[2021] JMCA Civ 14

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MR JUSTICE FRASER JA
THE HON MR JUSTICE BROWN JA (AG)

APPLICATION NO COA2021APP00039

BETWEEN	**NORDBUILD LIMITED**	**1ST APPLICANT**
AND	**CHARMAINE BOWEN**	**2ND APPLICANT**
AND	**THE ATTORNEY GENERAL FOR JAMAICA**	**RESPONDENT**

Ms Charmaine Bowen in person and representing the 1st applicant

Ms Faith Hall and Ms Nicola Richards instructed by The Director of State Proceedings for the respondent and the Registrar of Titles, the 2nd ancillary defendant in the court below

Mrs Daniella Gentles-Silvera and Ms Kathryn Williams instructed by Livingston Alexander and Levy for Victoria Mutual Building Society Limited, Livingston Alexander and Levy, Daniella Gentles-Silvera and Kathryn Williams, the 3rd, 7th and 8th ancillary defendants in the court below

Ms Carlene Larmond instructed by Patterson Mair Hamilton for National Commercial Bank, Patterson Mair Hamilton, Jerome Spencer and Kimberly Diedrick, the 4th, 5th and 6th ancillary defendants in the court below

16, 19 April and 26 May 2021

BROOKS P

[1] On 18 December 2020, Bertram-Linton J declared Nordbuild Limited and its managing director, Ms Charmaine Bowen (together referred to hereafter as 'the

applicants'), to be vexatious litigants. The declaration was made on an application by the Attorney General for Jamaica, pursuant to the Vexatious Actions Act ('the VAA'). The applicants now seek an extension of time within which to file an appeal from that declaration, so as to have it set aside. The Attorney General and other parties, with whom the applicants have been in litigation, oppose it. Those other parties were among the ancillary defendants in the court below. They have not been named as respondents to this application, but were served with the documents. Those who have appeared before the court will, therefore, be treated as respondents.

[2] In deciding whether to grant such an application, the court considers a number of issues. Different cases require the emphasis on one or more of the issues that must be considered. This case requires more stress to be placed on considering whether the applicants' proposed appeal has a real prospect of success. Before considering the usual issues however, it may be helpful, as a backdrop to identify the reason and effect of declaring a person to be a vexatious litigant.

The relevant law

[3] Section 2 of the VAA stipulates that it is the Attorney General who may apply for a person to be declared a vexatious litigant. Before granting the application, a judge of the Supreme Court must give the party, who is to be affected by the proposed order, the opportunity to be heard. The order should only be made if the court is satisfied that that party has habitually and persistently and without any reasonable ground instituted vexatious legal proceedings. Whether or not the order is made, is within the discretion of the judge who hears the application. The section states:

> "2.-(1) If, on an application made by the Attorney-General under this section, the Supreme Court is satisfied that any person has habitually and persistently and without any reasonable ground instituted vexatious legal proceedings, whether in the Supreme Court or in any inferior Court, and whether against the same person or against different persons, the Court may, after hearing that person or giving him an opportunity of being heard, order that no legal proceedings shall without the leave of the Supreme

> Court or a Judge thereof be instituted by him in any Court, and such leave shall not be given unless the Court or Judge is satisfied that the proceedings are not an abuse of the process of the Court and that there is prima facie ground for the proceedings.
>
> (2) A copy of any order made under this section shall be published in the *Gazette*."

[4] Where an order is made under section 2 of the VAA, the affected party is prohibited from instituting any legal proceedings without the prior approval of the Supreme Court, or a judge of that court.

How did Nordbuild and Ms Bowen get to this point?

[5] The various cases, about which the Attorney General has complained, have their respective genesis in loan transactions. The first set of cases involved Ms Bowen alone. She borrowed money from Island Victoria Bank ('IVB') and secured the loan and overdraft facilities by mortgages of two real estate holdings. She defaulted in servicing the loans and IVB's successor financial institutions sought to realise the security. Ms Bowen denied being indebted and sued IVB, as well as all the successor financial institutions, to prevent the sale of her properties.

[6] Nordbuild borrowed from National Commercial Bank ('NCB') and Victoria Mutual Building Society ('VMBS') in order to finance its development of land to build an apartment complex. Nordbuild complained that NCB, by maliciously classifying it a bad debtor and refusing to activate a loan facility, hampered its business. The malice, Nordbuild alleged, arose from Ms Bowen's rejection of the sexual advances of one of NCB's officers.

[7] Nordbuild's complaints against VMBS arose from disputes over mortgages granted to VMBS of the property being used for the project. It fell into arrears with the repayment of the loan, and sought to negotiate a settlement with VMBS. Each side alleged that the other had failed to perform its end of the negotiated settlement. VMBS

sought to sell two of the apartments to realise its security, and Nordbuild sued to prevent the sale.

[8] The respective claims filed by Ms Bowen and Nordbuild, separately and jointly, will be set out in greater detail below. In some of them the applicants were assisted by counsel. In others they were self-represented. Each case went through various amendments during its lifetime. Appeals from decisions made in the Supreme Court in respect of some of them, were considered by this court. In one case Nordbuild even sought leave from Her Majesty in Council, to appeal from this court's decision.

The present application

[9] Shortly after Bertram-Linton J made the declaration under the VAA, the applicants filed, in this court, a number of documents, by which they sought to challenge the order. They did so without legal representation and their efforts were misguided. It is unnecessary to traverse those efforts, because the Attorney General and the various respondents, whom the applicants served with the documents, and who have appeared before the court, have agreed that this court should treat the documents before it as an application for an extension of time, as has already been mentioned.

[10] The law governing such applications is now well settled, and reference to the judgment of Panton JA, as he then was, in **Leymon Strachan v The Gleaner Company Ltd and Stokes** (unreported), Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered 6 December 1999, is almost standard procedure. In that case, Panton JA outlined the court's considerations when determining whether to grant an application for extension of time to file an appeal. He said, in part, at page 20 that:

> "(1) Rules of court providing a time-table for the conduct of litigation must, prima facie, be obeyed.
>
> (2) Where there has been a non-compliance with a timetable the Court has a discretion to extend time.
>
> (3) In exercising its discretion the court will consider-

(i) the length of the delay;

(ii) the reasons for the delay;

(iii) whether there is an arguable case for an appeal and; [sic]

(iv) the degree of prejudice to the other parties if time is extended.

(4) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for extension of time, as **the overriding principle is that justice has to be done**." (Emphasis supplied)

The analysis that will follow will be so guided, but with a slight truncation.

[11] The respondents, who have appeared and are represented before the court are the Attorney General, the Registrar of Titles, VMBS, NCB, Patterson Mair Hamilton, Mr Jerome Spencer, Miss Kimberley Diedrick, Livingston Alexander & Levy, Mrs Daniella Gentles-Silvera and Ms Kathryn Williams (collectively referred to hereafter as 'the respondents'), contend that the issues of the length of the delay and the reasons for the delay need not detain the court. The respondents do not rely on them because they accept that the applicants, at an early stage, demonstrated an intention to contest Bertram-Linton J's order. The respondents lay their stress on the issue of whether there is an arguable appeal. It is, therefore, that issue that will next be assessed.

Is there an arguable case for an appeal?

[12] The applicants, through Ms Bowen, have identified four main areas in which, they say, the impugned order is fatally flawed. These are:

a. the status of the Attorney General prohibited her from properly instituting the application under the VAA;
b. the breach of the applicants' rights by Bertram-Linton J in refusing to grant an adjournment to the applicants to allow Nordbuild to get legal representation in the matter;

c. the error by Bertram-Linton J in finding that the Attorney General had satisfied the requirements of section 2 of the VAA; and
d. the error by Bertram-Linton J in failing to recognise that:
    i. Nordbuild and Ms Bowen had separate identities; and
    ii. there was no abuse of the court's processes by Nordbuild, as it had filed no fresh claim in respect of any matter in which there had been a final judgment.

The status of the Attorney General

[13] The applicants assert that the Attorney General should be considered prohibited from instituting the application pursuant to the VAA, because the Attorney General had not discharged her liability under the various claims by the applicants. The essence of the complaint is that the Attorney General has an interest to serve in seeking to prevent the applicants from pursing their claims. The applicants contend that the Attorney General instituted the claim under the VAA in order to avoid paying the money that she owed to them. The Attorney General's application was, therefore, the applicants assert, not properly before the court.

[14] The premise on which the applicants have based their complaint, is flawed. A perusal of the claims shows that:

a. there is no judgment against the Attorney General or any order of any court making her liable to the applicants in any matter;
b. the claim in which the Attorney General was named as a party (Claim No 2015 HCV 01263), was discontinued; and
c. the claims in which the Registrar of Titles, for whom the Attorney General would appear, is named (Claim Nos 2015 HCV 01263 and Claim No 2017 HCV 01419), make no assertions of any wrong-doing by the Registrar of Titles.

There was, therefore, at the time of filing the claim under the VAA, no liability pending against the Attorney General which would, in principle, disqualify her from instituting that claim. In any event, the VAA does not impose any restriction on the Attorney General, on the basis propounded by the applicants.

The issue of the refusal of an adjournment

[15] The applicants' complaint in this regard is that when they appeared before Bertram-Linton J, on 16 June 2020, the learned judge wrongly refused Ms Bowen's application for an adjournment in order to have Nordbuild represented by counsel. The learned judge's refusal, the applicants assert, constitutes a breach of Nordbuild's right to counsel and, consequently, the order under the VAA, cannot stand.

[16] The applicants support their stance with an affidavit from counsel, Mr Isat Buchanan, who deposed that he had been approached by the applicants to act for them. He said that he agreed to do so, without charge, if they were able to secure an adjournment of the case so that he could prepare himself. He indicated that the applicants' case was of some complexity and that Nordbuild "could have benefitted from having counsel in the matter". Mr Buchanan did not state when he had been approached by the applicants, but stated that he had had no opportunity to take steps to place himself on the record for the case.

[17] Learned counsel for the respondents have all asked the court to reject this complaint as contrived. They point out that all the documentation leading up to the hearing before Bertram-Linton J, including up to the week before the hearing, indicate that Ms Bowen represented both Nordbuild and herself. Learned counsel also pointed out that at the beginning of that hearing, Ms Bowen indicated that she represented both applicants, and asked to be allowed to proceed with an ancillary claim that the applicants had filed. It is only when Bertram-Linton J refused that request that Ms Bowen requested an adjournment to obtain representation by counsel.

[18] The points made by learned counsel are verified by Bertram-Linton J in her judgment. She did so at paragraphs [18]-[20]:

> "[18] Ms Bowen since the matter began consistently tried, by offering various excuses to have the matter adjourned. None of these excuses were facilitated or accepted by the court and as she has on previous occasions based on the records proceeded by representing herself as well as [Nordbuild].
>
> [19] She began by asking the court to deal with the ancillary claim and then insisted that she does not represent [Nordbuild]. This the court considered to be particularly strange because in all the proceedings she had always represented herself as the Managing Director of [Nordbuild]. In addition, she had also been properly served with documents in this claim and properly accepted service on behalf of [Nordbuild].
>
> [20] Also her insistence on dealing with the ancillary claim demonstrated that she was attempting to speak on behalf of [Nordbuild] since the issues albeit not before the court in that ancillary claim all touched and concerned [Nordbuild]."

[19] Ms Larmond, on behalf of the respondents NCB, Patterson Mair Hamilton, Jerome Spencer and Kimberley Deidrick, also relied on an affidavit filed by Mr Luke Browne. In that affidavit, Mr Browne explained that Mr Buchanan had been in contact with the applicants from as far back as February 2020. Mr Browne exhibited to his affidavit a letter dated 10 February 2020 in which Mr Buchanan informed the Registrar of this court that he acted for Ms Bowen in a case between Nordbuild and a Mr Charles Maxwell.

[20] It cannot be said that the learned judge erred in refusing to grant an adjournment when this case came before her. The court documents filed on behalf of the applicants were all filed by Ms Bowen for and on behalf of both applicants. That has been the case with the majority of the matters that involve the applicants.

[21] The applicants had no entitlement to an adjournment. They also have no constitutional right to be represented by counsel. That right, which is not absolute, is granted only to persons who are charged with a criminal offence. The principle that guides the grant or refusal of an adjournment of a case, is the demands of justice in that particular case at that particular time. Phillips JA made that point in her judgment in **Kenneth Boswell v Selnor Developments Limited** [2017] JMCA App 30. She supported the point at paragraph [54] of her judgment with a quote from **Maxwell v Keun and Others** [1928] 1 KB 645. Atkin LJ, as he then was, stated, in part, at page 653:

> "I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does do so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the Court has power to review such an order, and it is, to my mind, its duty to do so."

[22] The conduct of the case up to the point that it came before the learned judge, and the conduct thereafter, demonstrates that the applicants did not genuinely seek an adjournment to obtain the services of counsel. Ms Bowen took all the steps on behalf of the applicants up to that point, and all the steps thereafter in instituting this application. This court should not interfere with the exercise of the learned judge's discretion in refusing to grant an adjournment. Accordingly, it must be said that the applicants were afforded an opportunity to be heard in respect of the Attorney General's application and were, in fact, heard.

Did the Attorney General satisfy the requirements of section 2 of the VAA?

[23] The opportunity to be heard is one of the requirements of section 2 of the VAA. Under that section, the Attorney General is also obliged to satisfy the Supreme Court that the party, to be affected by the proposed order, "has habitually and persistently and without any reasonable ground instituted vexatious legal proceedings, whether in

the Supreme Court or in any inferior court, and whether against the same person or against different persons".

[24] Whereas the applicants assert that the Attorney General failed to satisfy the latter requirement, an objective examination of the various proceedings will assist in determining that issue. The words of Lord Bingham CJ in **Her Majesty's Attorney General v Paul Evan John Barker** (unreported), High Court of Justice of England and Wales, Case No CO/4380/98, judgment delivered 16 February 2000 ('**AG v Barker'**), are instructive. In considering an application by the Attorney General of that country for an order under section 42 of their Supreme Court Act, which is similar in effect to section 2 of the VAA, Lord Bingham CJ stated at paragraphs 19 and 22:

> "19. ...'Vexatious' is a familiar term in legal parlance. The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process. Those conditions are in my view met in this case. Many of the proceedings show no justiciable complaint and, as has been pointed out, several writs have been issued against individual officers in the same department when one writ would have served against them all.
>
> …
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> 22. From extensive experience of dealing with applications under section 42 the court has become familiar with the hallmark of persistent and habitual litigious activity. The hallmark usually is that the plaintiff sues the same party repeatedly in reliance on essentially the same cause of action, perhaps with minor variations, after it has been ruled upon, thereby imposing on defendants the burden of resisting claim after claim; that the claimant relies on essentially the same cause of action, perhaps with minor variations, after it has been ruled upon, in actions against successive parties who if they were to be sued at all should

> have been joined in the same action; that the claimant automatically challenges every adverse decision on appeal; and that the claimant refuses to take any notice of or give any effect to orders of the court. The essential vice of habitual and persistent litigation is keeping on and on litigating when earlier litigation has been unsuccessful and when on any rational and objective assessment the time has come to stop."

[25] The evidence before the learned judge was that the applicants had filed several claims in the Supreme Court. The claims were largely against the same individuals and largely alleging the same complaints. The first relevant claim filed was by Ms Bowen. This was filed in 2004 and intituled 2004 HCV 1216 Charmaine Bowen v Island Victoria Bank Limited, Union Bank Limited, RBTT Bank Jamaica Limited, Financial Sector Adjustment Company Limited, Jamaican Redevelopment Foundation Inc ('JRF') and Dennis Joslin Jamaica, Inc. The 2004 claim sought declarations that Ms Bowen was not indebted to the various entities. Pusey J struck out the claim on 21 March 2013. Ms Bowen appealed from that decision and the appeal was dismissed on 31 July 2017.

[26] Ms Bowen applied directly to the Judicial Committee of the Privy Council for leave to appeal from this court's decision. The Privy Council refused the application on 8 February 2018. The refusal stated that the proposed appeal did not raise an arguable point of law or a point of general public importance. Nordbuild's application to intervene in the matter was refused and Ms Bowen was ordered to pay the respondents their costs of the application.

[27] It is significant, however, that Ms Bowen crafted and served on the defendants to that claim, a document purporting to be an amended order issued by the Privy Council. The document, among other things, stated that the Privy Council had granted leave to appeal.

[28] Despite the fact that the 2004 Claim had been dismissed, in October 2019, Ms Bowen filed a notice of application for court orders in the Supreme Court in that claim.

The application sought to enforce an award against the defendants to that claim. The award, the application asserted, had been certified at £131,000,000.00. The application named her as the claimant and Nordbuild as "Intervenor".

[29] On 26 February 2018, the applicants also filed claim no 2018 HCV 00750 in the Supreme Court. The defendants to that claim are Island Victoria, Union/RBTT/RBC & Sagicor Financial Corporation as the first defendant, Refin & Finsac Limited & JRF Inc & Dennis Joslin Inc as the second defendant and "Attorneys (i) William Panton, Cindy Lightbourne of and Dunn Cox; (ii) Charles Piper of AND Charles Piper & Associates (iii) Christine McNeil of AND Attorney General (iv) Raphael Codlin and of And [sic] Raphael Codlin & Ass." as the third defendant.

[30] The claim is against the banks for damages for, among other things, fraud and confiscation of the applicants' houses and against the attorneys-at-law for breach of their professional ethics in failing to have the fraud rectified. On 17 September 2018, Nembhard J (Ag), as she then was, struck out the claim as against the various attorneys-at-law. On 14 June 2019, Lindo J struck out the claim as against JRF and Dennis Joslin Jamaica Inc. The parties have not disclosed the current status of this claim as it affects the other defendants.

[31] Nordbuild filed other claims between 2012 and 2018. On 21 December 2012, it filed claim no 2012 HCV 07171 against NCB Limited, Tankweld Construction Company Limited and John Graham, VMBS Building Society and CD Alexander Realty. The claim was for damages for a variety of matters related to a debt that Nordbuild owed to NCB. Allegations were made of concealment of conflicts of interests in one of Nordbuild's attorneys-at-law, and of sexual harassment of Ms Bowen by one of NCB's officers. The claim was discontinued on 9 July 2013.

[32] On 17 September 2013, Nordbuild filed another claim (No 2013 HCV 05075), against several defendants. The named defendants are:

Victoria Mutual Building Society Limited & Servants:		
Chief Executive Officer	Richard K. Powell	
Mortgage Manager	Patricia Fisher	
In House Attorney	Keri-Gaye Brown	1st Defendant
Mr Angulu of Angulu & Associates & VMBS		2nd Defendant
VMBS Limited, Mrs Shelly-Ann Fort-Sykes & Nunes, Scholefield, Deleon & Co		3rd Defendant
Charles Maxwell, Jodi-Ann L Barber of Petro jam Limited ('irregular' purchaser of unit #8)		4th Defendant
Remax Elite and Newton Johnson Real Estate Broker		5th Defendant
Attorney General for National Land Agency		6th Defendant
Attorney General for National Housing Trust Limited		7th Defendant

[33] This claim also alleged conflicts of interest, fraud, the production of a fraudulent surveyor's report and harassment. The defendants also included purchasers of real estate from VBMS under powers of sale contained in the mortgage that Nordbuild had given to VMBS. Nordbuild withdrew the claim on 4 December 2015, when it came on for hearing before Bertram-Linton J (Ag), as she then was.

[34] Nordbuild filed its next claim on 26 February 2015. It was numbered 2015 HCV 01263. Again it named a number of defendants, namely:

"NATIONAL COMMERCIAL BANK	1st Defendant
Branch Manager Stewart Reid, Contracted Broker	
REMAX ELITE & REMAX REALITY [sic] GROUP	
And its Servant/Servants and	

Purchaser/Purchasers

VICTORIA MUTUAL BUILDING SOCIETY LTD — 2nd Defendant

THE REGISTRAR OF TITLES — 3rd Defendant"

[35] Again Nordbuild alleged breaches of contract, fraudulent conversion, conflict of interest and damages for reckless delay in issuing certificates of title in respect of strata lots.

[36] On 19 October 2018 Simmons J (as she then was) struck out the claim as against VMBS, gave judgment for VMBS for damages to be assessed and ordered a stay against Nordbuild from bringing any further proceedings against VMBS in respect of the transaction, which was the subject of that claim.

[37] Before that judgment was handed down, however, Nordbuild had filed another claim against VMBS, NCB and The Registrar of Titles. This is claim no 2017 HCV 01419. It alleged, among other things, fraud, breach of mortgage deed, and reckless delay in releasing certificates of title for strata lots.

[38] During the course of the litigation, Shelly Williams J made an order that there should be no communication between the parties or their legal advisers, unless it is filed in court with the Registrar. The claim was, therefore, struck out as of 1 November 2019, as a sanction for Nordbuild's failure to satisfy an order for costs.

[39] Nordbuild filed yet another claim against VMBS and NCB. This was, however, an ancillary claim to a claim (Claim No 2018CD 00082) filed, by purchasers, against Nordbuild to remove caveats from certificates of title for properties that VMBS had sold under powers of sale contained in a mortgage. In the ancillary claim, Nordbuild alleged that the properties were fraudulently transferred to the purchasers and that VMBS failed to disburse the entire proceeds of two mortgage loans.

[40] Laing J ordered that the ancillary claim be stayed until the final determination of Claim Nos 2015HCV01263 and 2017HCV01419. Nordbuild's application for permission to appeal from Laing J's decision was refused.

[41] The Attorney General has exhibited numerous documents, including letters and email messages that Ms Bowen sent to several of the parties to the various claims. Many of these can only be described as obscene. The applicants' misrepresentation of an order of the Privy Council is also particularly poignant at this time. That document too has been the subject of many email messages as the applicants portray and support it as a genuine document. The inclusion of the registry of the Privy Council in these various email messages provoked that registry to warn the applicants that a continuation of the practice would result in that registry blocking messages from the applicants.

[42] These documents and actions by the applicants characterise the litigation as falling within the description set out by Lord Bingham CJ in **AG v Barker**, namely, "its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant". It is also of significance that the applicants have failed to pay the vast majority of the several orders for costs, which have been made against them.

[43] Based on this analysis, the learned judge had more than ample material to find that the applicants have "habitually and persistently and without any reasonable ground instituted vexatious legal proceedings". The Attorney General had, indeed, satisfied the requirements of section 2 of the VAA.

The complaint that Bertram-Linton J failed to recognise that:

i. Nordbuild and Ms Bowen had separate identities; and

ii. there was no abuse of the court's processes by Nordbuild, as it had filed no fresh claim in

respect of any matter in which there had been a final judgment.

[44] Ms Bowen argued that the learned judge erred by failing to recognise that she and Nordbuild had separate identities and therefore the acts of Nordbuild are not her acts. She relied, in part, for these submissions on the judgment of Sykes J, as he then was, in **Asset Recovery Agency v Andrew Hamilton and Others** [2013] JMSC Civ 136. In that case, Sykes J relied on some of the reasoning in **Johnson v Gore Wood & Co (a firm)** [2000] UKHL 65; [2002] 2 AC 1; [2001] 1 All ER 481 to point out that parties should not be barred from litigating matters that not been previously finalised. Ms Bowen also pointed out that it cannot be said that there is re-litigation of an already decided matter until the previous case has been tried. There has, she argued, been no trial to finality of any of the matters involving either Nordbuild or her.

[45] Ms Bowen's arguments are misplaced. The fact that she has a separate legal identity from Nordbuild does not arise in this case. Each of them has filed claims and they have jointly filed claims. The Attorney General's contention is that all those claims are tainted with vexation.

[46] On the matter of the absence of a final judgment, it is true that there is a close relationship between the aim of rules which were discussed in **Asset Recovery Agency v Andrew Hamilton** and **Johnson v Gore Wood**, on the one hand, and the aim of section 2 of the VAA, on the other hand, namely, the "underlying public interest…that there should be finality in litigation and that a party should not be twice vexed in the same matter" (page 31 of **Johnson v Gore Wood**). Both are predicated on the assertion that there has been previous litigation which covers the same ground and is against the same, or largely the same parties. There is, however, a difference between the two contexts. The VAA, in seeking the prevention of habitual and persistent institution of vexatious litigation, not only attempts to prevent abuse of the court's processes by the re-litigation of the same subject matter of claims, but also addresses the nature of the claims and the manner in which they are pursued. The fact, therefore, that a claim has been discontinued does not prevent it from being vexatious.

Similarly, if a claim is attended by abusive and cantankerous behaviour by the claimant, it can be described as vexatious. Such claims may be referred to by the Attorney General in an application under section 2 of the VAA.

[47] There is also a difference in the timing of giving effect to the aim of the various rules mentioned above. The complaints about *res judicata*, action estoppel, issue estoppel and **Henderson v Henderson** abuse of process (taken from **Henderson v Henderson** (1843) 3 Hare 100; [1843-1860] All ER Rep 378; 67 ER 313), which were discussed in **Asset Recovery Agency v Andrew Hamilton** and **Johnson v Gore Wood**, speak to the striking out of a claim after it has been filed. A declaration under section 2 of the VAA requires the affected party to justify being able to institute an action, before it is filed. If a party, who is declared to be a vexatious litigant, wishes to institute a claim, that party may apply to the court for permission to do so. He or she may be permitted to do so if the court is satisfied that the party has a proper claim.

[48] These proposed grounds must also fail.

The degree of prejudice to the other parties if time is extended

[47] In the absence of an arguable case for an appeal, it is plain that to allow the applicants to appeal from the decision would cause unnecessary inconvenience and expense, as they have already incurred in this application. The prejudice is particularly poignant in a case such as this, where the litigation, thus far, instituted against them has been vexatious and their costs have not been paid.

Conclusion

[49] Based on the reasoning set out above, the learned judge cannot be said to have been plainly wrong in the exercise of her discretion to declare the applicants to be vexatious litigants. Indeed, the very ancillary claim that the applicants filed in response to the Attorney General's claim confirms that they are vexatious litigants. In the ancillary claim, the applicants sought to bring 13 parties (as well as associates and

spouses of some parties) into a matter to which they had no direct, or any, connection, and, in that ancillary claim, sought to renew claims that had been the subject of claims that had been discontinued, struck out or stayed.

Accordingly, the applicants having not demonstrated that they have an arguable case for an appeal, justice requires that the application for an extension of the time, in which to file an appeal from Bertram-Linton J's order, should be refused.

Costs

[50] Prior to the hearing of the application, the applicants had also applied for a member of the panel to recuse himself from the hearing. When the matter came before the court, Ms Bowen informed the court that the applicants no longer wished to pursue that application. At that time the issue of the costs of that application was reserved to the conclusion of the hearing of the present application.

[51] Having considered all the circumstances, especially as the point did not affect the respondents, it is best that there be no order as to costs in respect of that previous application.

[52] The present application is however, a different matter. The respondents are the successful parties in a contested application and therefore, following the general rule, are entitled to their costs. That should be the order made.

FRASER JA

[53] I have read, in draft, the judgment of Brooks P. I agree with his reasoning and conclusion and have nothing else to add.

BROWN JA (AG)

[54] I too have read the draft judgment of Brooks P and agree with his reasoning and conclusion.

BROOKS P

ORDER

1. The application to extend the time within which to file a notice and grounds of appeal is refused.

2. No order as to costs in respect of the application for a judge to recuse himself.

3. Costs of the application for extension of time to the respondent and the second through eighth ancillary defendants to be agreed or taxed.

4. Should any party disagree with the order as to costs, that party is entitled to file and serve written submissions in that regard within 14 days of the date of this judgment, failing which the order as to costs shall stand.

5. Should submissions in opposition to the order as to costs, be filed and served in accordance with order 4 hereof, the parties served with the submissions in opposition are entitled, within 14 days of being served with those submissions, to file and serve submissions in response.

6. The court will thereafter consider and rule on the written submissions.