Magistrate Court of Rivière du Rempart in a case between the defendant, who was the plaintiff in the Rivière du Rempart case, and one of the plaintiffs (Rasool Elam Soobhany), who was the defendant in the Rivière du Rempart case. The Supreme Court of Mauritius, presided by Lalouette J., although it eventually came to the determination that the Rivière du Rampart Judgment was *res judicata* in favour of all the plaintiffs, in dismissing the counterclaim of the defendant, stated the following, as part of the judgment —

> *"*[I] *am of opinion that the judgment of the Court of Rivière du Rempart constitutes res judicata, at least in so far as defendant and plaintiff Rassool Elam Soobhany are concerned".*

84. Upon careful consideration of the arguments presented by both Counsel and the authorities, I conclude that there is identity of parties between the two actions (CS74/2020 and CS119/2022). I agree with the argument presented by Counsel for the Respondent that the parties involved in both actions were suing and being sued in the same capacities. In both actions, the Plaintiffs were suing in their capacity as reserved heirs, while the Respondent was being sued in its capacity as the Estate of the Late Ogilvy Berlouis, represented by its executrix, Josephine, Claude, Maryse Berlouis. According to the principles enunciated in the authorities above, it is immaterial that in the action number CS74/2020 there was another party who was also a Defendant. Therefore, I reject the argument presented by Counsel for the Appellants that there is no identity of parties. Accordingly, I hold that the learned Judge was correct to determine that there was identity of parties.

(B) Identity of subject matter

85. According to article 1351 (1) and (2) of the Civil Code 2021, for a final judgment to have the effect of *res judicata*, it is not sufficient for the same parties to act in the same capacity in both cases; it is necessary that the demand relate to the same subject matter.

86. According to **JurisClasseur Procédure civile, 2º Identité de chose demandée** (or Identity of the thing claimed) at **§ 157**[7], **t**he concept of subject matter is defined in terms of the purpose of the authority, namely to avoid calling into question what has been decided by the Court: the subject matter of the demand must therefore be sought in the content of the decision, in what has been asked of the Court and which has been the subject of a decision in respect of, both of the material thing claimed (a), of the rights claimed over the same thing (b) or of the questions resolved in order to rule (c) on the benefit claimed.

87. I have carefully considered the facts of this case, the authorities and the arguments presented by both Counsel with respect to the identity of subject matter. Counsel for the Respondent has argued against a narrow interpretation of the identity of subject matter, contrasting with the position of Counsel for the Appellants. I agree with Counsel for the Respondent that, in appropriate cases, the Court's analysis should go beyond a narrow interpretation of the identity of subject matter. To determine whether or not the learned Judge was correct to hold that the identity of subject matter was present, I will start by considering the arguments presented by Counsel for the Respondent.

88. **JurisClasseur Procédure civile** explains at **§ 5**[8] that the authority of *res judicata* is based on two essential foundations. One of the essential foundations of the authority of *res judicata* is its ability to control and sanction the diligence of parties involved. In this respect, case-law has extended the scope of *res judicata* to include questions which have been implicitly resolved when a litigant exhibits dilatory or inconsequential behaviour. **§ 5** explains as follows —

[7]JurisClasseur Procédure civile, op.cit., § 157. *"… la notion d'objet est définie en fonction de la finalité de l'autorité, à savoir éviter de remettre en cause ce qui a été tranché par le juge: l'objet de la demande doit donc être recherché dans le contenu de la decision dans ce qui a été demandé au juge et qui a fait l'objet d'une décision à l'égard, aussi bien de la chose matérielle réclamée (a), que des droits revendiqués sur cette même chose (b) ou encore des questions résolues pour statuer (c) sur l'avantage réclamer."*

[8] JurisClasseur Procédure civile, op. cit., § 5.

> *"Ensuite, l'autorité de la chose jugée permet de contrôler et de sanctionner la diligence des parties. Elle s'oppose à ce qu'une partie réitère le même procès, dans le but de rectifier un mauvais choix initial, ou de réparer une omission et de prolonger artificiellement le contentieux (par exemple en sollicitant l'annulation du contrat en se fondant sur un vice du consentement, puis en réitérant la même demande d'annulation fondée sur un autre vice du consentement : Cass. 1re civ., 20 juill. 1965 : Bull. civ. I, n° 399). L'autorité de la chose jugée constitue alors " un instrument de rationalisation et de moralisation des stratégies judiciaires "(RTD civ. 1995, p. 177 , obs. J. Normand). À cet égard, la jurisprudence étend le domaine de l'autorité de la chose jugée aux questions implicitement résolues lorsqu'elle est confrontée à un comportement dilatoire ou inconséquent d'un plaideur (c'est le cas de celui qui demande l'exécution d'une vente et, après l'avoir obtenue d'un premier juge, sollicite la résolution de la même vente. - Cass. com., 4 janv. 1982 : Bull. civ. IV, n°1)."*

89. It is understood that the principle upon which Counsel for the Respondent relies states that both actions are not required to seek the same reliefs: it is sufficient if the subject matter of the second action is implicitly included in the subject matter of the first one. A logical extension of this principle is that if the second action asserts a claim which is either identical to or a necessary consequence of the first one, then there exists identity of subject matter. Therefore, to decide whether or not there is identity of subject matter, the substance of the claim should be examined, not only its form.

90. I have not found any authorities from the Courts of Seychelles, which address the principles cited by Counsel for the Respondent regarding the identity of subject matter in the context of *res judicata*. It is to be noted that the case of **Bertier de Sauvigny**, which serves as the basis for how the Courts of Seychelles interpret the principle of *res judicata* under article 1351, does not refer to the principles relied upon by Counsel for the Respondent.

91. With respect to the facts of this case, Counsel for the Respondent argued that the subject matter of the two actions (CS74/2020 and CS119/2022) are so related that the two arguments carried on about them raise the same question regarding the re-distribution of the testamentary dispositions made by the late Ogilvy Berlouis between the same parties. In that regard, he argued that the learned Judge came to the correct finding that the identity of subject matter was present because "*in all three matters the Plaintiffs sought*

and seek a re-distribution of the succession of the late Ogilvy Berlouis". In my assessment, with respect to the facts of this case, the arguments presented by Counsel for the Respondent are misconceived.

92. In my view, the essential subject matter or relief of the two actions is not the distribution of the estate of the late Mr. Ogilvy Berlouis among his heirs, as argued by Counsel for the Respondent by referring to it as "*the ultimate relief*". In my view, the essential or immediate relief sought by the Plaintiffs in the action number CS74/2020 was a declaration that the Last Will and Testament of Ogilvy Berlouis is null. The learned Judge in the Judgment-2021 considered whether or not the Last Will and Testament of Ogilvy Berlouis may be declared null on the basis that the dispositions were not in accordance with article 913 of the Civil Code 1976. The Judgment-2021 did not grant this relief because the amended plaint failed to disclose a reasonable cause of action against the Defendants. Additionally, the learned Judge concluded that if she were to make an order for reduction, such an order would be considered *ultra petita*. Even if the learned Judge had erred, such error would not have prevented the Judgment-2021 from acquiring the authority of *res judicata* on the facts of this case.

93. Having considered the claims in the prayer of the Appellants in the action number CS119/2022, it is my view that the essential or immediate relief sought by the Appellants was a declaration "*that the dispositions in the Will of Ogilvy Berlouis dated 20 December 2017 be varied in accordance with the law*". In their amended notice of appeal, the Appellants have asked the Court of Appeal to grant their appeal, set aside the Ruling-2024, and order the "***reduction of the dispositions in the Will of the deceased in accordance with the law***." [Emphasis supplied]

94. I pose the question of whether or not the difference in subject matter is sufficient to distinguish the two actions with respect to subject matter. The answer is yes. In my view, the right which is the subject matter of the action number CS119/2022 is not identical to that which was the subject matter of the action number CS74/2020: the right which is the subject matter of the action number CS119/2022 is not essentially included in that which was the subject matter of the action number CS74/2020 "*as being a subdivision or a*

necessary sequel or consequence": see **Pesant**, **Roberge** and **Ungava Mineral Exploration Inc**. It follows that the two arguments carried on about the two actions do not raise the same question regarding the re-distribution of the testamentary dispositions made by the late Ogilvy Berlouis between the same parties.

95. I read the following from **DALLOZ RÉPERTOIRE DE DROIT CIVIL 2e edition Tome VII QUOTITÉ DISPONIBLE SECT. 3. — Action en réduction.,** at notes 421 and 424 with respect to the action of reduction —

> *"421.* […]. *Si la quotité disponible est dépassé, les réservataires ont une action spéciale, dite action en reduction, pour obtenir leur reserve (C. civ., art. 920 et s.).*
> […].
>
> *424. Le dépassement de la quotité disponible n'a pas pour sanction la nullité de la libéralité : celle ci est seulement réductible. Cette sanction n'est pas automatique.* ***Les réservataires doivent demander la reduction, chacun pour sa part s'ils sont plusieurs : main ils ne le peuvent qu'après le décès du disposant****."*
>
> […]
>
> *469. L'effet de l'action en reduction, quand elle réussit, est d'entraîner l'anèantissement total ou partiel de la libéralité."* [Emphasis is mine]

96. I will now examine the interpretation of the identity of subject matter as presented by Counsel for the Appellants in her arguments. Based on the principle that the Appellants are not claiming the same right over the same thing, I conclude that there is no identity of subject matter. The Plaintiffs in the amended plaint (CS74/2020) have pleaded the following essential claims in their prayer —

> "*a)* [t]*hat the Will of the 1st Defendant is declared void to the extent that it leaves the entirety of the 1st Defendant's estate to the 2nd Defendant;*
>
> *(c)* [t]*hat the 1st Defendant provides all the heirs with an inventory of the 1st Defendant's estate and that any dispositions to the 2nd Defendant are declared null and void and brought back to the hotchpot;*".

97. In the plaint (CS119/2022), the Appellants have pleaded the following essential claim in their prayer —

> *"1. Declare that the dispositions in the Will of Ogilvy Berlouis dated 20 December 2017 be varied in accordance with the law;"*

98. My finding is consistent with the case-law on the interpretation of article 1351. In **Julienne v Julienne (1992) SLR 12**, the plea of *res judicata* was rejected as the first suit concerned a settlement of compensation among heirs and the second a *desaveu de paternité* of the defendant, who would otherwise benefit from the settlement. In **Pouponneau v Janish SCAR (1979) 290**, the plea of *res judicata* was also rejected as the first suit concerned a declaration of title to a house and the second suit, the ejectment of the defendant.

99. Based on the above, I conclude that the learned Judge was wrong to conclude that there was identity of subject matter.

100. This brings me to the last requirement: identity of "*cause*".

(C) Identity of "*cause*"

101. The existence of identical parties and subject matter is insufficient to invoke the authority of *res judicata* under article 1351 (1) and (2) of the Civil Code 2021. It is essential that the "*cause*" of the new demand is identical to the "*cause*" of the previous demand. However, defining the concept of "*cause*" is challenging, and there is uncertainty among legal writers with respect to the definition of its elements.

102. I read the following from **DALLOZ ENCYCLOPÉDIE JURIDIQUE 2ᵉ ÉDITION Tome II ASTREINTES à CLÔTURES, CHOSE JUGÉE § 2. — La notion de cause.** at notes 157, 158, 159 and 178 **—**

> *"**157. La cause d'une demande en justice peut être définie comme l'acte ou le fait juridique qui constitue le fondement direct et immédiat du droit réclamé** (AUBRY ET RAU, 6e éd., t.12, § 769 ; Com. 4 oct. 1954, motifs, préc.), c'est, par exemple, le contrat de vente en vertue duquel un acheteur réclame la délivrance de la chose vendue ou le contrat de dépôt sur lequel une personne fonde sa*

demande en restitution. Ce n'est donc pas dans le droit qu'il s'agit de faire valoir que reside la cause, mais dans le principe générateur de ce droit. […].

158. *Définir la cause d'une demande comme étant le principe générateur du droit réclamé ne fait en réalité que déplacer le problème, car, sous son apparente simplicité, cette definition ne nous enseigne pas grand-chose ; en réalité toute la question est précisément de savoir, dans chaque hypothèse déterminée, quel est le fondement de la demande. Or, à cet égard, la notion de cause est si malaise à définir qu'il est pratiquement impossible de tracer des règles générales. Tout au plus peut-on isoler cette notion en l'opposant, d'une part aux moyens et, d'autre part, à l'objet de la demande.*

A. — La distinction entre la cause de la demande et les moyens.

159. *Les moyens sont les arguments de fait ou de droit qu'un plaiduer apporte à la barre pour justifier sa pretention ; autrement dit, tandis que la cause d'une demande en est le principe générateur, les moyens, eux, ne sont que les éléments utilises par les parties, soit pour determiner la portée de la règle de droit applicable, soit pour faire la prevue du fait juridique invoqué comme la cause de la demande* […].

B. — La distinction entre la cause de la demande et son objet.

178. Tandis que l'objet d'une demande est le droit réclamé en justice* […], *la cause de cette demand n'est autre que le principe générateur du droit réclamé ; c'est-à-dire le fait juridique que lui a donné naissance* […]. *Ce principe n'est pas douteux.[…]." [Emphasis is mine]

103. According to **DALLOZ ENCYCLOPÉDIE JURIDIQUE**[9] at note 157, the "*cause*" is the act or legal fact which is the direct and immediate basis of the right claimed.

104. In **Bertier de Sauvigny**, the Court stated that the "*cause is the fact, or the act, whence the right springs. It might be shortly described as the right which has been violated."*

105. The phrases *"the act or legal fact which is the direct and immediate basis of the right claimed*", "*the fact, or the act, whence the right springs", "the right which has been violated",* or "*the principle giving rise to the right claimed*" are efforts to capture in words the abstract notion of "*cause*".

[9] DALLOZ ENCYCLOPÉDIE JURIDIQUE, loc. cit.

106. I will now consider the facts of this case, the authorities, and the arguments presented by both Counsel to determine whether or not the learned Judge correctly concluded that the identity of "*cause*" was satisfied. After carefully considering the amended plaint CS74/2020 and the plaint CS119/2022, I conclude that the legal facts which directly and immediately support the right claimed in both actions are related to the dispositions in the Last Will and Testament of Ogilvy Berlouis which exceed the disposable portion (although I have mentioned above, that the right claimed in the action number CS74/2020 cannot be supported by the set of facts). The arguments of Counsel for the Appellants appeared to conflate the concepts of "*cause*" and subject matter. As stated in note 178 from **DALLOZ ENCYCLOPÉDIE JURIDIQUE**[10], there is a distinction between the two.

107. Hence, I conclude that the learned Judge was correct to find that the identity of "*cause*" was satisfied. She concluded that the two actions CS74/2020 and CS119/2022 *arise from the same set of facts, the dispositions made by the late Ogilvy Berlouis* […] *the second matter and the current matter concerns the dispositions made in the last Will and Testament dated the 20 December 2017".*

Conclusion

108. I conclude that the final Judgment-2021 does not have the effect of *res judicata* or "*autorité de la chose jugée*" *vis-à-vis* the action number CS119/2022.

Amended ground 2 of the appeal

109. If I am wrong with respect to the conclusion reached that the final Judgment-2021 does not have the effect of *res judicata vis-à-vis* the action number CS119/2022, I would, in any event, have concluded that the plaint instituting the action number CS119/2022 is an abuse of the process of the Court.

110. I state the reasons for concluding that the plaint instituting the action number CS119/2022 is an abuse of the process of the Court.

[10] DALLOZ ENCYCLOPÉDIE JURIDIQUE, loc. cit.

Submissions on behalf of the Appellants:

111. In her skeleton heads of argument, Counsel for the Appellants began by submitting that the form of abuse referred to by Counsel for the Respondent is described in **Henderson v. Henderson (1843) 3 Hare 100**. She submitted that the rule in **Henderson** precludes a party from raising matters in subsequent proceedings which were not, but could and should have been raised in earlier proceedings. According to her, the rule in **Henderson** has been mitigated by the House of Lords' decision in **Johnson**. Counsel for the Appellants has urged the Court of Appeal to take a broad, merits-based approach, as explained by the House of Lords in **Johnson**, in determining whether or not the Appellants' conduct amounts to an abuse of process in all the circumstances.

112. She argued that the Court of Appeal should also consider the remarks of Auld L.J. in the English case of **Bradford & Bingley Building Society v Seddon Court of Appeal | March 11, 1999 | 1. W.L.R. 1482**. In **Bradford & Bingley Building Society**, Auld L.J. (with whom Nourse and Ward L.JJ. agreed) remarked at pages 1492-1493 —

> *"…mere 're'-litigation, in circumstances not giving rise to cause of action or issue estoppel, does not necessarily give rise to abuse of process. Equally, the maintenance of a second claim which could have been part of an earlier one, or which conflicts with an earlier one, should not, per se, be regarded as an abuse of process. Rules of such rigidity would be to deny its very concept and purpose. As Kerr LJ and Sir David Cairns emphasised in Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd [1982] 2 Lloyd's Rep 132 , 137, 138-139 respectively, the courts should not attempt to define or categorise fully what may amount to an abuse of process; see also per Stuart-Smith LJ in Ashmore v British Coal Corpn [1992] 2 QB 338 , 352. Sir Thomas Bingham MR underlined this in Barrow v Bankside Agency Ltd [1996] 1 WLR 257 , stating, at p 263b, that the doctrine should not be 'circumscribed by unnecessarily restrictive rules' since its purpose was the prevention of abuse and it should not endanger the maintenance of genuine claims; see also per Saville LJ, at p 266d-e.*
>
> > *"**Some additional element is required, such as a collateral attack on a previous decision** (see e g Hunter v Chief Constable of the West Midlands Police [1982] AC 529 ; Bragg's case [1982] 2 Lloyd's Rep 132 , per Kerr LJ and Sir David Cairns, at pp 137 and 139 respectively, and Ashmore's case [1990] 2 QB 338), **some dishonesty** (see e g per Stephenson LJ in Bragg's case, at p 139, and Potter LJ in Morris v Wentworth-Stanley [1999] 2 WLR 470 , 480 and 481; or successive actions amounting to*

unjust harassment (see e g Manson v Vooght [1999] BPIR 376 ...))."
[Emphasis is Counsel for the Appellants]

113. Counsel for the Appellants highlighted the pronouncements made by the learned Judge in paragraph [42] of the Judgment-2021, which are reiterated in paragraph [34] hereof, to emphasise that the Appellants have brought forward a genuine subject of litigation. Counsel's essential argument in that regard appears to be that the Appellants are seeking a legal remedy for the violation of article 913 of the Civil Code 1976, and, hence, the bringing of the action number CS119/2022 does not amount to unjust harassment of the Respondent and, hence, an abuse of the process of the Court.

114. In light of the principles stated above, Counsel for the Appellants urged the Court of Appeal to examine the proceedings of both actions with a view to assessing the Appellants' overall conduct in bringing the two actions. She explained that *"although the closeness of the relationship is related, the two causes of action are distinctively different"* (in paragraph [39] of her skeleton heads of argument).

Submissions on behalf of the Respondent:

115. Counsel for the Respondent argued that the learned Judge correctly concluded that the plaint instituting the action number CS199/2022 was an abuse of the process of the Court. In his argument, he highlighted that the pronouncement made in **Bradford & Bingley Building Society**, relied upon by Counsel for the Appellants, has been overtaken by the House of Lords decision in **Johnson** as well as the Court of Appeal decision of **Michael Wilson & Partners Ltd v/s Sinclair and others [2017] EWCA Civ. 3**. Counsel submitted that the Court of Appeal in **Commercial House One (Seychelles) Ltd** has quoted and referred with approval to the House of Lord's decision of **Johnson** and the Court of Appeal decision of **Michael Wilson & Partners Ltd | 2017**. He also referred to the authorities of **Gomme** and **Gill v/s Film Ansalt [2013] SLR 137** in support of his stance.

116. Counsel for the Respondent argued that a broad, merits-based judgment and analysis of the facts of the present appeal demonstrate that the action number CS119/2022

constitutes an abuse of the process of the Court. According to Counsel for the Respondent, the Appellants' conduct is in all the circumstances an abuse of the process of the Court. He argued that the action number CS119/2022 involved unjust harassment of the Respondent by the Appellants, taking into account the successive actions instituted against the Respondent, namely the cases CS146/2018 and CS74/2020.

117. I will examine the rest of his arguments during the stage of analysis.

ANALYSIS OF THE CONTENTIONS OF THE PARTIES

118. The Court has an inherent power to prevent an abuse of its process. This term *"connotes that the powers of the court must be used bona fide and properly, and must not be abused. The court will prevent the improper use of its machinery and will not allow it to be used as a means of vexatious and oppressive behaviour in the process of litigation."* (**ODGERS ON HIGH COURT PLEADING AND PRACTICE Twenty-Third Edition by D. B. CASSON - 1991**).

119. I quote the remarks made by Bingham L.J. in **Johnson** (with which the other members of the Appellate Committee agreed), with respect to the inherent power of any Court to prevent abuse of process —

> *"Abuse of process*
>
> *The rule of law depends upon the existence and availability of courts and tribunals to which citizens may resort for the determination of differences between them which they cannot otherwise resolve. Litigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court (Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. [1975] A.C. 581 at 590 per Lord Kilbrandon, giving the advice of the Judicial Committee; Brisbane City Council v. Attorney-General for Queensland [1979] A.C. 411 at 425 per Lord Wilberforce, giving the advice of the Judicial Committee). This does not however mean that the court must hear in full and rule on the merits of any claim or defence which a party to litigation may choose to put forward. For there is, as Lord Diplock said at the outset of his speech in Hunter v. Chief Constable of the West Midlands Police [1982] A.C. 529 at 536, an*
>
> > *"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 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. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. 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.""*

120. In the Seychellois case of **Gomme**, the Court of Appeal considered *inter alia* the term abuse of process as described in **Henderson** in light of its underlying public policy requirement that there should be finality to litigation and an end to litigation in a matter which has been dealt with in an earlier case. The Court of Appeal in **Gomme** remarked —

> *"**The rationale behind the rule of res judicata and its strict application is grounded on a public policy requirement that there should be finality in a court decision and an end to litigation in a matter which has been dealt with in an earlier case**. Because of the imaginative use that has been made to go round the rule, courts have developed the rule of abuse of process. **The rule of abuse of process encompasses more situations than the three requirements of res judicata. Courts cannot stay unconcerned where their own processes are abused by parties and litigants. There is a time when they have to decide that enough is enough where the lawyers have not advised their clients.** Abuse of process will also apply where it is manifest on the facts before the court that advisers are indulging in various strategies to perpetuate litigation either at the expense of their clients who may be hardly aware or at the instance of their clients who have some ulterior motive such as of harassing parties against whom they have brought actions or others who may not be parties. Courts have a duty to intervene to put a stop to such abuses of legal and judicial process*[…].
>
> ***The proper adherence to the rule of law in a democratic society enjoins one to ensure that one is debarred from rehashing the same issue in multifarious forms. Litigation should be reserved for real and genuine issues of fact and law. The dictum of Sir James Wigram VC in Henderson v Henderson (1843) 3 Hare 100 at 115, reproduced in the case of Bradford & Bingley Building Society (supra), is worth reproducing:***
>
> > ***where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the***

> ***same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest; but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.****"* [Emphasis is mine]

121. The case of **Johnson** expands upon the long standing principle in **Henderson**. Bingham L.J. stated the following with respect to the form of abuse described in **Henderson** —

> *"Thus the abuse in question need not involve the reopening of a matter already decided in proceedings between the same parties, as where a party is estopped in law from seeking to re-litigate a cause of action or an issue already decided in earlier proceedings, but (as Somervell L.J. put it in Greenhalgh v. Mallard [1947] 2 All E.R. 255 at 257) may cover*
>
> > *"**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**."* [Emphasis is mine]

122. Both Counsel have urged the Court of Appeal to apply the test for **Henderson** abuse, as recommended in **Johnson**. I pause here to state that **Bradford & Bingley Building Society** was decided subsequent to the judgment in **Johnson v Gore Wood & Co | Court of Appeal (Civil Division) | November 12, 1998 | [1999] B.C.C. 474**.

123. In **Johnson**, the House of Lords dealt with the need for finality in litigation. The speech of Bingham L.J. summarised the main principles in these terms at page 31 —

> *"But Henderson v. Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. **This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole.** The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. **I***

> ***would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before*** *As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim.* ***While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice****."* [Emphasis is mine]

124. In **Aldi Stores Ltd v WSP Group plc EWCA Civ 1260**, Thomas LJ (as he then was) reiterated that the question in every case is whether, applying a broad merits approach, the applicant's conduct is in all the circumstances an abuse of process. *"The Court will rarely find that the later action is an abuse of process unless the later action involves unjust harassment or oppression."*

125. The Court of Appeal in the cases of **Commercial House One (Seychelles) Ltd**, **Vijay Construction (Proprietary) Limited and Gomme** have referred to and quoted with approval the House of Lord's decision in **Johnson**. In the case of **Gomme**, the Court of Appeal noted that the rule against abuse of process *"has also been applied in a case where a plaintiff who could and should have pursued his claim in an earlier action against the same defendant: see Ashmore v British Coal Corporation [1990] 2 QB 338,*

Johnson v Gore Wood & Co 919980 EWCA Civ 1763, and (A Minor) v Hackney London Borough Council [1996] 1 WLR 789."

126. In describing the case as an abuse of process, the learned Judge considered the case of **Vijay Construction (Proprietary) Limited**, which dealt with the need for finality in litigation, *inter alia*. In **Vijay Construction (Proprietary) Limited**, the Court of Appeal stated the following in paragraphs [38] and [39] of the judgment —

> "*Abuse of process*
>
> *38. Rejection of res judicata leaves in play the possibility that the present proceedings are an abuse of process. This, in a sense as an extended version of the res judicata principle, was explained Sir James Wigram, Vice-Chancellor, in Henderson v Henderson (1843) 3 Hare 100, 67 ER 313* […].
>
> *39.* ***There is now no absolute rule that it is an abuse of process to pursue in later proceedings a claim that could have been advanced in, or at the same time, as earlier proceedings as the House of Lords judgment, Johnson v Gore Wood & Co (a firm) [2002] 2 AC 29 shows. The conclusion in that case was whether second proceedings are an abuse of process should be judged broadly on the merits, taking account of all public and private interests involved and the facts of the case. For these purposes, the critical question is whether the plaintiff is misusing or abusing the process of the courts****."* [Emphasis is mine]

127. **The Court of Appeal in Commercial House One (Seychelles) Ltd** has also cited and referred with approval to the **Michael Wilson & Partners Ltd's** case. **Michael Wilson & Partners Ltd, Simon L.J. (**with whom Patten and Ryder L.JJ. agreed) provided a review of the power to control abuse of process of the Court as follows —

> "*(1) In cases where there is no res judicata or issue estoppel, the power to strike out a claim for abuse of process is founded on two interests: the private interest of a party not to be vexed twice for the same reason and the public interest of the state in not having issues repeatedly litigated; see* ****2658*** *Lord Diplock in Hunter's case [1982] AC 529 , Lord Hoffmann in the Arthur J S Hall case [2002] 1 AC 615 and Lord Bingham in Johnson v Gore Wood & Co [2002] 2 AC 1. These interests reflect unfairness to a party on the one hand, and the risk of the administration of public justice being brought into disrepute on the other, see again Lord Diplock in Hunter's case. Both or either interest may be engaged.*

(2) An abuse may occur where it is sought to bring new proceedings in relation to issues that have been decided in prior proceedings. However, there is no prima facie assumption that such proceedings amount to an abuse: see Bragg v Oceanus [1982] 2 Lloyd's Rep 132 ; and the court's power is only used where justice and public policy demand it, see Lord Hoffmann in the Arthur J S Hall case.

(3) To determine whether proceedings are abusive the court must engage in a close 'merits based' analysis of the facts. This will take into account the private and public interests involved, and will focus on the crucial question: whether in all the circumstances a party is abusing or misusing the court's process, see Lord Bingham in Johnson v Gore Wood & Co and Buxton LJ in Laing v Taylor Walton [2008] PNLR 11 .

(4) In carrying out this analysis, it will be necessary to have in mind that: (a) the fact that the parties may not have been the same in the two proceedings is not dispositive, since the circumstances may be such as to bring the case within 'the spirit of the rules', see Lord Hoffmann in the Arthur J S Hall case; thus (b) it may be an abuse of process, where the parties in the later civil proceedings were neither parties nor their privies in the earlier proceedings, if it would be manifestly unfair to a party in the later proceedings that the same issues should be relitigated, see Sir Andrew Morritt V-C in the Bairstow case [2004] Ch 1 ; or, as Lord Hobhouse put it in the Arthur J S Hall case, if there is an element of vexation in the use of litigation for an improper purpose.

(5) It will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse of process, see Lord Hobhouse in In re Norris. To which one further point may be added.

(6) An appeal against a decision to strike out on the grounds of abuse, described by Lord Sumption JSC in Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd) [2014] AC 160 , para 17 as the application of a procedural rule against abusive proceedings, is a challenge to the judgment of the court below and not to the exercise of discretion. Nevertheless, in reviewing the decision, the Court of Appeal will give considerable weight to the views of the judge, see Buxton LJ in the Laing v Taylor Walton case, para 13." [Emphasis is mine]

128. In **Commercial House One (Seychelles) Ltd**, this Honourable Court quoted and referred with approval to the Hong-Kong case of **Lo Kai Shui v HSBL International Trustee Limited & Ors [2021] HKCF 1539**, in which it has been held, *inter alia* —

> *"*[a] *pleading or part of a pleading may also be struck out where the pleaded claims constitute an abuse of process, in that they could and should have been raised in earlier proceedings: Ko Hon Yue at §§83-84 (MA CJ), Yifung Properties v Smith [2019] 1 HKLRD 36 at §16 (Lam VP)."* See also the case of **Gangadoo v Gable and Wireless Seychelles Ltd (2013) SLR 317**.

129. I now apply the approach set out above to the facts of this case.

130. The only question to consider in this case is whether or not it was oppressive or otherwise an abuse of the process of the Court for the Appellants to pursue against the Respondent the action number CS119/2022, which they could have brought in the action number CS119/2022 against the Respondent. In my view, there is, of course, no doubt that the action number CS119/2022 could have been brought in the action number CS74/2020. However, in the light of the case of **Johnson**, which have been referred to and quoted with approval by the Courts of Seychelles, it does not at all follow that the Appellants should have done so or that their failure to do so renders the action number CS119/2022 oppressive to the Respondent or an abuse of the process of the Court. The burden rests on the Respondent to establish that it is oppressive or an abuse of process for the Respondent to be subjected to the action number CS119/2022.

131. Counsel for the Appellants argued in their amended ground 1 of the appeal that it was just for the Appellants to pursue the action number CS119/2022, which the learned Judge had previously found to be a "*genuine action*" under article 920 of the Civil Code 1976. In my view, this factor cannot be taken as initiating a right to a cause of action by the Appellants against the Respondent.

132. When Bingham L.J. in **Johnson** referred to a "*broad, merits-based approach*," he was not referring to the substantive merits of the actual claim. Based on **Johnson**, the merits I have to refer to relate to whether or not the Appellants could or should have raised the present claim for reduction in the action number CS74/2020, if it was to be raised at all. Millet L.J. in **Johnson** stated, "*the doctrine* [of abuse of process] *now under consideration can be no more than a procedural rule based on the need to protect the process of the Court from abuse and the defendant from oppression."* In **Brisbane City Council v Attorney-General for Queensland [1979] AC 411, at p. 425**, Lord

Wilberforce, giving the advice of the Judicial Committee of the Privy Council, explained that the true basis of the rule in **Henderson** is abuse of process and observed that it "*ought only to be applied when the facts are such as to amount to an abuse; otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation*."

133. At this juncture, I must address the first action number CS146/2018, filed by Laura Berlouis, the Plaintiff, on the 5 September 2018. This action was instituted against the Estate of the late Mr. Ogilvy Berlouis named as the First Defendant. The demand in the action number CS146/2018 was to reduce the gratuitous dispositions, which the late Mr. Ogilvy Berlouis had allegedly made in excess of the disposable portion. However, the action number CS146/2018 did not proceed to trial, as the Plaintiff withdrew this action. Therefore, my analysis will focus on the two actions, CS74/2020 and CS119/2022.

134. On the basis that a broad evaluative assessment is required, I must look at all the circumstances of the case. A number of considerations are relevant to this.

135. Counsel for the Appellants argued that the two causes of action in the two actions (CS74/2020 and CS119/2022) are different; however, she also argued that these two causes of action are closely related. She did not elaborate upon the arguments. On the other hand, Counsel for the Respondent argued that abuse of process was present by the mere fact that the Appellants have brought a claim, which could, and should, have been raised in the action number CS74/2020, if it were to be raised at all. He argued that there was no financial impediment and, in fact, no obstacles whatsoever preventing the Appellants from pursuing their present claim in the action number CS74/2020.

136. In my opinion, the arguments presented by Counsel for the Appellants do not support the Appellants' case. If the Appellants intended to allege reduction against the Respondent, they could, and should have done so within the claim CS74/2020. It is important to note that although the claim for reduction is new, it is based on substantially the same facts as the claim for nullity in the action number CS74/2020. Specifically, (a) the Appellants are

the children of the late Ogilvy Berlouis and are consequently reserved heirs, and (b) the late Ogilvy Berlouis made a testamentary disposition which exceeded the disposable portion permitted by the Civil Code 1976. It is noteworthy that the facts presented in the amended plaint CS74/2020 do not support the claim for nullity, but rather support a claim for reduction.

137. It is essential to my consideration and analysis of the facts that the action number CS74/2020 was litigated to a trial, as pointed out by Counsel for the Respondent. Both Plaintiffs, as reserved heirs, gave evidence during the trial. The Second Defendant, Josephine Claude Maryse Berlouis, the beneficiary of the dispositions, testified on her behalf. Having considered the record of the hearing, with care, I observed that the evidence given by the parties concentrated on the key issue: the gratuitous dispositions made by the late Mr. Ogilvy Berlouis in the Last Will and Testament of Ogilvy Berlouis, which exceeded the disposable portion, which ran afoul of article 913 of the Civil Code 1976. The plaint instituting the action number CS119/2022 alleged the same matter with respect to the gratuitous dispositions made by the late Mr. Ogilvy Berlouis in the Last Will and Testament of Ogilvy Berlouis, which exceeded the disposable portion. Based on article 718 of the Civil Code 1976, the cause of action for reduction, on the basis that the late Ogilvy Berlouis had gratuitously disposed of in excess of the disposable portion, came into existence on 3 April 2018.

138. In all the circumstances of the case, Counsel for the Respondent is correct to argue that there was no impediment whatsoever preventing the Appellants from pursuing the present claim for reduction based on articles 913 and 920 of the Civil Code 1976 in the action number CS74/2020. The claim for nullity in the action number CS74/2020, was pursued on the basis of articles 913 and 920 of the Civil Code 1976, which was an incorrect approach by Counsel for the Defendants. The learned Judge, after hearing the evidence, dismissed the action number CS74/2020 on the ground that it did not disclose a reasonable cause of action against the Defendants. With respect to the merits of the action number CS74/2020, the learned Judge concluded that if she were to make an order for the reduction of the dispositions, such an order would be *ultra petita*, as the Plaintiffs had not

prayed for that order. The learned Judge stated in the Judgment-2021 in paragraph [42] that the case was not "*brought in a proper manner*". Neither the Plaintiffs, nor the Defendants appealed from the Judgment-2021, which is now a final judgment for all intents and purposes. The Appellants filed the plaint instituting the action number CS119/2022 ten months after the Judgment-2021 was delivered. The action number CS119/2022 raised the issue of reduction based on facts which are not fresh. In my view, in all the circumstances of the case, the claim for reduction could, and should, have been raised and litigated in the action number CS74/2020.

139. It is noted that although the learned Judge did not expressly refer to the test in the case of **Johnson**, it is clear in the Ruling-2024 that she focused her attention on the crucial question of whether or not, in all the circumstances, the Appellants are misusing or abusing the process of the Court by seeking to raise before it the claim for reduction which could, and should, have been raised in the action number CS74/2020. The learned Judge stated in paragraph [55] of the Ruling-2024 —

> *"[55] This Court still stands by its finding, that it came after a full trial, that the deceased could not have gifted the entirety of his estate to his Executor, Maryse Berlouis. This Court could not have made the finding at paragraph [56] without considering the evidence that was recorded. The gift, by the deceased, of the entirety of his estate, gave rise to a cause of action for reduction. The said cause of action existed from the time the succession opened and was in existence when the first case was filed. The findings of this Court in CS74/2020 [2021] has not created a new cause of action that was not available to the Plaintiffs* […] *when the second case* [CS74/2020] *was filed."*

140. In the case of **Morris v Cottingham [2024] EWHC 2340 (Ch)**, the defendants relied on "*CPR Rule 3.4(2)(b)*", on the basis that bringing a further claim in relation to Mr Cottingham's estate is a *Henderson v Henderson* abuse of process, as it is a claim which should have been brought at the time of Mr Morris's first claim, in 2019. Mr Fuller noted that, even where causes of action are different, the second action may nevertheless be struck out as an abuse where the claim in the second action should have been raised in the earlier proceedings if it was to be raised at all (referring in support to the decision in **Mansing Moorjani v Durban Estates Limited [2019] EWHC 1229 (TCC)** at [17.4]). In this case, Mr Fuller argued that, as the first claim related to Mr Cottingham's estate, Mr

Morris could, and should, have brought the present claim as part of those proceedings. He noted, in particular, that there was correspondence in 2014 which makes it clear that Mr Morris was aware of the Swiss will and the potential for benefitting from that Swiss will.

141. The Court did not accept the argument. It found that, "*the first claim related to three matters: the first was a payment of £85,000, which Mr Morris says he was due under what was originally referred to as a deed of variation, but which* [the Court] *gather subsequently was accepted as a binding contract in relation to Mr Cottingham's estate; the second element of the claim was damages of £800,000, for pain and suffering, following what he claimed was an illegal eviction from a property; and the third element was damages of £10,000, in respect of goods which he says were removed from that property. Based on this,* [the Court] *found that any claim in relation to the Swiss will and the Swiss estate is sufficiently different to the claims made by Mr Morris' first claim and that it would not be abusive for Mr Morris to be allowed to make this claim*".

142. The Court in **Morris** stated —

> *"40. As the judge notes in Moorjani at [17.4(e)], the Court will rarely find abuse unless the second action involves "'unjust harassment' of the defendant."*
>
> *41. In addition, Lord Bingham noted, in Johnson v Gore-Wood [2002] 2 AC 1 at page 31 that: "It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the Court by seeking to raise before it the issue which could have been raised before."*
>
> *42. As I say, in my view, it cannot be said that this further claim, dealing with a completely different aspect of the estate, is harassment or is abusing the Court's process."*

143. Based on a broad evaluative assessment and in all the circumstances of the case, the claim for reduction, dealing with substantially the same facts as the claim for nullity, is harassment or is abusing the Court's process. In the case of **Morris**, the Court concluded

that there was no harassment on the basis that the further claim dealt with a completely different aspect of the estate.

144. Consequently, balancing the interest of the Appellants in being able to pursue their new claim for reduction under articles 913 and 920 of the Civil Code 1976, against the interest of the Respondent in not being vexed a second time and the public interests in access to the Court and finality, the learned Judge was correct to conclude that the balance comes down clearly in favour of the Respondent. Allowing this second claim, CS119/2022, to proceed against the Respondent on substantially the same facts, would, in the view of the learned Judge, amount to harassment of the Respondent.

145. In **Gill v Film Ansalt [2013] SLR 137**, a case referred to by the learned Judge in her consideration of the issue of abuse of process, the Court of Appeal stated —

> *"27. The Court becomes a vehicle of unjust outcomes in the hands of those who advertently or inadvertently abuse the justice system. Organised society in a democratic set-up needs a minimum of discipline which, for all the rights and liberties guaranteed, goes to secure the rule of law on sure foundations. Abuse of process was developed by the courts to protect the judicial process from abuse and misuse. Courts have a duty to intervene to put a stop to such misuse of legal and judicial process. See Bradford & Bingley Building Society v Seddan [1999] 1 WLR 1482; House of Spring Gardens v Waite [1990] 2 All ER 990; and In Re Norris [2001] 1 WLR 1388; Gomme v Morel SCA 06/2010. There was a duty of the Judge to look beyond."*

146. Against this background, I conclude that the learned Judge was correct in finding that the plaint instituting the action number CS119/2022 is an abuse of the process of the Court.

GROUND RAISED BY THE RESPONDENT IN HIS HEADS OF ARGUMENT

147. I briefly consider the ground raised by Counsel for the Respondent, which claimed that the plaint instituting the action number CS119/2022, wherein *"The Estate of the late Ogilvy Berlouis Herein represented by its executor Josephine Claude Maryse Berlouis"* was named as the defendant, is a nullity.

148. In this minority judgment, I have chosen not to embark on an analysis with respect to whether or not the plaint instituting the action number CS119/2022 is a nullity or if the same plaint constitutes nothing more than an irregularity which can be cured.

149. I state this because the case-law of the Courts of Seychelles indicates that a claim for reduction can be brought against the "Estate", the "Beneficiary", the "Executor", or any combination of these parties.

150. In my view, a plaint instituting the action of reduction should name the Beneficiary as the defendant. In the plaint CS119/2022, the beneficiary is identified as Josephine, Glaude Maryse Berlouis. Exhibit A2, the Last Will and Testament of Ogilvy Berlouis, named Josephine Claude Maryse Berlouis as the beneficiary: the second disposition reads —

> *"2. I give, bequeath and devise all my properties whatsoever, whether movables and immovable and wherever situated, solely to Josephine Claude Marise Berlouis."*

F. Robinson JA

Signed, dated and delivered at Ile du Port on 18 December 2024.