[2015] JMCA Civ 45

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 82/2013

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**NATIONAL COMMERCIAL BANK JAMAICA LIMITED**	**APPELLANT**
AND	**JUSTIN O'GILVIE**	**1ST RESPONDENT**
AND	**INCOMPARABLE ENTERPRISES LIMITED**	**2ND RESPONDENT**
AND	**BULLS EYE SECURITY SERVICES LIMITED**	**3RD RESPONDENT**

Mrs Sandra Minott-Phillips QC and Miss René Gayle instructed by Myers Fletcher Gordon for the appellant

Paul Beswick, Miss Carissa Bryan and Kayode Smith instructed by Ballantyne Beswick & Company for the respondents

23, 24 February and 25 September 2015

MORRISON JA

[1] I have read, in draft, the reasons for judgment written by my brother Brooks JA. I agree with his reasoning and his conclusions and there is nothing which I can possibly add.

DUKHARAN JA

[2] I too have read the draft judgment of Brooks JA. I agree with his reasoning and conclusion that the appeal should be allowed. There is nothing further that I can usefully add.

BROOKS JA

[3] The main issue raised by this appeal is whether a second claim by Mr Justin O'Gilvie and the companies, for which he is the principal, against National Commercial Bank Jamaica Limited ("NCB" or "the bank"), constitutes an abuse of the process of the court and ought to be struck out as such. Sykes J in a judgment handed down on 4 October 2013, ruled that it was not an abuse of process and ordered that it be tried along with the first claim. NCB is aggrieved by the decision and has appealed to this court asking that the ruling be set aside.

[4] In their first claim, Mr O'Gilvie and his companies (together referred to herein as "the respondents") claimed that NCB gave them insufficient notice of its intention to close their respective accounts held with the bank. In that claim the respondents sought a permanent injunction to prevent NCB from closing the accounts. The attempt to secure an interim injunction was unsuccessful and, after the bank gave a brief extension of time for their operation, the accounts were closed. There was, in that claim, an implicit acceptance by the respondents that NCB was entitled to close the accounts. They contended, however, that the bank could only do so after having given reasonable notice of its intention so to do. The issue joined in that claim is whether

reasonable notice was given and whether damages would result from any failure to give such notice.

[5] In the second claim, the respondents sued the Bank of Jamaica, the Asset Recovery Agency ("the ARA"), NCB and the Attorney General. In this claim, the allegations were that the Bank of Jamaica, as the central bank, failed to regulate and direct NCB so as to prevent NCB from discriminating against the respondents. The claim against the Bank of Jamaica was struck out by Sykes J as part of the judgment mentioned above. The allegations against the ARA were that it recklessly alleged that the respondents were in possession of property derived from the criminal activity of convicted drug dealer, Mr Christopher Coke. The Attorney General has been joined pursuant to the Crown Proceedings Act. The details of the claims against those other parties are not relevant for these purposes, and will not be set out in this judgment.

[6] In that second claim, the allegation against NCB was that, in closing their accounts, it had discriminated against the respondents and had therefore breached their constitutional rights. The basis for the discrimination, it was asserted, was the respondents' connections with the inner city area called "West Kingston".

[7] Whereas the second claim is, all things being equal, headed for a trial between the respondents on the one hand, and the ARA and the Attorney General, on the other, NCB contends that it should not be included as a party to that trial. Apart from its complaint that the learned judge reached the incorrect decision on the issue of abuse of

process, NCB also asserts that the respondents' bases for this second claim against the bank are fundamentally flawed both as to fact and as to law.

[8] This judgment will address firstly, the learned judge's decision on the question of whether the second claim constitutes an abuse of the process of the court. Secondly, it will assess the complaint, by NCB, that the respondents' claim lacks a proper factual and legal foundation. It would be helpful, however, to first set out the relevant parts of the claims involved.

The claims

[9] The first claim was filed on 10 January 2013. The respondents were the claimants. They commenced the claim by a fixed date claim form, despite the fact that it was a claim asserting breach of contract. This may perhaps be explained by the fact that the main relief they sought was an injunction. The respondents filed an amended fixed date claim form on 7 March 2013 in which Mrs Maxine O'Gilvie and O'Choy O'Gilvie were joined as claimants. In that amended claim, the respondents sought:

> "1. A declaration that [NCB] is to give the 2nd and 3rd claimants reasonable notice of at least 9 months before terminating the accounts held by the 2nd and 3rd claimants at the [bank];
>
> 2. Damages for the breach of the contract for services between the...claimants and the [bank];
>
> 3. An injunction to restrain [NCB] from terminating the accounts held by the 2nd and 3rd claimants with the [bank] before the expiration of 9 months from the 18th day of December, 2012;
>
> …"

[10] Mr O'Gilvie filed the affidavit in support of the fixed date claim. He deposed that he is a friend, from childhood, of Mr Christopher Coke, mentioned above. Mr O'Gilvie asserted that the ARA improperly levelled accusations against him that his businesses and assets were funded by the criminal activity of Mr Coke. Those accusations, he said, resulted in a litany of woes including, the imposition of a restraining order in a civil recovery claim under the Proceeds of Crime Act ("the POCA"), the cancellation of his visa to the United States of America and that of his wife. It was in that scenario that, Mr O'Gilvie stated, coming "[i]mmediately after the civil recovery claim commenced, the [bank] notified [him] that it was no longer interested in proceeding with the use of [one of his premises] as a branch and removed [its] Automatic Banking Machine [from those premises]".

[11] It was in that context also that NCB indicated its intention to close his accounts and those of his companies. The bank remained steadfast in its resolve, despite the fact that it had been informed that the ARA had conceded that it could not prove its allegations against the respondents and had withdrawn the proceedings under the POCA.

[12] Mr O'Gilvie, at paragraph 11 of his affidavit, made an assertion, which essentially accepted the bank's right to terminate the accounts. He said:

> "I have been informed by my attorneys-at-law and verily believe that there is nothing in law to stop a bank from terminating its relationship with one of its customers even though this may give rise to a breach of contract because the court may not wish to enforce a contract of services. Further, my Attorneys-at-law have advised me of the decision of *Prosperity Limited v Lloyds Bank Limited* [1922-

> 23] TLR 372 and the implications of the decision there from [sic]."

The bank now relies heavily on that assertion.

[13] He complained in that claim of the hardship that the bank's then intention to close his accounts would wreak on his personal life and on his businesses. He argued that the notice that the bank gave was inadequate and should be extended.

[14] The bank contested the first claim. The respondents' application for an interim injunction to prevent the closure of the accounts was filed at the same time as the fixed date claim form. The application was heard on 8 March 2013 and was dismissed. As mentioned above, that first claim still subsists.

[15] The second claim was commenced on 7 March 2013, also by a fixed date claim form. This second claim, although naming other defendants, alleged that NCB, in seeking to close their accounts, had discriminated against the respondents, in breach of the Constitution of Jamaica. It also asserted that **Prosperity Limited v Lloyds Bank Limited** (1923) 39 TLR 372; 3 LDAB 287, accepted as good law in the first claim, should no longer be followed in this jurisdiction. The portion of the respondents' prayer in that claim, that is relevant to the bank, stated:

> "AND the claimants claim pursuant to Part 56 of the Civil Procedure Rules:
>
> 1. A declaration that save where it can be proven that the claimants are in breach of any applicable laws relating to the operation of bank accounts, or are declared guilty by a Court of Law of the Island of criminal activity which is likely to cause reputational risk to [NCB], the [defendants] collectively or

individually are to provide the claimants with banking services equivalent to the banking services provided by [NCB] to the claimants at the commencement of this action;

2. …

3. …

4. Against [NCB], damages for breaching the claimants' constitutional rights based on section 25 of the Jamaican Constitution.

5. A declaration that the decision in *Prosperity Limited v Lloyds Bank Limited* is no longer good law to be followed in this jurisdiction;

6. A declaration that financial institutions do not have the authority to unilaterally terminate vital banking service relationship with their customers without a valid reason or some form of pre-defined fault on the part of the customer;

…"

[16] In paragraph 8 of the fixed date claim form, the respondents set out the details of their charge of discrimination by NCB. They alleged that the discrimination arose from the fact that they had close connections to West Kingston and that they were accused, albeit wrongly, under the POCA. A further accusation was that NCB, as holding a bank licence from the Government of Jamaica, was acting as an agent, co-conspirator and/or proxy for the Government in effecting these breaches of the respondents' constitutional rights.

[17] It is in that context that NCB made the application to strike out the second claim as an abuse of the process of the court.

The abuse of process issue

[18] In its appeal from the learned judge's decision on the issue of abuse of process, NCB complained that the learned judge had misinterpreted the import and impact of the seminal decision of **Johnson v Gore Wood & Co (a firm)** [2002] 2 AC 1. As a result of that misinterpretation, it asserts, the learned judge applied an incorrect test in deciding the issue of abuse of process in this case. The relevant grounds of appeal are:

> "(1) The learned Judge erred in concluding that the **Gore Wood** approach rejected the **Yat Tung** approach and that this Court in its decisions in **S & T Distributors Ltd et al v CIBC Jamaica Ltd et al** and **Hon. Gordon Butch Stewart OJ et al v Independent Radio Co Ltd et al**, rejected the latter (**Yat Tung**) approach in favour of the former (**Gore Wood**) approach.
>
> (2) The learned Judge failed to appreciate that the decision in **Gore Wood** to reverse the strike out order turned on the fact that the parties had proceeded from the outset on the expectation that a second case would follow the first. Thus, the defendant was estopped (by convention) from contending subsequently that the second claim on the same facts should be struck out as an abuse of the process of the court (a material distinction from the facts of the instant case).
>
> (3) ...
>
> (4) The learned Judge erred in failing to apply the law as set out in numbered paragraph 40 of his written reasons to the facts he found, namely that:
>
> i. The claimants have brought a second claim against NCB; and
> ii. The second claim is grounded on the same facts as the first; and

iii. ...

(5) ...

(6) The learned trial Judge erred in failing to sufficiently appreciate that:

i – viii. ...

ix. There is such an inconsistency between the two actions that it would be unjust to permit the later one to continue.

x. Adequate means of redress if warranted are therefore available to the Respondents against the Appellant in their first action.

xi. The later proceeding is unjust harassment of the Appellant in all the circumstances."

[19] An assessment of NCB's complaints requires the identification of two distinct but contrasting principles in law. The first is that courts exist for the resolution of disputes and should not lightly dismiss a litigant's claim without there having been a trial of the issues raised in his complaint. Lord Bingham of Cornhill in **Gore Wood** referred to that principle at page 22C of the report:

> "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] AC 581, 590 per Lord Kilbrandon, giving the advice of the Judicial Committee…"

[20] The second principle has two related elements. The first is that there must be finality to litigation. The second is that the court should be alert not to allow its process to be misused. It is in this latter context that the principles of cause of action estoppel, issue estoppel and the rule in **Henderson v Henderson**, or **Henderson v Henderson** abuse of process (taken from **Henderson v Henderson** (1843) 3 Hare 100; [1843-1860] All ER Rep 378; 67 ER 313), become relevant. These are among the methods used by the court to protect its process. They are applied to prevent litigants from seeking to re-litigate matters that have already been decided between the same parties.

[21] Although it is **Henderson v Henderson** abuse with which this appeal is primarily concerned, it is important to understand its generic relationship to cause of action estoppel and issue estoppel. These two were explained by Diplock LJ (as he then was) in **Thoday v Thoday** [1964] P 181 at pages 197-198:

> "...'Estoppel' merely means that, under the rules of the adversary system of procedure upon which the common law of England is based, a party is not allowed, in certain circumstances, to prove in litigation particular facts or matters which, if proved, would assist him to succeed as plaintiff or defendant in an action...
>
> ...[Estoppel per rem judicatam] is a generic term which in modern law includes two species. **The first species, which I will call 'cause of action estoppel,' is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties**. If the cause of action was determined to exist, i.e., judgment was given upon it, it is said to be merged in the judgment, or, for those who prefer Latin,

> transit in rem judicatam. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam...**The second species, which I will call 'issue estoppel,' is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled**.... **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**...." (Emphasis supplied)

[22] The rule in **Henderson v Henderson** is closely allied to the principles of cause of action estoppel and issue estoppel. Lord Bingham in **Gore Wood**, at page 31A, said "**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". Lord Millett, at page 59E of **Gore Wood**, described it as a "procedural rule based on the need to protect the process of the court from abuse and the defendant from oppression".

[23] The principle of **Henderson v Henderson** abuse of process is extracted from the following quote from Sir James Wigram VC in **Henderson v Henderson**. The learned Vice-Chancellor said at pages 381-382 of the All England Law Report:

> "...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-case [sic], not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time**..." (Emphasis supplied)

[24] That reasoning by Wigram VC is well respected and has been cited by a number of cases. Its more recent application was closely assessed by the House of Lords in **Gore Wood**. Sykes J relied heavily on the reasoning in **Gore Wood** and particularly the opinion of Lord Bingham delivered therein. He found that **Gore Wood** applied a more "nuanced" approach to the rule in **Henderson v Henderson** than that applied by older cases, including a decision of the Privy Council in **Yat Tung Investment Co Ltd v Dao Heng Bank Ltd and Another** [1975] AC 581. He reasoned that, in a case where the issues in a second claim could have been raised in the first, **Gore Wood** required the court, before coming to the conclusion that the second claim was an abuse of its process, to examine all the facts and circumstances of the case.

[25] At paragraph 38 of his judgment, Sykes J stated that the older cases used a more mechanical approach by asking, "[whether] this matter have been raised in the previous proceeding" and analysing the answer with "[i]f yes, then it's an abuse of

process. If no, then it's not". The learned judge concluded on **Yat Tung** by saying, "[i]t follows that so far as **Yat Tung** appears to say that the fact of bringing the second claim, was ipso facto, an abuse without engaging in any nuanced analysis then it is not to be followed".

[26] Sykes J reasoned that the question of abuse of process was a procedural matter and that the court, in exercising its powers of management, could decide whether the cases could be fairly conducted without unnecessary expense to the parties and waste of the court's resources.

[27] He analysed the abuse issue in some detail in his judgment, as did learned counsel before this court. Mrs Minott-Phillips QC, for NCB, argued that the decision in **Gore Wood** was made on its own facts and that the learned judge erred in finding that **Gore Wood** rejected the rule in **Henderson v Henderson** as it was applied in **Yat Tung**. Learned Queen's Counsel argued that the result of the learned judge's decision is that NCB would be "twice-vexed" on the same issue.

[28] Mr Beswick, for the respondents, supported the learned judge's approach. He submitted that although the first claim accepted the validity of **Prosperity Limited**, it is now contended that it is bad law. Learned counsel argued that the respondents were entitled to argue points in the alternative.

[29] In explaining the goal of the rule in **Henderson v Henderson**, Lord Bingham said at page 32H:

> "…An important purpose of the rule [in **Henderson v Henderson**] is to protect a defendant against the harassment necessarily involved in repeated actions concerning the same subject matter...."

[30] The rule, however, was never intended to be an absolute determinant of whether a case was allowed to proceed or not. From its inception, it allowed for exceptions in special circumstances. Not only did Wigram VC speak to exceptions in "special cases", but many of the cases in applying the rule, include, in the assessment of the issue, the question of whether special circumstances warrant the rule being avoided.

[31] Lord Kilbrandon in **Yat Tung** addressed the issue of special circumstances being allowed as exceptions. He said at page 590 D-E:

> "...The shutting out of a 'subject of litigation'—a power which no court should exercise but after a scrupulous examination of all the circumstances—is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless 'special circumstances' are reserved in case justice should be found to require the non-application of the rule...."

[32] This court also considered the matter of special circumstances providing exceptions to the rule in **Henderson v Henderson**. In **Clarence Ricketts v Tropigas SA Ltd and others** SCCA No 109/1999, delivered 31 July 2000, the court considered whether a claimant would be allowed to file a claim for the recovery of damages for personal injury suffered in a motor vehicle crash, in circumstances where a

judgment in respect of his property loss in that crash, had already been concluded in a previous claim, by way of consent.

[33] In his judgment, Langrin JA, with whom the rest of the court agreed, assessed the case in the context of the rule in **Henderson v Henderson**. He found that the rule did apply where personal injury and property loss arose from the same set of circumstances. He also found that there were no special circumstances in that case to avoid the application of the rule. He said at page 15:

> "...In the instant appeal no explanation has been given as to why the claim was not brought in the earlier proceedings. Examples of what would constitute special circumstances were given by Stuart-Smith L.J. in [**Talbot v Berkshire County Council** [1993] 4 All ER 9)]…"

[34] After assessing a number of cases dealing with the rule in **Henderson v Henderson**, Langrin JA concluded his judgment with another reference to the rule and the way its application could be avoided. He said at pages 16-17:

> "...In my judgment the rule in **Henderson v Henderson** (supra) should be applied in personal injury actions. The fact that negligence is the only cause of action in this case, it would be a dangerous precedent to split actions that could be heard together thus wasting judicial time. All claims which can be heard together should be so done in order to avoid multiplicity of proceedings. Nothing new, which could properly be regarded as special circumstances has emerged since the first proceedings..."

Ricketts v Tropigas was decided before the House of Lords' decision in **Gore Wood**.

[35] Whereas it may be said that the learned judge in this case did not include in his judgment, a recognition that the application of the rule in **Henderson v Henderson**

could be avoided by "special circumstances", his understanding of the approach advocated by **Gore Wood** cannot be faulted. Lord Bingham at page 31 B-C stated what he deemed to be the preferred approach. He said:

> "…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…It is, however, wrong to hold that because a matter could have been raised in earlier 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**…." (Emphasis supplied)

He then set out, at page 31 E-F the difference between the approach that he preferred and the approach that had been formerly used by the courts, (including this court as exemplified by **Ricketts v Tropigas)**:

> "…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…."

[36] Lord Millett also preferred a more nuanced approach. He said that there was no presumption of abuse when two claims in respect of the same subject matter were filed. He said at pages 59H-60A:

> "...In so far as the so-called rule in *Henderson v Henderson* suggests that there is a presumption against the bringing of successive actions, I consider that it is a distortion of the true position. The burden should always rest upon the defendant to establish that it is oppressive or an abuse of process for him to be subjected to the second claim...."

Although Lord Bingham did point to the fact that there was a mutual expectation by the parties in **Gore Wood**, that there would have been a second claim, and he considered that as an important part of the circumstances, it would not be correct, as learned Queen's Counsel submitted, that the case was decided on its unique facts. Both Lord Bingham and Lord Millett made broad statements of principle which went beyond the facts of that case.

[37] There was, therefore, a shift to the more nuanced approach to which Sykes J referred. The shift was, however, not as dramatic as the learned judge seemed to have understood it. The older approach did not propound, as the learned judge suggested that it did, "any legal proposition which says that the filing of a second claim is, without more, automatically an abuse of process". The inquiry as to special circumstances was an essential element of the approach. As Lord Bingham stated in **Gore Wood**, the result in each approach "may often be the same". It may be that the application of the former approach in some of the previous cases did amount to, what Lord Bingham described as "too mechanical an approach".

[38] This court has adopted the reasoning in **Gore Wood**. It did so in **S & T Distributors Limited and Another v CIBC Jamaica Limited and Another** SCCA No 112/2004, delivered 31 July 2007, and in **Hon Gordon Stewart OJ and Others v**

Independent Radio Company Limited and Another [2012] JMCA Civ 2. In **S & T**, Harris JA considered the rule in **Henderson v Henderson** in the context of Lord Bingham's approach. She said at page 48 of the judgment:

> "…Where a party seeks to pursue a claim already brought in a previous suit which clearly seeks to unjustly expose the defendant to litigation, then, the court must view the later proceedings as abusive. There are however, circumstances in which a second suit may be regarded as something other than an obvious endeavour by a claimant to revive an earlier action. There, [sic] are also situations in which a matter which ought to be raised in an earlier suit was not raised, or, a claim made in an earlier suit, is advanced in later proceedings which the court may not regard as an unfair persecution of a defendant. In such cases, as proposed in **Johnson v Gore Wood & Co.** (supra), the court ought to adopt a broad based approach by engaging itself in a balancing exercise and conducting an 'enquiry into all the circumstances with due weight given to each circumstance and with a judgment being formed at the end of the exercise as what justice requires overall.'"

In accordance with that reasoning, the court allowed a claimant to pursue a claim for breach of contract despite the fact that it concerned the sale of a parcel of real property, which sale was the subject of an earlier claim that it had filed. The court found that the first claim was fundamentally different from the second in that the first was seeking an injunction to prevent a sale and a declaration that the defendant was not entitled to sell the property. There were additional elements in the second claim, the court found, that distinguished it from the first.

[39] In **Stewart v Independent Radio**, Hibbert JA (Ag) (as he then was) conducted a careful analysis of the rule, starting with the dictum of Wigram VC. His

analysis included a consideration of **Greenhalgh v Mallard** [1947] 2 All ER 255, **Yat Tung**, **Gore Wood**, **Buckland v Palmer** [1984] 3 All ER 554, **Talbot** and others.

[40] The complaint in **Stewart v Independent Radio** was that the claimants had filed a second claim for damages for libel which duplicated a claim that had been earlier filed by them against the same party. The judge at first instance struck out the second claim and the claimants appealed. It was argued for the respondents that "even if...the second claim raised a different issue, it could and should have been raised in the first claim".

[41] After carefully considering the authorities and the circumstances of the case, Hibbert JA, with whom the rest of the court agreed, found that the striking out was inappropriate. He ruled that since no trial date had yet been set in the first claim, it would be more appropriate to order a consolidation of the claims. That approach, he reasoned, "would put no additional burden on the court in its adjudication of the issues, nor would it cause any injustice to the [respondents], bearing in mind" that the first claim envisaged the reliance on other defamatory publications.

[42] In all, but one, of the cases considered by Hibbert JA, the first claim had already been concluded when the claimant sought to proceed with the second. The exception was **Buckland v Palmer**, where the second claim was filed while a stay was in place in respect of the first. Although **Henderson v Henderson** was not mentioned by name, it was with that principle with which the court wrestled. It found that the prospect of two claims proceeding between the same parties in respect of the same motor vehicle

collision was undesirable. The spectre of having different results from the two claims was anathema for the court. It therefore ruled that the second claim should be struck out, but was heartened, in the interests of justice, by the fact that it was open to the claimant to apply to remove the stay in the first claim and amend the pleadings so as to accommodate the matters raised by the second claim.

[43] Morrison JA, giving the lead judgment in the Court of Appeal of Belize, in **Belize Port Authority v Eurocaribe Shipping Services Limited and Another** Civil Appeal No 13/2011, delivered 29 November 2012, also conducted a thorough review of cases dealing with **Henderson v Henderson** abuse of process. He distilled from that analysis a number of principles which are apposite to this appeal. He said at paragraph [43]:

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

> concerned to circumscribe somewhat more closely the limits of **Henderson v Henderson** abuse of process and to confine its applicability to cases of real misuse or abuse of the court's processes, or oppression." (Emphasis as in original)

[44] In **Belize Port Authority**, Morrison JA went on to examine "whether, taking all the circumstances into account, [the claimant], by instituting the [second claim], is abusing or misusing the process of the court by putting before it an issue which could and should have been brought forward for adjudication in the [first claim]" (paragraph 61). The **Gore Wood** approach was that which the Court of Appeal of Belize used.

[45] After its analysis of the circumstances, the court found that the second claim was "no more than a repetition, in thinly veiled new guise" of the first claim. It struck out the second claim.

[46] It will be the **Gore Wood** approach that will be used to examine the issues raised by this appeal. It is therefore necessary not only to consider the fact that both claims arise from the same fact scenario but the other issues raised by NCB and refuted by the respondents.

The legal and factual foundation issue

[47] A primary aspect of NCB's claim is that there is no proper legal or factual basis on which the second claim may be founded. The grounds of appeal that affected this aspect of the case are as follows:

> "(3) The learned Judge erred in not conducting a scrupulous examination of all the circumstances before him including all the affidavit evidence.

(4) The learned Judge erred in failing to apply the law as set out in numbered paragraph 40 of his written reasons to the facts he found, namely that:

i. ...

ii. ...

iii. The only two reasons advanced by the Claimants for NCB's closure of the accounts were:

1. His friendship with Christopher Coke ("Dudus"); and

2. Being from Tivoli Gardens/West Kingston.

(5) The learned Judge erred in failing to appreciate that the only fundamental rights alleged by the Claimants in the documents they filed to have been breached were:

i. The right to freedom of association; and
ii. The right to freedom from discrimination on the ground of place of origin;

and that the affidavit evidence showed that neither assertion was capable of rising to the level of a sustainable claim for breach of a fundamental right of an actual person and, even more so, of a juristic person.

(6) The learned trial Judge erred in failing to sufficiently appreciate that:

i. The constitution [sic] does not bestow a fundamental right or freedom to operate a bank account;

ii. The operation of a bank account is a private contractual arrangement;

iii. His conclusion [in numbered paragraph 33 of his reasons] that there is no constitutional provision that confers on the Bank of Jamaica (the supervisory authority for banks) the power to interfere in the private arrangements between two private citizens ought not to be limited to the Bank of Jamaica.

iv. In alleging an interference by the Appellant with the 1st Respondent's constitutional right to freedom from discrimination on the ground of his place of origin, the 1st Respondent deliberately concealed from the court the real facts of the addresses he gave to the Appellant in order to put forward a bogus case;

v. NCB is not an exclusive provider of banking services;

vi. It is settled law that in the absence of express contrary agreement or statutory impediment, a contract by a bank to provide banking services is terminable upon reasonable notice.

vii. The courts will not grant specific performance of a contract for personal services."

[48] In respect of complaint of the lack of a legal basis for the second claim, NCB suggested that it is a well established principle that a bank may terminate its contracted services even where the account is not in debit and is not being operated contrary to the bank's terms. Learned Queen's Counsel cited **Prosperity Limited** and **National Commercial Bank Jamaica Limited v Olint Corporation Limited** [2009] UKPC 16; [2009] 1 WLR 1405 in support of that principle of law. **Olint** is a decision of the Privy

Council from this jurisdiction and is therefore binding on this court. Their Lordships dealt with the issue of the termination of banking services in the first paragraph of the judgment.

[49] Lord Hoffmann, in delivering the opinion of the Board, cited the question that was certified by this court and stated that a bank could terminate its services upon reasonable notice. He said at paragraph 1:

> "The chief issue in this appeal, as formulated by Panton P in the Court of Appeal, is whether a bank, 'by merely giving reasonable notice', can lawfully close an account that is not in debit, where there is no evidence of that account being operated unlawfully. Their Lordships have no doubt that in the absence of express contrary agreement or statutory impediment, a contract by a bank to provide banking services to a customer is terminable upon reasonable notice: *Paget's Law of Banking*, 13th ed (2007), p 153."

[50] The learned authors of Paget's Law of Banking cited **Prosperity Limited** and **Joachimson (A Firm Name) v Swiss Bank Corporation** [1921] 3 KB 110 as authority for the proposition that Lord Hoffmann accepted as being the law on the point. The learned judge in **Prosperity Limited** also ruled that to grant an injunction against a bank to continue to provide services to a customer "would be in the nature of a decree for specific performance, which it would be impossible for the Court to carry out". In **Joachimson**, Atkin LJ (as he then was) took it as unquestioned that the bank could terminate the contract on giving reasonable notice. He said, at page 127:

> "...I think that there is only one contract made between the bank and its customer. The terms of that contract involve obligations on both sides and require careful statement. They appear upon consideration to include the following provisions. The bank undertakes to receive money and to

> collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer addressed to the bank at the branch, and as such written orders may be outstanding in the ordinary course of business for two or three days, it is a term of the contract that the bank will not cease to do business with the customer except upon reasonable notice. The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery..."

The learned authors of Paget's Law of Banking opine, at paragraph 7.13 of the 13th Edition of their work, that the computerised nature of modern banking suggests that the emphasis on banking being a personal confidential service no longer had the currency that it did in 1921. They maintain however, that "damages remain as adequate a remedy as they ever were, and this ground of the decision [in **Prosperity Limited**] represents a substantial hurdle to a successful application for an injunction".

[51] The bank in **Olint** gave notice of its intention to close its customer's accounts. The customer applied for an interim injunction to prevent the closure but the judge at first instance refused the application. An appeal from that decision to this court was successful. The customer alleged that the bank was acting maliciously and contrary to the provisions of the Banking and Fair Competition Acts. It was in the appeal from the decision in this court in which Lord Hoffmann made the comments cited above, at paragraph [49].

[52] His Lordship ruled that neither the Banking Act nor the Fair Competition Act could prevent the bank from terminating its services. He opined that the judge at first instance was entitled to have found that there was no triable issue and therefore dismiss the application. The opinion in **Olint**, therefore, barring any statutory change, represents the law on the point.

[53] Mr Beswick submitted that there has been an important constitutional change that affects the law on the issue. He pointed out that **Olint** was decided before the amendment of the Constitution in which the Charter of Rights was promulgated. Learned counsel submitted that the Charter gave each citizen protection from discrimination and extended that protection beyond the actions of agents of the state but also from actions of other citizens (natural or juristic), that is, it also has "horizontal application". Mr Beswick submitted that "in the interests of justice including the public interest, the Respondents should be allowed to fully ventilate this claim and the very important points it will of necessity be forced to consider". He argued that other legislation, also recently passed, made the "ability to hold a bank account...a legal necessity to live in and conduct business in Jamaica".

[54] The application of the Charter of Fundamental Rights and Freedoms, since its promulgation in 2011, has not been the subject of much judicial assessment. The provisions that are readily identifiable as being applicable to this case are sections 13(3)(e) and (i) and 13(5). These state, respectively, as follows:

> "(3) The rights and freedoms [guaranteed by, and] referred to in subsection (2) are as follows—

(a) ...

(b) ...

(c) ...
(d) ...

(e) **the right to freedom of peaceful assembly and association**;

(f) ...

(g) ....

(h) ...

(i) the right to freedom from discrimination on the ground of—

(i) being male or female;

(ii) **race, place of origin, social class, colour, religion or political opinions**;

...

(4) ...

(5) A provision of this Chapter binds natural or juristic persons if, and to the extent that, it is applicable, taking account of the nature of the right and the nature of any duty imposed by the right." (Emphasis supplied)

[55] It is not immediately clear how these provisions can assist the respondents. That, however, is not the focus of this judgment. At this stage, the question is whether this constitutional development may be argued as affecting the law as established in **Prosperity Limited** and cemented in **Olint**. If it is a "genuine subject of litigation", to use the words of Morrison JA in **Belize Port Authority**, it should be resolved by the

court. In the absence of decided cases on the point, it cannot be said that such an argument is not a genuine subject of litigation.

[56] The views of Sykes J on this point were along the vein that the matter should be argued. He said at paragraph [52]:

> "…What can be said is that Jamaica now has a new bill of rights. Not only is there a new bill of rights there are also some new rights and a clear provision that permits one private citizen to enforce the bill of rights against another private citizen (section 13 (5)). This is called horizontal application in the vocabulary of constitutional lawyers."

He followed up on that view in his conclusion at paragraph [56]:

> "This court is not saying that Mr O'Gilvie will succeed. What is being said is that his constitutional claim cannot be dismissed out of hand…Mature reflection by a court after full argument is required in this case. The court cannot say that the claim is so beyond the pale that it has no legal foundation."

[57] In respect of the factual underpinnings of the claim, NCB posited that the respondents had put forward no evidence to support their claim of discrimination by the bank, on the basis of their connection with West Kingston or with Mr Christopher Coke. In the case of Mr O'Gilvie, Mrs Minott-Phillips submitted, the evidence was that the addresses he gave to the bank were not addresses in West Kingston, but elsewhere. Learned Queen's Counsel also argued that the bank contracted with Mr O'Gilvie's companies despite the fact that they had West Kingston addresses. NCB, in light of the interaction with Mr O'Gilvie and his companies, including the presence of the bank's automated banking machine in one of his premises, could not credibly assert that it was

ignorant of Mr O'Gilvie's connections with West Kingston. This aspect of Mrs Minott-Phillips' submissions is without merit.

[58] Nonetheless, learned Queen's Counsel had other strings to her bow. There were no particulars, Mrs Minott-Phillips submitted, that indicated the manner in which the bank had interfered or sought to interfere with Mr O'Gilvie's right to associate with Mr Coke. Similarly, she argued, there was no evidence to support any conspiracy between the bank and the ARA or any other agency to close the respondents' respective accounts. She submitted, at paragraph 14 of her written submissions, that:

> "In short, there is nothing in the second action that rises to the level of being a sustainable claim for redress for breach by NCB of the fundamental rights and freedoms of the Respondents."

[59] Mr Beswick did not advance any convincing arguments in respect of the absence of a factual basis for the respondents' claims. He submitted that the discrimination is something that the court would be asked to infer. Learned counsel submitted that an inference of discrimination is inescapable from the history of the matter. He admitted that the respondents do not presently have the evidence, but discovery would allow them to secure it. Mr Beswick submitted that unlike individuals, corporate entities, such as NCB, would have the communication stored in its archives and the relevant information will be secured by the discovery process.

[60] This, it seems, is an admission that the respondents hope to embark on a fishing expedition.

[61] Rule 8.9 of the Civil Procedure Rules ("the CPR") requires a claimant to include in the claim form all the facts on which the claimant relies. Rule 8.9(1) states:

> "The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies."

[62] In the face of this requirement, the respondents' second claim alleged, against NCB, the following:

> "8. The claimants claim against [NCB] and [the Attorney General] for discrimination contrary to sections 13, 23 and 24 of the Jamaican Constitution.
>
> a. The claimants submit that [NCB] is guilty of treating [Mr O'Gilvie] differently as a result of his place of origin and the associations he acquired as a result of his upbringing in West Kingston.
>
> b. Further and/or alternatively, the claimants aver that [NCB] is treating the claimants differently than how it would treat other businessmen and companies because he falls into a class of the population which have been accused of wrong doing under the Proceeds of Crime Act and on that basis has decided to restrict and/or terminate the claimants' banking services.
>
> c. Additionally, the discrimination as practised by [NCB] is a flagrant breach of the claimants' right to natural justice as [NCB's] actions come on the back of the claimants having the case against them withdrawn for a lack of evidence. In the circumstances [NCB] is acting as a tribunal of fact, determining the claimants' innocence and/or guilt and further, passing judgment that the claimants are not worthy of continued banking services.
>
> d. Further and/or alternatively the claimants aver that [NCB] by virtue of the license [sic] granted

> to it by the Government of Jamaica is acting as an agent and/or co-conspirator and/or a proxy for the said Government and therefore must be held to the same standard as an agent and/or arm of the government would be so held."

[63] In his affidavit filed in support of these assertions, Mr O'Gilvie did not refer to any act or statement by NCB that demonstrated the respondents' accusations against the bank. He, instead, referred to his beliefs. He said in this regard:

> "17. In relation to [NCB], **I believe** that [NCB] is treating me differently to how it would treat a businessman whose place of origin on the Island of Jamaica is different to my place of origin. That is, to say it bluntly, [NCB] is treating me differently because I am from West Kingston/Tivoli Gardens area. **I verily believe** that if I originated from Orange Grove or Strawberry Hill, attended Campion College and was a member of its prestigious swim team, I would be treated differently to how I am being treated now. Unfortunately, I grew up in West Kingston and attended Denham Town High School. As such, I do not readily have links or contacts with the cabal which is in charge of the banking sector in Jamaica.
>
> 18. Alternatively, **I believe** [NCB] is guilty of discriminating against me as I fall into the limited category of persons who have been subject to prosecution under the POCA [Proceeds of Crime Act]. Further, I fall into the even narrower category of citizens who have been exonerated of the allegations of money laundering.
>
> 19. Additionally, [NCB] and [the ARA] are guilty of breaching my Constitutional right to associate with whomever I choose. As far as I am aware there is no prohibition in being friends with any other Jamaican citizen. As such, it is a breach of my constitutional rights for the [ARA] to institute a baseless claim against me which is [sic] predicated on the fact that Mr Coke is my friend and further for [NCB] to terminate my banking services based not on my conviction of a crime, but based entirely on the unfounded suspicion of the [ARA], which has proved to be baseless. Additionally, it should be clear that this is discriminatory as

> Mr Coke has several 'friends', several who are richer and more prominent than I am, but I am being treated differently for no justifiable reason." (Emphasis supplied)

[64] The absence of any statement of fact supports Mrs Minott-Phillips' submission that the second claim lacks any factual foundation as against NCB. Mr Beswick's submission that something could turn up on disclosure is to be rejected as flying in the face of rule 8.9 of the CPR requiring the claimant to state the facts upon which it relies. As a result, although there may be an arguable point in law to attempt to set aside on constitutional grounds, in respect of these respondents, the principle approved by **Olint**, there is no factual basis to support a claim of discrimination and thereby to invoke the constitutional basis by which such an attempt could be made.

[65] Although **Prosperity Limited** has been criticised by the respondents as outdated, to the extent that it is still the law, there is an opinion stated in the judgment that is relevant to the respondents' complaint in this case. In **Prosperity**, Lloyd's Bank sent a notice to its customer of its intention to close the customer's account at the end of a month. The account was the instrument through which the customer operated a "snowball" scheme of insurance. Although the scheme was not illegal, the court was of the view that Lloyd's Bank was entitled to say that it was one with which it did not wish to be associated. McCardie J is reported to have opined that:

> "No suggestion had been made that the scheme was a dishonest one; the directors were gentlemen of respectability, and nothing had been said against the way in which the business of the [customer] was carried on, but...a scheme under which a subscriber who paid the sum of 35s. only obtained an insurance of 16s. **was a scheme with**

> **which [Lloyd's Bank] were justified in saying that they would not be associated**." (Emphasis supplied)

[66] NCB, in its application to strike out before Sykes J, referred to Mr O'Gilvie's address and that of his companies, and denied any breach of the constitutional rights of the respondents. Sykes J did not, however, address the presence or absence of supporting evidence for those aspects of the dispute. His omission was fundamental to this second claim.

[67] Whereas this court will not lightly disturb the exercise of the discretion of the judge at first instance, it will do so if that judge has failed to take into account a material fact (see **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042). The absence of a factual basis for the second claim is fatal to the claim. An order joining it to the first claim will not supply that want. Sykes J, despite a commendable attempt to take a common sense approach to the matter, failed to recognise the factual gap. His decision must be reversed.

Conclusion

[68] The second claim, despite the fact that it arose from the same set of circumstances as the first, would not have been an abuse of the process of the court if there had been a factual basis on which it could be brought. An examination of all the circumstances, as recommended by **Gore Wood**, could have warranted Sykes J making the orders that he did, had there been a factual basis to support the second claim. As it is, there was no such factual basis. Mr O'Gilvie spoke to his belief that NCB was acting in a discriminatory manner but provided no support for his belief. Accordingly,

the appeal should be allowed, the decision of Sykes J in respect of NCB's continued participation in the claim should be set aside and the claim should be struck out as against NCB. Costs should also be awarded to the bank in this court and in the court below. Such costs are to be taxed, if not agreed.

MORRISON JA

ORDER

(a) The appeal by the National Commercial Bank Jamaica Limited is allowed.

(b) The order of Sykes J dismissing the appellant's application to strike out the respondents' claim is set aside.

(c) The respondents' claim as against the appellant in Claim No 2013 HCV 01436 is struck out as being an abuse of the process of the court.

(d) Costs to the appellant, both here and in the court below. Such costs are to be taxed if not agreed.