[2022] JMCC COMM 8

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2021CD00057

IN THE MATTER OF THE CONSTITUTION OF JAMAICA

AND

IN THE MATTER OF PART III, PART IV AND PART XIII OF THE TELECOMMUNICATIONS ACT

AND

IN THE MATTER OF THE DOMESTIC MOBILE SPECTRUM LICENCE #01280 DATED THE 14TH SEPTEMBER 2016 ISSUED TO SYMBIOTE INVESTMENTS LIMITED

BETWEEN	**XTRINET LIMITED**	**1ST CLAIMANT**
AND	**SYMBIOTE INVESTMENTS LIMITED**	**2ND CLAIMANT**
AND	**ATTORNEY GENERAL OF JAMAICA**	**1ST DEFENDANT**
AND	**MINISTER OF SCIENCE, ENERGY AND TECHNOLOGY**	**2ND DEFENDANT**

IN CHAMBERS

Ms. Ashleigh Ximines instructed by Knight Junor Samuels for the Claimants

Ms. Althea Jarrett Q.C. instructed by the Director of State Proceedings for the Defendants

Dates Heard: January 12 & 13 and March 3, 2022

Civil Practice and Procedure – Preliminary Point – Doctrine of Res Judicata – Striking Out Statement of Case – Abuse of Process – Civil Procedure Rule 26.3 (b)

PALMER HAMILTON, J.

BACKGROUND

[1] I wish to adopt the background that was set out by Brooks JA **in The Attorney General of Jamaica & Superintendent of Police Anthony McLaughlin v Xtrinet Limited** [2020] JMCA App 14 as similar facts now give rise to the present claim. Xtrinet Limited (hereinafter referred to as Xtrinet) operates a telecommunications business. It provides, under the auspices of licences under the Telecommunications Act (hereinafter referred to as the Act), a number of services to the public, including internet and domestic voice services. It does so from, apparently, the same premises from which, another telecommunications company, Symbiote Investments Limited (hereinafter referred to as Symbiote), formerly operated. It also uses, in its operation, equipment that Symbiote previously used, up to the time that Symbiote lost its telecommunications licences. Xtrinet asserts that it is entitled to use that equipment because it has purchased all the shares in Symbiote. Xtrinet also claimed the right to use the frequency of the electromagnetic spectrum (the spectrum) that Symbiote previously used. The Spectrum Management Authority (hereinafter referred to as the SMA) disputed Xtrinet's right so to do. The responsible Minister of Government revoked Symbiote's telecommunication licences in 2018. Xtrinet maintains that the Minister did not revoke Symbiote's licence to use the spectrum.

[2] The claim was initiated by way of a Fixed Date Claim Form filed on the 23rd day of February, 2021. The Claimants sought the following declarations from the Court:

> *(i) A declaration that the Domestic Spectrum Licence issued to Symbiote Investments Limited on the 14th of September 2016, bearing numbers 01280, is still valid and subsisting;*
>
> *(ii) A declaration that the Domestic Spectrum Licence issued to Symbiote Investments Limited on the 14th of September 2016,*

bearing numbers 01280, shall remain in full effect until it expires or is revoked in accordance with the procedures established in the Telecommunications Act;

(iii) A declaration that the purported revocation contained in the letter dated the 10th of December, 2018 has no legal effect because it was not in full compliance with the regulatory procedure established in the Telecommunications Act;

(iv) A declaration that pursuant to a Share Sale Agreement dated the 26th of August, 2019 and the provisions of the Companies Act, Symbiote Investments Limited became a wholly owned subsidiary of Xtrinet Limited; and

(v) A declaration that Xtrinet Limited acquired by assignment Symbiote Investment Limited's spectrum licence as a 'proforma transaction' pursuant to section 17 of the Telecommunications Act and is therefore permitted to use the licence in accordance with the provisions of the Act.

[3] The claim was supported by an Affidavit of Livingston Hines filed on the 23rd day of February, 2021. On the 1st day of April, 2021 the Defendants filed an Acknowledgment of Service and they filed their response to the claim on the 30th day of April, 2021.

[4] On the 3rd day of January, 2022 the Defendants filed a Notice of Intention to take a Preliminary Point. The notice stated that, *"the issues to be raised by the claim have been definitively determined by the Court of Appeal in* ***The Attorney General and Superintendent Anthony McLaughlin v Xtrinet Limited*** *[2021] JMCA Civ 34, and therefore this claim should be struck out as an abuse of the process of the court*." The notice was accompanied by Skeleton Submissions.

ISSUE

[5] Whether the issues raised in the claim brought by the Claimants bearing Claim Number **SU2021 CD 00057** amounts to an abuse of process in light of the Court of Appeal's decision in **The Attorney General and Superintendent Anthony McLaughlin v Xtrinet Limited** [2021] JMCA Civ 34.

SUBMISSIONS

Submissions on behalf of the Defendants

[6] Queen's Counsel for the Defendants submitted as a point in *limine* that the Court of Appeal in **The Attorney General and Superintendent Anthony McLaughlin v Xtrinet Limited** [2021] JMCA Civ 34, addresses and definitively resolves the core issues that arise in the instant claim in favour of the Defendants. She further submitted that to proceed with this claim in light of that judgment is an abuse of process of this court and amounts to an improper collateral attack on the decision of the Court of Appeal. She contends that it is plain from paragraphs 26 to 37 of the said judgment that the Court of Appeal found that:

> *(a) The Domestic Mobile Spectrum Licence (hereinafter referred to as DMSL) issued to the 2nd Claimant was revoked and therefore is not valid and subsisting; and*
>
> *(b) The 2nd Claimant had no DMSL to transfer to the 1st Claimant. The 2nd Claimant had been disqualified from holding a DMSL as it no longer satisfied the precondition for doing so as all its carrier and service provider licences had been revoked, consequently the provisions of section 23 of the Act are of no moment*

[7] Learned Queen's Counsel contends that save for the fourth declaration claimed by the Claimants, none of the other declarations sought should be granted in light if the 2021 decision of the Court of Appeal. There is no issue jointed between the Defendants and the Claimants in relation to the fourth declaration as the Defendants are not contradictors and there would be no utility in making it.

[8] Queen's Counsel also made substantive submissions should the Court not agree with the point in *limine*. She submitted that it is indisputable that the 2nd Claimant's Carrier and Service Provider Licences were all revoked by the 2nd Defendant and without those licences the 2nd Claimant could not hold a DMSL. This, she highlighted, was resolved by Brooks JA in paragraphs 29 and 31 of his judgment **Attorney General and Superintendent Anthony McLaughlin v Xtrinet Limited** [2021] JMCA Civ 34. The DMSL is therefore not subsisting.

[9] She contends that since the 2nd Claimant had no DMSL, and not being eligible to hold one, the 2nd Claimant could not have transferred any DMSL to the 1st Claimant by virtue of a pro forma transfer under the Act. This, she also submits, was put to rest by Brooks JA in paragraphs 31 of the said 2021 judgment. There is therefore no question that the 2nd Claimant could not have transferred the DMSL to the 1st Claimant by pro forma transfer. The DMSL was conditional upon the 2nd Claimant holding a Claimant's Carrier and Service Provider Licence, which Queen's Counsel noted is a plain mandate under section 23 of the Act. She submitted that the 2nd Defendant need not have engaged the provisions of section 23 of the Act before the revocation of the 2nd Claimant's DMSL. This was also dealt with Brooks JA in paragraphs 31 of the said 2021 judgment.

[10] Other cases mentioned by Queen's Counsel are: S**ymbiote Investments Limited v Minister of Science Energy & Technology and Office of Utilities Regulations** [2019] JMCA App 8, **Gouriet v Union of Post Office Workers** [1977] 3 All ER 70 at page 100, **The Honourable Dorothy Lightbourne v Andrew Coke and Others**, unreported Supreme Court decision, delivered May 11, 2020, and **St. George Johnson et al v Joel Betty and The Attorney General** unreported Supreme Court decision delivered August 4, 2010.

Submissions on behalf of the Claimants

[11] Ms. Ximines noted that the issue to be determined is whether the filing and hearing of the Fixed Date Claim Form bearing claim number **SU2021 CD 00057** would amount to an abuse of process having regard to the judgment of the Court of Appeal entered on the 9th of July 2021 having the citation number **[2021] JMCA Civ 34.**

[12] She submitted that to establish cause of action estoppel, the party asserting the estoppel must establish the following criteria as laid out by Buckley, J. in **Carl Zeiss Stiftung v Rayner & Keeler** (No. 3) (page 538):

> *(i) that there has already been a judicial decision by a competent court or tribunal;*
>
> *(ii) that decision was of a final character;*
>
> *(iii) the decision relates to the same question as that sought to be put in issue by the plea in respect of which the estoppel is claimed; and*
>
> *(iv) the decision must have been between the same parties between whom the question is sought to be put in issue.*

[13] She argued that the cause of action estoppel is confined to cases where the cause of action and the parties are the same in the second suit as in the first suit and that a competent court made a decision that brings finality to the issues put before them thereby disposing of the matters entirely. Ms. Ximines submitted that the Defendants have failed to fulfill the criteria established to warrant the invocation of this estoppel. The causes of action are different, the parties are different, the issues raised on the current claim were not actually claimed or put in issue in the earlier claim, those issues did not form part of any hearing on the merits and so did not form part of the decision or final judgment of the court as the earlier claim.

[14] Learned counsel submitted that Symbiote, the 2nd Claimant in these proceedings, was never a party to the proceedings at the Court of Appeal nor would they have had the opportunity to ventilate the issues raised now before any other tribunal. She further submitted that the arguments made by the litigants at the Court of Appeal were tailored to unearth whether the Judge had erred in granting an order for the return of the equipment, documents and other devices seized to Xtrinet and whether her discretion was erroneously exercised. She noted that the issues that are properly before this Court remain unanswered. The issue as to the processes engaged in the purported revocation of the Domestic Spectrum Licence held by Symbiote was never left for the Court of Appeal's consideration and any discussion that was had with regard to the same was not made on its merits.

[15] Ms. Ximines contends that the Court of Appeal was not called to determine the lawful existence of a spectrum licence and the rights of its owner to deploy the licence for a lawful purpose based upon its issue by the SMA.

[16] Ms. Ximines further contended that the Claimants would not have had the opportunity to advance or challenge the validity of the revocation process before the Court of Appeal, as this issue was not before the Court. She submitted that it could not be accurately/appropriately satisfied that the Claimants are seeking to improperly use the jurisdiction of this Honourable Court for an unintended, malicious or perverse reason that would amount to an abuse of process. They are not maliciously and deliberately seeking to misuse the Court processes for a purpose that is unjustified by the underlying legal action or to accomplish some improper purpose. They are simply in pursuit of justice.

[17] Other cases mentioned by learned counsel are: **Arnold v National Westminster Bank Plc (No. 1)** [1991] 2 AC 93, 104, **Yat Tung Investment Co Ltd v Dao Heng Bank Ltd** [1975] AC 581, 591, **Infochannel Limited v Cable & Wireless Jamaica Limited** Supreme Court Civil Appeal No. 99/2000, and **Cayne and Another v Global Natural Resources** (1984) 1 AER 225.

LAW AND ANALYSIS

Striking Out & Abuse of Process

[18] Rule 26.3 (1) of the Civil Procedure Rules 2002, as amended, (hereinafter referred to as 'the CPR') gives the Court the power to strike out a statement of case or part of a statement of case if it appears to the court –

> *(a) …;*
>
> *(b) that the statement of case or the part to be struck out is an abuse of the process of the Court…;*
>
> *(c) …; or*
>
> *(d) ...*

[19] The phrase *'statement of case'* is defined in Rule 2.4 of the CPR. It means –

> *(i) a Claim Form, Particulars of Claim, Defence, Counterclaim, Ancillary Claim Form or Defence and a Reply; and*
>
> *(ii) any further information given in relation to any statement of case under Part 34 either voluntarily or by order of the court.*

[20] Kodilinye and Kodilinye in their text Commonwealth Caribbean Civil Procedure, 2nd Edition stated that "the phrase 'otherwise an abuse of the process of the court' is a catch-all provision which encapsulates the general principle underlying the striking-out rules…" An attempt to re-litigate decided issues or a claim based on a document disclosed in a previous action have been held to amount to an abuse of the process of the court. (Halsbury's Laws of England, 5th Edition)

[21] In deciding whether the Claimants' statement of case should be struck out as an abuse of the process of the Court, I will examine the current case before me and the decided case in order to make a determination as to whether the current case is seeking to put forward issues which have already been adjudicated on.

Res Judicata

[22] The basis for the Defendants' Notice of Intention to take Preliminary Point is the doctrine of *res judicata*. *Res judicata* is a Latin term meaning "a matter judged" or "a thing decided." It is a common law principle meant to prevent a cause of action between the same parties and regarding the same issues from being re-litigated once it has been judged on its merits. It preserves the binding nature of a court's decision.

[23] The doctrine of *res judicata* has been affirmed by the Court of Appeal in multiple cases. Once such case being **Gordon Stewart v Independent Radio Company Limited and Wilmot Perkins** [2012] JMCA Civ. 2, where it was said that *"the doctrine of res judicata is to protect courts from having to adjudicate more than once on issues arising from the same cause of action and to protect the public*

interest that there should be finality in litigation and that justice be done between the parties…"

[24] Pusey J. in **Matheson v Watts** [2018] JMSC Civ 144 at paragraph 30 noted that once a final judgement has been reached in a case and that decision is not appealed, subsequent judges who are presented with a case that is identical to or substantially the same as the earlier one will apply the doctrine of *res judicata* to uphold the effect of the first judgement.

[25] McDonald-Bishop, J. in **Fletcher & Company Limited v Billy Craig Investments Limited and Scotia Investments Limited** analysed the doctrine of res judicata and stated at paragraph 27 that,

> *"Usually res judicata is pleaded by way of estoppels and so the trend has been to treat res judicata as arising on the plea of three forms of estoppels: the two traditional ones being **"cause of action estoppels"** and **"issue estoppels"** and the third being an extension of the doctrine of estoppel as enunciated by Vice-Chancellor Sir James Wigram in **Henderson v Henderson** (1843) 3 Hare 100.*

Cause of Action Estoppel

[26] Cause of Action Estoppel was explained by Diplock LJ in **Thoday v Thoday** [1964] P 181 at pages 197-198:

> *"...'cause of action estoppel,' is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, i.e., judgment was given upon it, it is said to be merged in the judgment, or, for those who prefer Latin, transit in rem judicatam. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam."*

[27] The case of **Carl Zeiss Stiftung v Rayner & Keeler Ltd** (No. 3) [1970] 1 Ch 506, 537 also laid out the criteria that must be satisfied in order to establish that the cause of action estoppel is to be applied. Buckley, J. noted that to establish cause

of action estoppel, the party asserting the estoppel must establish the following criteria:

(i) that there has already been a judicial decision by a competent court or tribunal;

(ii) that decision was of a final character;

(iii) the decision relates to the same question as that sought to be put in issue by the plea in respect of which the estoppel is claimed; and

(iv) the decision must have been between the same parties or their privies as the parties between whom the question is sought to be put in issue.

[28] It was held in Yat Tung Investment Co. Ltd v Dao Heng Bank Ltd. [1975] AC 581 that *res judicata* applied even though one of the parties in the second action was not a party in the earlier action. The Court would have to therefore determine whether the claimant in the current proceedings is seeking to put forward an issue that was determined against it in the earlier proceedings even if the parties to the two actions are different.

[29] The Defendants' Notice of Intention to take a Preliminary Point concerns the Court of Appeal's decision in **The Attorney General and Superintendent Anthony McLaughlin v Xtrinet Limited** [2021] JMCA Civ 34. McDonald-Bishop J (as she then was) noted in **Fletcher & Company Limited v Billy Craig Investments Limited and Scotia Investments Limited** at paragraph 27 that, *"whatever difference there might be between the two concepts* [cause of action estoppel and issue estoppel], *however, it cannot be denied that they work with each other towards the attainment of the same results, which is, to put an end to litigation in the interest of justice."*

[30] The cause of action before me now concerns the purported revocation of the DMSL that was issued to Symbiote while the cause of action at the Court of Appeal

mainly concerned then search and seizure of Xtrinet's equipment and documents. The Court of Appeal's decision arose following the hearing of an application brought by the Attorney General of Jamaica and Superintendent of Police Anthony McLaughlin against the decision of Pettigrew-Collins J made on the 10th day of March, 2020. Pettigrew-Collins' J decision arose following the hearing of an application brought by Xtrinet regarding return of its equipment and documents which were seized by Superintendent Anthony McLaughlin and other members of the police force.

[31] This estoppel applies and the plea succeeds where the cause of action is the same and had been determined on its merits. Since the causes of action are different, I don't think it necessary to embark upon the test as laid out in **Carl Zeiss Stiftung v Rayner & Keeler Ltd.** (supra). I therefore find that the cause of action estoppel does not arise.

ISSUE ESTOPPEL

[32] Since the cause of action estoppel does not arise, I will now consider whether the issue estoppel arises. This estoppel arises where a plea of *res judicata* could not be established because the causes of action are not the same. (Halsbury's Laws of England, 4th edition, Vol. 16, paragraph 1530)

[33] Diplock LJ in **Thoday v Thoday** (supra) also explained this type of estoppel. He stated that:

> *"…'issue estoppel,' is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled.... If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was…"*

[34] McDonald-Bishop, J. (as she then was) in **Fletcher & Company Limited v Billy Craig Investments Limited and Scotia Investments Limited** (supra) accepted from the Halsbury's Laws of England, 4th edition, Vol. 16, paragraph 1530, that for issue estoppel to arise to sustain a plea of *res judicata*, it must be shown that the party to be estopped is seeking to re-litigate a precise point which had *'once been distinctly put in issue in an earlier proceeding and which has been solemnly and with certainty determined against him'.* It must be shown that the matter on which the decision was alleged to have been made in the earlier action was one that had come directly (not collaterally or incidentally) in issue in the first action and embodied in a judicial decision that is final. The principle applies whether the point involved in the earlier decision is one of fact or law or a mixed question of fact and law.

[35] The conditions for the application of the doctrine as laid out in Halsbury's Laws of England, 4th edition, Vol. 16, paragraph 1530 are:

> *(i) the same question was decided in both proceedings;*
>
> *(ii) the judicial decision said to create the estoppel was final; and*
>
> *(iii) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.*

[36] It was stated in **Arnold v National Westminster Bank Plc. (No. 1)** (supra) that issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue. The party seeking to re-open the issue that has been previously decided will therefore be estopped from raising the issue in the subsequent matter.

[37] In this present case the Defendants are claiming that the core issues brought by the Claimants have already been dealt with by the Court of Appeal. The Court of Appeal's decision arose following the hearing of an application brought by the

Attorney General of Jamaica and Superintendent of Police Anthony McLaughlin against the decision of Pettigrew-Collins J made on the 10th day of March, 2020. Pettigrew-Collins' J decision arose following the hearing of an application brought by Xtrinet regarding return of its equipment and documents which were seized by Superintendent Anthony McLaughlin and other members of the police force.

[38] The first question to be answered is whether the same question is to be decided in both proceedings. I have already laid out what the Claimants are now seeking to have resolved and will compare that with the decision of the Court of Appeal.

[39] One of the issues that the Court of Appeal had to consider was whether the learned judge had sufficient evidence to make the order she did in relation to the spectrum licence issued to Symbiote. Learned Queen's Counsel represented both Appellants at the Court of Appeal. She submitted that the learned judge erred when she ordered the return of the equipment that was seized, as at the time there was insufficient evidence to make such an order. She relied on section 23 of the Act which requires a person to have a spectrum licence to use the spectrum and on section 63A (1) (b) which provides that it is an offence to use the spectrum without obtaining a spectrum licence. Learned counsel Ms. Ximines represented the Respondent and her position was that Xtrinet, through its acquisition of Symbiote, had acquired Symbiote's spectrum licence by way of a proforma transaction. Ms. Jarrett Q.C. disputed this and contended that the learned judge did not consider whether Xtrinet was using the spectrum without the spectrum licence and in failing to do so the learned judge could not find that Xtrinet was operating legally and the items seized were not being used in contravention of the Act.

[40] Ms. Ximines submitted that the learned judge considered all that she was required to consider and found that Xtrinet had complied with the Act. She further submitted that section 23 of the Act outlined a specific revocation process for the spectrum licence, which was never done, nor was the unexpired portion of the value of Symbiote's spectrum licence refunded.

[41] The Court of Appeal in making their decision had to consider whether Xtrinet had a good claim that it was lawfully using the spectrum and in doing so they also considered whether Symbiote had a spectrum licence. Brooks JA discussed and analyzed this in paragraphs [29] to [42] which state:

> *[29] The case of Symbiote Investments Limited v Minister of Science and Technology and Another recounted the history between Symbiote and the Minister at paragraphs [8] to [19]. The court noted that the Minister granted Symbiote six telecommunications licences between 2015 and 2016. Symbiote later applied to the Minister for a spectrum licence, which the Minister granted on 14 September 2016 for 15 years. By letter dated 10 April 2018, the Minister informed Symbiote that its licences were revoked, which the Minister confirmed on 12 June 2018. There was no mention of the spectrum licence, however, Symbiote no longer satisfied the pre-condition for holding a spectrum licence.*
>
> *[30] The SMA informed Symbiote, by letters dated 10 September 2019 (page 107 of bundle 2) and 3 December 2019 (page 133 of bundle 2), that its spectrum licence had been revoked. Additionally, in the letter dated 3 December 2019, the SMA advised Symbiote that the "Radio Frequency Spectrum is neither assignable nor transferrable".*
>
> *[31] Xtrinet was aware of this position. By letter dated 9 December 2019 (page 134 of bundle 2) it wrote to the Minister protesting the SMA's position. The Minister did not respond, but Xtrinet's position is untenable. Symbiote, having been disqualified from holding a spectrum licence, could not transfer to Xtrinet what it did not have. Accordingly, Xtrinet's submission that it received Symbiote's spectrum licence by way of pro forma transfer, that is, "an assignment or transfer from a body corporate to its wholly owned subsidiary or vice versa" cannot succeed. In these circumstances, the fact that there is no evidence of the revocation process, as outlined at section 23 of the Act, having been pursued, is of no moment.*
>
> *[32] Xtrinet was aware that it did not have a spectrum licence. It applied to the SMA for a spectrum licence. In the letter dated 13 January 2020 (page 137 of bundle 2), sending the application, Mr Hines acknowledged that Xtrinet did not have a spectrum licence…*
>
> *[33] There is no evidence that the SMA granted this application.*
>
> *[34] Xtrinet's fight for the survival for a spectrum licence did not end there. It also submitted that it was operating under a period of forbearance. While it is accepted that Xtrinet applied for forbearance, there is no evidence that the SMA granted the request*

for forbearance. It must be concluded, therefore, that Xtrinet did not obtain a spectrum licence or any forbearance.

[35] Despite the absence of a spectrum licence, Xtrinet was utilising the spectrum. Mr Hines admitted that usage in letter dated 18 February 2020 (pages 111-112 of bundle 2), in response to a letter by SMA enquiring whether Xtrinet was using the particular frequency range. Mr Hines indicated that Xtrinet:

(a) was using the spectrum;

(b) did not have a spectrum; and

(c) sought forbearance.

[36] …

[37] In the absence of any forbearance, every limb, on which Xtrinet sought to rely, crumbled.

[38] The SMA also conducted investigations which disclosed that Xtrinet was using the spectrum, without a licence. The SMA's Monitoring and Inspection Department conducted routine monitoring checks between 17 September 2019 and 1 March 2020 and detected activity on frequency range 746-756 MHz, which was to be free from use. This was the same frequency previously utilised by Symbiote. On 13 February 2020, the SMA sent a notice to Xtrinet to cease and desist the use of the spectrum.

[39] Mr Philmore Trowers, the Manager of the Monitoring and Inspection Department of the SMA, provided two statements to the police dated 18 February 2020 and 17 March 2020. These statements outlined the findings of the routine monitoring exercise on the spectrum. The first statement indicated that during the routine checks conducted between 17 September 2019 and 13 February 2020, there was activity on the spectrum range. The second statement records monitoring of the frequency range conducted between 21 February 2020 and 1 March 2020 which revealed that there was no activity on the frequency range, except on 28 February 2020 when technical experts turned on Xtrinet's equipment to conduct tests. Mr Trowers stated: "…Based on the results of the monitoring exercises conducted during the period February 21, 2020 to March 1, 2020; no activity was detected in the 700 MHz downlink frequency band 746-756 MHZ, except on February 28, 2020, when the equipment located at the network operating center (NOC) at 4 Eastwood Avenue, Kingston 10 being operated by Xtrinet Limited located was powered on by technical experts as a result of analysis being conducted on the said equipment."

[40] This evidence is particularly pertinent, bearing in mind that the police personnel seized Xtrinet's equipment, documents and

> *apparatus on 21 February 2020. Mr Leroy James, Telecommunications Engineer, who gave evidence for Xtrinet, indicated that the equipment which the police seized cannot demonstrate that it was used for broadcasting on the frequency range. The investigation conducted by the SMA between 21 February 2020 and 1 March 2020 runs counter to Mr James' opinion. The SMA's monitoring exercises indicate that the equipment seized by the police, from Xtrinet, can be used to demonstrate that the equipment and apparatus were being used to access the frequency range, at a time when Xtrinet did not have a spectrum licence. This would support the appellants' contention that the equipment and apparatus were being used in breach of the Act.*
>
> *[41] If that evidence is accepted, Xtrinet was in breach of the Act.*
>
> *[42] The learned judge's decision to grant Xtrinet's application for the return of the equipment was based on a finding that the equipment was not being used to contravene the Act (see paragraphs [40] and [47] of the learned judge's judgment). It has been established that this finding by the learned judge was based on an inference that particular facts existed. That inference has now been demonstrated, based on the later information, to be incorrect. On this basis, this court can set aside the learned judge's decision. It is, nonetheless, accepted that there are criminal charges to be considered by the Parish Court and therefore, the statements made here are based solely on what has been placed before this court.*

[42] The Court of Appeal found at paragraph 60 that Xtrinet had been utilizing the spectrum without a spectrum licence or forbearance from the SMA. The issue concerning the licence was dealt with by the Court of Appeal. It is therefore my judgment that the Claimants are seeking to have the same question decided in both proceedings.

[43] In answering the second limb of the test, I find that the Court of Appeal's decision is final. Therefore, the estoppel may be created having satisfied the final limb of the test, that is, that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[44] McDonald-Bishop J in **Fletcher & Company Limited v Billy Craig Investments Limited and Scotia Investments Limited** accepted the broader view of Drake J in **North West Water Ltd v Binnie & Partners** [1990] 3 All ER 547, 551 in which

the question as to whether a claim was res judicata on the basis of issue estoppel was considered. It was noted by Drake, J. *"that the authorities on the subject have revealed two schools of thought as to the limit which should be put on the application of this form of estoppel. His Lordship noted that one school of thought (the broader approach) holds that the true test of an issue is whether for all practical purposes the party seeking to put forward the issue has already had the issue determined against him by a court of competent jurisdiction even if the parties are different. The other conflicting approach, he explained, is to confine issue estoppel to those species of estoppel per rem judicatum that may arise in civil actions between the same parties or their privies."*

[45] McDonald-Bishop J further noted at paragraph 50 that, "*issue estoppel should apply in situations where the parties are different provided the person against whom the estoppel is being sought to be invoked in the subsequent proceedings was a party to the earlier proceedings in which the point in issue was determined against him. It would follow from this line of thinking that the fact that in this case the second defendant was not a party in the earlier proceedings should not, of itself, preclude the invocation of the doctrine."*

[46] It is therefore an established principle that issue estoppel applies even where a defendant in the later proceedings was not a party to the earlier proceedings. Therefore, the fact that Symbiote and the Minister of Science, Energy and Technology were not parties at the case at the Court of Appeal does not preclude the invocation of this doctrine. I therefore find that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

HENDERSON V HENDERSON

[47] This type of estoppel is a wider conception of the *res judicata* doctrine. McDonald Bishop J (as she then was) said in **Fletcher & Company Limited v Billy Craig Investments Limited and Scotia Investments Limited** at paragraph 81 that,

> *"The principle, succinctly stated, is that a party cannot in a subsequent proceeding raise a ground of claim or defence which upon the pleadings or the form of the issue was open to him in the former one: Halsbury's Laws of England, 4th Edition, Vol. 16, paragraph 1533."*

[48] The principle was applied by the Privy Council **in Yat Tung Investment Co Ltd v Dao Heng Bank Ltd.** [1975] AC 581,591 where it was said,

> *"But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The locus classicus of that aspect of res judicata is the judgement of Wigram V.C. in Henderson v Henderson..."*

[49] In **Henderson v Henderson** (1843) 3 Hare 100, 114-115, Sir James Wigram V-C stated:

> *"In trying this question, I believe I state the rule of the court correctly, when I say, that 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."*

[50] I find that the **Henderson v Henderson** principle does not arise on these facts as the issues concerning the revocation of the DMSL were raised in earlier proceedings and a decision rendered.

CONCLUSION

[51] It is therefore my view that the Defendants have fulfilled the criteria established on the authorities that are to be satisfied for the application of the issue estoppel. I find that the issues raised on the current claim form part of the final judgment of a competent court or tribunal. I do agree that the Court of Appeal addressed and definitively resolved the core issues that arise in the instant claim in favour of the

Defendants in **The Attorney General and Superintendent Anthony McLaughlin v Xtrinet Limited** [2021] JMCA Civ 34. As such the claim brought by the Claimants will be struck out as an abuse of process of the court.

ORDERS AND DISPOSITION

[52] Having regard to the forgoing my Orders are as follows:

(i) The Defendants' Preliminary Point filed on the 3rd day of January, 2021 is granted;

(ii) The Claimants' Fixed Date Claim Form and Affidavit of Livingston Hines in Support of Fixed Date Claim Form both filed on the 23rd day of February, 2021 stand as struck out;

(iii) Costs to the Defendants to be taxed if not agreed;

(iv) Defendants' Attorneys-at-Law to prepare, file and serve orders made herein.