[2013] JMSC Civ 136

(NO 2)

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2013 HCV 03440

IN THE MATTER OF AN APPLICATION BY THE ASSETS RECOVERY AGENCY FOR A CIVIL RECOVERY ORDER PURSUANT TO SECTION 57 OF THE PROCEEDS OF CRIME ACT, 2007

BETWEEN	**THE ASSETS RECOVERY AGENCY**	**APPLICANT**
AND	**ANDREW HAMILTON**	**FIRST RESPONDENT**
AND	**DOROTHY HAMILTON**	**SECOND RESPONDENT**
AND	**ANDRE HAMILTON**	**THIRD RESPONDENT**
AND	**ANDREW HAMILTON CONSTRUCTION LIMITED**	**FOURTH RESPONDENT**
AND	**ANDREHAN SEAFOODS COMPANY LIMITED**	**FIFTH RESPONDENT**
AND	**DEVON CLEARY**	**SIXTH RESPONDENT**
AND	**JANET RAMSAY**	**SEVENTH RESPONDENT**

AND	**PAULETTE HIGGINS**	**EIGHTH RESPONDENT**
AND	**ANNMARIE CLEARY**	**NINTH RESPONDENT**

IN CHAMBERS

Ian G Wilkinson QC and Shawn Wilkinson instructed by Wilkinson & Co for the first, second, third, fourth and seventh respondents

Anthony Pearson and Dawn Satterswaite for the sixth and ninth respondents

Roxann Mars instructed by Knight, Junor and Samuels for the fifth and ninth respondents

Nateline Robb Cato, Suzanne Watson Bonner and Charmaine Newsome for the Assets Recovery Agency

August 21 and September 30, 2013

CIVIL PROCEDURE - ABUSE OF PROCESS – STRIKING OUT CLAIM ON GROUNDS OF ABUSE OF PROCESS – DISCHARGING RESTRAINT ORDER ON THE GROUND OF ABUSE OF PROCESS

SYKES J

[1] The Assets Recovery Agency (ARA) believes that the respondents are in possession of property derived from drug trafficking, money laundering and gun-running. In August 2012, consistent with this view ARA, without notice, applied to restrain several parcels of real estate, freeze dealing with a number of motor cars and to freeze accounts at various financial institutions. Campbell J granted the order. The grounds for the order and accompanying affidavit spoke to investigations being conducted with a view to making a civil recovery application.

No civil recovery claim was ever filed in this matter. In November 2012, Donald McIntosh J extended the order to May 2013. In January 2013, the order was varied by Marsh J to facilitate the sale of two parcels of land.

[2] On May 27, 2013, Marsh J declined to extend the order on what was said, in the order, to be an oral application for extension of the restraint order.

[3] ARA took the view that in light of Marsh J's decision, the proceeding regarding that restraint order (now called the first restraint order) was at an end. ARA had received permission to appeal but eventually decided against it in light of its analysis and interpretation of what took place before Marsh J in May 2013.

[4] ARA's analysis and interpretation of the sequence of events led it to apply for another restraint order (now called the second restraint order) which, this time, was supported by a claim form and particulars of claim. Sykes J granted the restraint order on a without notice application. At the hearing involving all the parties, some of the respondents submitted that the second restraint order was an abuse of process. Indeed, they submitted that the entire process surrounding the second restraint order was an abuse and consequently the claim form and particulars of claim should be struck out and the restraint order should also be discharged. This judgment is about deciding whether these submissions are acceptable.

[5] Arising from Marsh J's decision, a total of JA$82,660,000.00 were to be released to two firms of attorneys (JA$67,590,000.00 to the firm of Wilkinson & Co and JA$15,070,000.00 to Knight, Junor & Samuels). Both sums were to be handed over on or before June 7, 2013. These sums represented the balance of the proceeds of sale of property which were sold after the variation of the restraint order in January 2013. Marsh J's May order had this first paragraph:

> *The oral application for an extension of restraint order granted on the 29th day of August 2012, extended to the 7th*

day of November 2012 and further extended on the 29th day of January 2013 is refused.

Whether the second restraint order was an abuse of process

[6] The Court of Appeal of Jamaica in **S & T Distributors Limited v CIBC Jamaica Limited** SCCA No 112/04 (unreported) (delivered July 31, 2007) and Honourable **Gordon Stewart OJ v Air Jamaica Acquisition Group Limited** [2012] JMCA Civ 2 approved **Johnson v Gore Wood & Co (A Firm)** [2002] 2 AC 1 (HL), the leading case from England and Wales on abuse of process. In **Gore Wood** Lord Bingham and Lord Millett dealt with abuse of process. Lord Goff, Lord Cooke and Lord Hutton expressly agreed with Lord Bingham's analysis of the law and facts as well as his conclusion. Lord Millett gave his own analysis in arriving at the same conclusion as Lord Bingham.

[7] A brief account of the **Gore Woods** facts is necessary to understand the case. Mr Johnson conducted business through a number of companies. Over the years he had used the defendant firm of solicitors to advise him and to manage his affairs. In respect of one of his business ventures he, through his company, W Ltd, decided to exercise an option to purchase land his company had leased. He so advised his solicitors. The solicitors exercised the option but did so in a manner that led to litigation between W Ltd and the vendor. W Ltd prevailed, eventually, but at a very high cost. W Ltd sued the firm of solicitors. At the time of this claim, Mr Johnson also had a personal claim against the solicitors but it was not filed at the same time as the company's claim. The company's claim was settled. When the personal claim was brought, the solicitors took the point that it was an abuse of process because the very same facts or substantially the same facts were being relied on to ground the personal claim. From these premises, the solicitors argued that both claims should have been brought at the same time and to have successive claims arising from the same facts and circumstances was an abuse of process. The trial judge disagreed and dismissed the application. The Court of Appeal reversed the trial judge, holding that, the personal claims should have been brought at the same time as the company's

claims and that there was no good reason not do so because the basis of the personal claims 'encompasses practically the whole of the ground traversed for six weeks in the company action' (page 21 H). The Court of Appeal had applied what it understood to be the rule in **Henderson v Henderson** which was that where a person could have brought all his claims in one action and failed to do so, that would amount to an abuse of process unless there were special reasons for not doing so. Up to this point in the litigation saga, the Court of Appeal of England and Wales were saying that failure to bring the two claims which were based on the same facts was an abuse of process.

[8] In this regard the Court of Appeal was in distinguished company. The Judicial Committee of the Privy Council in **Yat Tung Investments Co Ltd v Dao Heng Bank Ltd** [1975] AC 583 held that a litigant who brought a claim on one ground which was dismissed would not be allowed to bring the same claim on another ground against the same defendant in the absence of some special reason. The Henderson rule was applied.

[9] The House of Lords unanimously reversed the Court of Appeal. For Lord Millett, a vital consideration was the risk of denying a litigant the right to have a matter litigated. At page 59 his Lordship stated:

> *It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon. This latter (though not the former) is prima facie a denial of the citizen's right of access to the court conferred by the common law and guaranteed by article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953). While, therefore, the doctrine of res judicata in all its branches may properly be regarded as a*

> *rule of substantive law, applicable in all save exceptional circumstances, the doctrine now under consideration can be no more than a procedural rule based on the need to protect the process of the court from abuse and the defendant from oppression.*

[10] His Lordship drew a clear line of demarcation between re-litigating a matter which was properly within the doctrine of res judicata and circumstances falling short of that doctrine. In the case of res judicata, the second matter would have to be stopped as a matter of law because they parties had already litigated the same issues between the same parties. There was no discretion to apply. Of course, this seemingly absolute statement has to be qualified in light of **Arnold v National Westminster Bank** [1991] 2 AC 93 where a party was able to come re-litigate an interpretation of the clause of lease where a decision of a higher court cast doubt on the interpretation given by a lower court. If the second matter fell squarely within the doctrine then it must be dismissed. In circumstances falling short of this, then more refined analysis is necessary having regard to the right of access to the courts so that matters can be resolved. If the parties have not in fact litigated the matter through to final judgment then that is a powerful factor pointing away from a dismissal of the matter on the ground of abuse of process.

[11] Lord Millett then went on to look at the facts of the case and noted that Mr Johnson and the company were separate legal persons and the interests of the company were quite different from his personal interest. His Lordship also held at page 60:

> *It was not in the company's interest for his personal claims to be joined with its own much simpler claim, or for its case to be delayed until Mr Johnson's own case was ready for trial. Had the company been in liquidation and its action brought by the liquidator, he would have been well advised to insist*

on separate trials and to object to any delay in the trial of the company's action.

[12] Lord Millett took account of the fact that the company's claim had far advanced along the road to trial. However, this does not explain why the personal claim was not brought at the same time since both claims arose at the same time and it appeared that Mr Johnson contemplated both claims from the outset. For his Lordship, the fact that the personal action could have been brought at the same time as the company's action did not mean it should necessarily have been brought. Indeed, there was no automatic rule that failure to bring all the claims between the parties arising out of the same facts and circumstances is necessarily an abuse of process. To put it another way, bringing a second claim does not necessarily lead to the conclusion that that act is inherently an abuse of process leading to the remedy of striking out the second claim. Consequently, Mr Johnson's failure to bring his personal claim did automatically mean that bringing the personal claim was oppressive or an abuse of process.

[13] Also, Lord Millett was extremely reluctant to hold the second claim as an abuse because Mr Johnson was suing in his personal capacity while the company was suing in its own right.

[14] Lord Bingham indicated at pages 30 - 31 what should be the correct approach to abuse of process. His Lordship stated:

It may very well be, as has been convincingly argued (Watt, "The Danger and Deceit of the Rule in Henderson v Henderson: A new approach to successive civil actions arising from the same factual matter" (2000) 19 CLJ 287), that what is now taken to be the rule in Henderson v Henderson has diverged from the ruling which Wigram V-C made, which was addressed to res judicata. But Henderson

v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in 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. As one cannot comprehensively list all

> *possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.*

[15] Lord Bingham, in reversing the Court of Appeal, took the view that the Court of Appeal's approach was too strict and mechanical. Interestingly, none of their Lordships contradicted the Court of Appeal's view that it was virtually the same allegations that were being used to ground both claims and that both arose at the same time. Lord Bingham accepted 'that it would certainly have been preferable if the judge who tried the company's action, and thereby became familiar with much of the relevant detail and evidence, had been able at the same time or shortly thereafter to rule on the personal claim. That would have been efficient and economical' (page 34D) but that there were good reasons for not adopting the efficient and economical course. The Court of Appeal, it was said, '[gave] little or no weight to the considerations which led Mr Johnson to act as he did and failing to weigh the overall balance of justice' (page 34G).

[16] From reading their Lordships' speeches it seems that what was deprecated was what appeared to be an automatic reflex action which goes like this, 'same

circumstances, substantially the same facts, not brought in one action (regardless of reason), then it must be abusive.' Their Lordships took the view that this was the approach of the Court of Appeal and thus it was stigmatised a mechanical. What Lord Bingham has in mind is a more nuanced approach which does not focus exclusively on whether the claim could have been brought but to take account of things compendiously described as '*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'* and focusing 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*.'

[17] The result was that that law was clarified, 'mechanicalism' was denounced and uncertainty introduced; uncertainty because a discretion is now involved. As Gary Watt observed in *Henderson is dead! Long live Henderson! – The Modern Rule of Abuse of Process* (CJQ 2001, 20 (Mar), 90 – 101, 101:

> *Lord Bingham's approach to abuse of process is the epitome of common sense, but it is common sense which might come at the price of uncertainty and unpredictability in the judicial response to successive civil actions arising from the same factual matter. His Lordship observed that the public interest underlying the rule in Henderson "is reinforced by the current emphasis on efficiency and economy in the conduct of litigation". It must be a concern, however, that the adoption of a "broad balance of justice" approach instead of a more doctrinal approach is as likely to multiply suits (witness the outcome in the instant case) as to preclude them.* ***Certainty breeds efficiency, broad discretion breeds litigation.*** (emphasis added)

[18] In like manner, a Judge of the Court of Appeal of New South Wales, writing extra-judicially came to the same conclusion. K R Handley, *A Closer Look at Henderson v Henderson* LQR, 2002, 118 (Jul) 397 – 407, 707, concluded:

> *Strike-out applications based solely on cause of action or issue estoppels can usually be determined summarily on minimal evidence. On the other hand the abuse of process issue which, in the words of Lord Bingham in* Johnson, *calls for "a broad merits-based approach" requires a discretionary judgment and this will tend to generate extensive evidence and lengthy argument.*

[19] The observation by these learned authors is the very thing that has happened in this case; the language and approach of **Gore Wood** has provided fuel for the submissions on both sided.

[20] So, what does Lord Bingham mean by '*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'*? Whatever else it may mean, based on his Lordship's dictum in **Gore Wood**, it means, at least, examining the reasons advanced by the person who is accused of abuse of process. It also means a close examination of facts, taking into account the reasons, if any, advanced by the person accused of abusing the process for the adoption of a particular course and then deciding whether what occurred is a sufficiently serious misuse of the process of the court to warrant being barred from continuing the case with the consequence that the actual merits of the case are not explored. Clearly, there is room for disagreement among experienced judges as the case of **Gore Wood** demonstrated.

[21] This court's deduction from **Gore Wood** is that the judge is to take account of various factors against the backdrop of fundamental principles. What are these fundamental principles? What are the factors?

The Fundamental Principles

[22] There are fundamental principles which must always be in mind when considering the question of abuse of process. These are:

(a) courts exist for the determination of disputes that the parties cannot resolve and so litigants, without scrupulous care, ought not to be denied the opportunity to have the courts decide their issues (**Gore Wood** – Lord Bingham p 22;

(b) access to the courts is a fundamental right (Lord Millett p 59) and section 16 of the Charter of Fundamental Rights and Freedoms;

(c) there should be finality in litigation and a party should not have to answer for the same matter twice (**Gore Wood** - Lord Bingham p 31);

(d) the public interest emphasizes efficiency and economy in the conduct of litigation (**Gore Wood** – Lord Bingham p 31). This is now reflected in the Civil Procedure Rules which state that the courts' resources should be used in such a manner that any given case is allocated its fair share of resources.

(e) abuse of process is not limited to cases of dishonesty or collateral attack on a previous decision and it is not necessary to establish any of these factors before

conduct is held to be an abuse of process. However, their presence will make it easier to conclude that there is an abuse of process but even then there is no inevitability about this because what is involved is a discretion (**Gore Wood** – Lord Bingham p 31);

(f) a distinction must be drawn between abuse of process and the doctrine of res judicata or issue or cause of action estoppel (**Gore Wood** - Lord Millett p 58);

(g) abuse of process is capable of applying to cases where the first matter did not proceed to judgment or may have ended in a settlement (**Gore Wood** - Lord Millett p 59);

(h) there is no presumption against bringing successive actions (**Gore Wood** – Lord Millett pp 59 - 60).

(i) the Henderson v Henderson rule does not extend to cases where the defendants in the second case is different from the first (**Gore Wood** - Lord Millett p 60).

[23] In addition to these fundamental principles, this particular case has an added dimension which must be taken into account. The instant case is not just a matter between private citizens. It action being taken to enforce the law which has as its objective the taking of property allegedly derived from criminal activity or unlawful activity. This is an important public policy issue which cannot be lightly swept aside because this objective is seen as vital to undermining the economic capacity of organised criminal enterprises to continue its criminal activity.

Factors to be considered

[24] In **Gore Wood**, their Lordships were careful not to develop a checklist of factors to be taken into account but left the decision to the good sense of the judge who

should take account of the full facts and circumstances in any particular case including any reasons advanced by the party accused of abuse of process explaining why he took the particular course. Despite the absence of a checklist, it is prudent to look at previous cases to get a sense of what factors may be of relevance. None of them is necessarily decisive by themselves but they are to be given due consideration and weight.

[25] From the decided cases some factors seem to figure prominently in the assessment process. These are as follows:

(a) if the matter was not yet adjudicated upon and/or it is between different parties then that is an important consideration in deciding whether there is an abuse of process (**Gore Wood**);

(b) if the second claim is in substance though not in form the same claim dressed up in different garb the second claim may be dismissed (**Yat Tung Investment Co Ltd v Dao Heng Bank Ltd** [1975] AC 581);

(c) if the first claim proceeds all the way to final judgment (or settlement) and the parties are the same and the second claim raises issues which properly belonged to the first claim and might have been brought forward with reasonable diligence, then in the absence of special circumstances the plea of abuse of process may succeed (**Henderson v Henderson**);

(d) if the second action is in substance a collateral attack on the decision in the first matter, then an abuse of process will be found to exist (**Hunter v Chief Constable of the West Midlands Police** [1982] AC 529; **Ilene Kelly and**

Errol Milford (Executors of Estate of Evelyn Francis, dec'd) v The Registrar of Titles [2011] JMCA Civ 42);

(e) if subsequent decisions of higher courts show that a particular legal position was incorrect then it may be possible for the same parties to reopen the matter decided between them. Thus res judicata in its strictest sense would not apply (**Arnold v National Westminster Bank** [1991] 2 AC 93);

(f) the explanation given by the person accused of abuse of process is taken into consideration (**Gore Wood**)**;**

[26] As can be seen from the factors just listed, not all will be relevant in every case but they nonetheless provide a guide to what the judge ought to be looking for. The presence of some, such as circumventing a previous decision, will quite likely lead to a finding that there is an abuse of process. On the contrary, the presence of others, for example, a higher court saying or suggesting that a lower court ruling in a particular case was incorrect, is more likely to lead to the conclusion that there was no abuse of process.

The Chronology

The first restraint order (Claim No. 2012 HCV 04604)

[27] In August of 2013, the ARA applied to Campbell J for a restraint order under section 32 of POCA preventing dealings in any way with a number of properties. It is not necessary to itemise them at this stage. The grounds of that application were:

(a) a civil recovery **investigation** had commenced in Jamaica and Andrew Hamilton, Rohan Fisher, and Ricardo Fisher, and their associates were

believed to be dealing with property derived from unlawful activity (emphasis added);

(b) in February 2012, Andrew Hamilton, Rohan Fisher and Ricardo Fisher were indicted for money laundering, drug and firearm offences in the State of California in the United States of America;

(c) it is believed that the proceeds from the alleged criminal activities were used to purchase properties, including real estate and motor vehicles, in their names.

[28] The application was supported by the affidavit of Mr Ronald Rose, an investigator of the ARA, dated August 16, 2012. Campbell J granted the order. As stated earlier, no claim form was filed in this matter.

[29] The contents of the affidavit can be summarised as follows:

(a) Mr Andrew Hamilton aka Anthony Randazzo, aka Andrew Campbell, aka Barri Housen, Ricardo Fisher aka Guy Williams, and Richard Anderson aka Rohan Fisher, aka Terrence Johnson, aka Brisco were indicted in the Central District of California in the United States of America for money laundering, drug and firearm offences.

(b) Mr Hamilton was believed to own, legally or equitably, properties which were either in his name, or in the name of himself and any of the thirteen respondents, or in the name of the respondents alone.

(c) investigations showed that Mr Hamilton was a director and shareholder in Andrew Hamilton Construction Company ('AHCC') and Andrehan Seafoods Company Limited ('ASCL'). The other shareholders in AHCL are Mr Andrew Hamilton (980), Miss Janet Ramsay (10) and Miss Ann-Marie

Cleary (10). AHCC was incorporated in 2003. The shareholders in ASCL are Mr Andrew Hamilton (900), Mr Douglas Bailey (80), Miss Janet Ramsay (10) and Miss Ann-Marie Cleary (10);

(d) information from the Jamaican revenue authorities revealed that AHCC filed 'nil annual income tax returns for the years 2004, 2005, 2006, 2007, 2009 and 2010'. No returns were filed for the year 2008. ASCL filed no returns since its incorporation in 2008;

(e) between 2002 and 2009, Mr Hamilton acquired property amounting to JA$429,500,000.00. It is believed that Mr Hamilton's alleged criminal activities provided the source of funds to purchase these properties;

(f) despite the lack of evidence of any known lawful economic activity AHCL was able to import equipment, vehicles and parts valued at JA$42,445,385.76 in the period April to September 2008;

(g) ASCL, without any known lawful economic activity was able to import a fishing vessel that cost JA$19,000,000.00.

[30] On May 27, 2013, the matter came on for hearing before Marsh J. The parties are not all agreed on what took place before Marsh J. Despite this there are some areas of agreement or at least there is a lack of disagreement. ARA, on May 22, 2013, had filed two written applications. The first was an application to extend the life of the restraint order. This application also asked for an order compelling the respondents to make full disclosure of their assets as ordered by Campbell J. The first application had as well an application that the respondents make available for inspection the restrained motor vehicles. The second application asked for an order that the estate of one of the respondents (Mr Joseph Arnold) be substituted for him since he was deceased.

[31] It is common ground that the applications were short served. The respondents objected to both applications being heard. Marsh J upheld the objection and neither application was heard. This left over the question of what to do with the restraint order which would expire on May 27, 2013, the same day as the hearing before Marsh J.

[32] Here now lies the disagreement between the parties. The respondents say that a full oral application for extension of the restraint order, lasting some three hours, was heard and the application refused. They point to the actual words of the order in support of their contention (see para 5 above). ARA says that neither application was heard on the merits although it agreed that Marsh J did spend some time on the matter. ARA's position was that what was heard was whether there was in fact a substantive application before the court.

[33] On either account, the outcome was that the restraint order was not extended with the consequence being that the money from the sale of the properties was to be handed over to the attorneys for the respondents (first affidavit of Miss Charmaine Newsome, attorney-at-law for ARA, dated June 6, 2013). His Lordship granted leave to appeal was granted. The orders were stayed until June 7, 2013.

[34] Some support for ARA's position can be gleaned from the affidavit of Mrs Roxanne Mars, attorney-at- law, dated July 4, 2013, in which counsel stated that '[h]is Lordship Justice Marsh on May 27, 2013, in claim no 2012 HCV 04604 [the first restraint order], previously filed by the Agency, ruled that the Asset Recovery Agency did not have an application before him for extension of a restraint order previously obtained by the Agency with the agency conceding appropriately that it failed to file and serve the necessary application within the time required' (para 6). The affidavit Miss Charmaine Newsome, counsel for ARA, is consistent on this point.

[35] The affidavit of Mr Anthony Pearson, attorney-at-law, does not challenge the account given by Mrs Mars and Miss Newsome on the issue of Marsh J's position on the written application for extension of time.

[36] Miss Annmarie Cleary's affidavit, dated July 1, 2013, on behalf of AHCL, does not specifically address the issue of whether Marsh J held that the written application for extension of time was not before him. She does say that his Lordship refused an application to extend the restraint order. Presumably, this was the oral application which is mentioned in Marsh J's order.

[37] As indicated to counsel during the hearing of this matter, it does seem odd to this court that Marsh J having ruled that a written application to extend the restraint order would not be heard would then proceed to hear an oral application for the very same relief. It seems to me that the more likely position was that the time before Marsh J was taken up with whether he had a claim before him and having decided that there was none, then it necessarily followed that the restraint order had to be discharged. If there was no claim then what would be the point of extending the restraint order. It must also be bourne in mind that Part 17 of the Civil Procedure Rules requires an applicant who receives an interim remedy before claim is filed to file the claim thereafter. This was not done in the matter before Marsh J. The interim remedy was in place from August 2013 right through to May2013 without any supporting claim form.

The second restraint order (Claim No 2013 HCV 03440)

[38] The second restraint order was granted by Sykes J. The affidavit of Mr Ronald Rose dated June 6, 2013 was placed before the court. A number of properties, real and personal were restrained. The affidavit can be summarised as follows:

(a) Mr Andrew Hamilton was on born October 25, 1970. He was employed as postman at age 18 years earning at maximum JA$286.54/week. He resigned and joined the Jamaica Constabulary Force. He spent just over

one year and then left for the United States of America on or around 1992/1993. Based on investigations in Jamaica and the United States, there is no evidence of Mr Hamilton working either as a self employed person or as an employee. From the records held by the Jamaican tax authorities Mr Andrew Hamilton filed income tax returns for the years 2009, 2010 and 2011;

(b) Mr Andrew Hamilton has five children other than Mr Andre Hamilton. These children were born between November 24, 1999 and March 2006. They have been named as joint owners of ten parcels of real estate (three of which have been sold). Miss Paulette Higgins and Miss Ann Marie Cleary are the trustees for the children;

(c) investigations in the United States did not reveal that Mr Hamilton earned any income other than in the year 1991;

(d) some of the respondents are either his relatives or close friends. Miss Dorothy Hamilton is his mother. At the time of this application she was 82 years old. She was born September 1, 1930. She is a pensioner and her employment was that of domestic helper. She lives with Miss Paulette Higgins, sister of Mr Andrew Hamilton and daughter of Miss Dorothy Hamilton;

(e) Mr Andre Hamilton was born on July 8, 1994 and was a minor when the properties were purchased. He is the son of Mr Andrew Hamilton;

(f) AHCL was incorporated on February 3, 2003. Based on letter sent to the Jamaican tax authorities by Miss Ann-Marie Cleary, a director, the company began operations in May 2008. There is no evidence that the company engaged in any significant business activity since 2003 that would enable it to purchase property. Mr Andrew Hamilton owns 980

shares of the 1000 shares. Miss Ann-Marie Cleary holds 10 and Miss Janet Ramsay holds 10;

(g) Between April to September 2008, ACHL, imported heavy duty equipment costing in excess of JA$35,000,000.00. The company at one point held real property which it purchased for US$800,000.00;

(h) ASCL was incorporated on August 12, 2008. The data from the Jamaican tax authorities show that this company has not filed any returns and there is no evidence that it ever engaged in any kind of business. It had no economic activity from which income could be generated and therefore it was economically incapable of purchasing property for money. Mr Andrew Hamilton owns 900 of the 1000 shares, Miss Ann-Marie Cleary 10, Mr Douglas Bailey 80 and Miss Janet Ramsay 10;

(i) ACHL and ASCL have their registered offices at 33 Moreton Park Avenue, Kingston 10. Several visits to this location revealed that the property was locked up and unoccupied. In other words, there was no sign of activity, economic or otherwise, at the registered office;

(j) Mr Devon Cleary, is Miss Annmarie Cleary's brother and therefore half-brother to Andrew Hamilton;

(k) Miss Janet Ramsay, born October 20, 1963, is an employee of the Jamaican postal service. She is Mr Hamilton's sister. She began working there in 1982. In January 2004, she was appointed a postwoman with earnings of JA$5,155.00/week. She began acting as an inspector of the postal service in November 21, 2012 with earnings of JA$10,813.73/week. Investigations revealed that Miss Ramsay for the years 1992 – 2007 had an average annual income of JA$214,000.00;

(l) Miss Paulette Higgins, born January, 15, 1960, was employed to the Jamaica Telephone Company (now LIME) between 1986 and 2002. She is the sister of Mr Andrew Higgins. She has been employed to Sagicor Life Jamaica Ltd since 2002. Her average annual income at LIME was approximately JA$245,000.00. At Sagicor her average annual income is JA$950,000.00. For the period 1986 to 2010 Miss Higgins had an average annual income of JA$385,000.00 with years 2006 – 2010 showing an average annual income of JA$1,500,000.00;

(m) Miss Ann Marie Cleary, born September 4, 1973, has been in a relationship with Andrew Hamilton for over twenty years. Her addresses are listed at 33 Moreton Park Avenue, the same address of the two companies, and 15900 Crenshaw Boulevard, Suit 203 Gardenia, California 90249, the same address in the United States as Andrew Hamilton. She has another address at Apartment 30, 9303 Artesia Boulevard, Belliflower, California. Miss Cleary signs documents on behalf of Andrew Hamilton Construction Limited regarding purchases and sales of properties acquired by the company. Miss Hamilton's listed occupations are hairdresser and business woman. She filed income tax returns for the period 2005 – 2011. These showed a total of JA$2,080,457.00 which means an average income of JA$346,000.00;

(n) none of the named respondents has earned legitimate income sufficient to enable them to purchase the properties restrained. Needless to say the minor children are beneficiaries under the trust could not have earned money to buy any of the properties;

(o) the most likely source of income to purchase these properties would be Mr Andrew Hamilton who is now a confessed drug trafficker and money launderer. He pleaded guilty and is awaiting sentence.

[39] From these allegations, ARA is suggesting that none of the defendants had the means from known legitimate sources to purchase the properties subject to the restraint order. It is also being suggested that the respondents are holding property which are from the proceeds of illegal activity, specifically, drug trafficking.

[40] ARA, through the affidavit of Mr Rose, is saying that practical experience of criminals seeking to launder money has shown that the usual route to achieve the appearance of legitimacy is to place property in the names of shell companies, family members and trusted associates. ARA is suggesting that in this case, there is sufficient evidence to make this a probable inference and at this stage of a restraint order all that needs be shown is that there is reasonable cause to believe (this test is a low threshold, lower than a balance of probability) that property in question is recoverable property under section 58 of the Proceeds of Crime Act ('POCA').

[41] This assertion by ARA is consistent with typologies done by the Financial Action Task Force (FATF) and other similar international anti-money laundering bodies. The voluminous body of literature on the subject suggests that criminals tend to rely on or use the names family members and trusted associates to hold property on their behalf. This is part of the money laundering process known as layering has as its objective the masking of the criminal origins of property so that, after a series of transactions the property itself or its derivative may come to be regarded as coming from an untainted source.

[42] The respondents have said this second affidavit of Mr Rose is substantially the same as that filed in support of the first restraint order. The court has examined both affidavits in detail and will agree that on a superficial view they appear to cover the same ground but they are fundamentally different in several respects. These will be set out now.

Contrasting the affidavits

[43] In the first affidavit of Mr Rose placed before Campbell J Mr Rose swore that a 'civil recovery investigation has started and investigations have found … assets … believed to be the proceeds of the alleged criminal conduct of Hamilton and represents recoverable property' (para. 5 of affidavit dated August 16, 2012). In the second affidavit placed before Sykes J, Mr Rose swore that 'Andrew Hamilton pleaded guilty in the State of California, United States of America to conspiracy to distribute marijuana and conspiracy to launder money' (para. 6 of affidavit dated June 6, 2013). The legal significance is that Mr Andrew Hamilton, on the face of it, has made a judicial confession of guilt before a court of law. At the time of the first affidavit he was a suspect but at the time of the second affidavit what was suspected has now become a fact by virtue of his guilty plea. Mr Hamilton by his plea of guilty took the case from allegations of criminal conduct to proof of criminal conduct. By any measure this must be a significant difference between the two affidavits. It surely must strengthen ARA's case. As to whether that is sufficient to enable a successful application for a recovery order is another matter.

[44] The first affidavit did not have any information about the manner in which Mr Hamilton conducted his now admitted drug trafficking and money laundering activity. The second affidavit of Mr Rose states in some detail how it is believed that Mr Hamilton conducted his drug trafficking business (see paras 15 – 16).

[45] The first affidavit did not contain any assertion regarding Mr Hamilton's source of income from any legitimate employment while in the United States of America. In the second affidavit there is the explicit assertion that investigation done by Drug Enforcement Agency ('DEA') showed that since 1991 Mr Hamilton has not had any legitimate source of income.

[46] The second affidavit reveals more focused and targeted investigations into the means of the named respondents who were also respondents in the first restraint

order application. This second affidavit highlights the monthly income and annualised income of some of the respondents in order to suggest that even though some of the properties are in the names of some of respondents, these persons were not able to purchase these properties based on their income. There is no evidence that the named respondents bought these properties with the aid of loans. The evidence strongly suggests that these were cash purchases.

[47] From this it is clear that the differences between the first and second affidavit of Mr Rose are substantial though they may not have taken up a significant number of paragraphs in second affidavit. The second is obviously more detailed than the first. These differences are not surprising given that the first affidavit indicated that it was an ongoing investigation.

[48] The second restraint order was granted in the context of there being a claim form where the ARA has stated that it is seeking a civil recovery order in respect of the restrained properties. Also there were properties restrained in the second restrained order that were not restrained by the first.

Analysis

[49] Mr Wilkinson QC who led the arguments for the respondents (supported by Mr Anthony Pearson and Mrs Mars) listed fourteen instances of what he submitted were abuses. The ultimate logic being that either individually or cumulatively the named abuses should lead the court to conclude that ARA is guilty of abuse of process. Summarising the fourteen points:

(a) no claim form was filed with first restraint order and one filed with the second restraint order so as to enable ARA to say that the present claim is different from the first;

(b) short-serving the respondent with the written application for extension of restraint order that came before Marsh J;

(c) the evidence before Marsh J is same as before this court;

(d) ARA is guilty of non-disclosure because it failed to inform Sykes J that submissions were made for over three hours and ARA also failed to exhibit the formal order of Marsh J;

(e) the respondents attorneys were not informed about the second application even though ARA knew that the respondents were legally represented;

(f) ARA waited until the 'last minute' to file the second application in order to avoid complying with Marsh J's order of May 27 that moneys be turned over to the respondents' attorneys-at-law;

(g) ARA should have proceeded by way of appeal if it was dissatisfied with Marsh J's order and having obtained leave to appeal, failed to follow up by actually appealing.

[50] This court is not of the view that much weight can be placed on the assertion that the same evidence before Sykes J was the same evidence before Marsh J when it is common ground that Marsh J did not hear the written applications which were in fact supported by affidavits. It is therefore difficult to say that his Lordship addressed his mind to the contents of the affidavit and then made a decision. It will be recalled that the respondents successfully persuaded Marsh J not to entertain the written applications.

[51] It was also said that when Sykes J granted the second restraint order he was acting as a Court of Appeal and this was wrong because a judge of coordinate jurisdiction has no power to set aside any order of another judge of equal

jurisdiction. The effect of the second order is to prevent Marsh J's order from taking effect and thus has the effect of a reversal. For this proposition the respondents relied on **Leymon Strachan v The Gleaner Company** [2005] 1 WLR 3204.

[52] **Leymon Strachan** was dealing with a rejected application by one Supreme Court judge to set aside another Supreme Court judge's order. One judge had set aside a default judgment (after damages had been assessed) and gave the defendants leave to file and serve a defence. The other judge refused to set aside the setting aside. The main argument was that the first judge had no jurisdiction to set aside a default judgment that had become final by virtue of having proceeded to final assessment of damages.

[53] Mrs Nateline Robb Cato submitted that despite the fact that ARA was granted leave to appeal, ARA decided not to appeal. It appears that the thinking was that since Marsh J had held that the written applications were not before him and there was no claim form, then as far as the first restraint order was concerned it was a dead letter. Implicit in this was the apparent view that rather than pursue what may turn out to be a fruitless appeal with attendant costs the better course would be to start afresh with a claim form, particulars of claim accompanied by application for ancillary relief in the form of a restraint order.

[54] Mrs Robb Cato also urged that this case is not a matter of private law between citizen and citizen. It is case, albeit a civil law application which is really about undermining organised criminal activity.

[55] In the case before this court, no order is being set aside. What was made was a fresh restraint application in a properly constituted claim. This application is not a review of Marsh J's order. This court is being asked to exercise the power to make a restraint order in the context of all that has happened. The fact that it might have the effect of not making a previous order take effect is not a bar to the exercise of the power but a factor (important) to be taken into account.

[56] It is clear that there was no final adjudication on the matter before Marsh J and indeed there could not be because there was no claim form or particulars of claim before his Lordship. Also, since it is common ground that his Lordship did not hear the written applications and adjudicate on them it seems fair to say that his Lordship may not have been aware that Mr Andrew Hamilton had pleaded guilty and was awaiting sentence.

[57] The respondents have submitted that the presence of a claim form and particulars of claim in the second restraint order is irrelevant because it is the same information being relied on. In the view of this court the claim and particulars of claim are important considerations because no court could proceed to final adjudication, even for a default judgment, or even a settlement on just the restraint order. There was no claim form in the first restraint order. There was no originating process on which a final order could be made.

[58] It was submitted strongly that ARA should have notified counsel for the respondents of their intention to make a second application for a restraint order. The respondents have also stressed that in the second application before Sykes J, ARA did not disclose the formal order of Marsh J and ARA also failed to disclose that Marsh J heard submissions for an extended period in order to decide whether an oral application for extension of the restraint order should be granted. This court has already stated its position on what were the likely submissions heard by Marsh J.

[59] Analogies were drawn, implicitly, between freezing orders and restraint orders. While it is true that the implicit analogy is helpful there is a fundamental distinction between both. The freezing order is brought to enforce pure private rights between party and party. A restraint order is a statutory creation designed to preserve allegedly criminally derived property for confiscation by the State. The consequences of non-disclosure do not quite operate in the same way when one is dealing with a restraint order. In **Jennings v Crown Prosecution Service**

[2006] 1 WLR 182, the Court of Appeal of England and Wales addressed the question. In that case, one of the issues was whether 'failure of the CPS to make proper disclosure should be visited by an order of this court to discharge the restraint order' (para. 18). While the court noted that there was a duty of disclosure on the Crown and the court should be scrupulous to ensure that the Crown does not abuse its powers, nonetheless it must not be forgotten that in these applications 'respondents … are usually charged with or suspected of serious crimes involving large sums of money or money's worth. The risk of dissipation will generally speak for itself' (para 55 Law LJ). Also, the court pointed out that applications of this nature are usually brought in the public interest (assuming they are brought in good faith) and thus the court should be more concerned with promoting the public interest than disciplining the Crown for non-disclosure. As stated earlier, 'the court must be alert to see that its jurisdiction is not being conscripted to the service of any arbitrary or unfair action by the state, and so should particularly insist on strict compliance with its rules and standards, not least the duty of disclosure' (para 56 Laws LJ). However, this latter consideration does not lead to automatic penalisation by discharging the restraint order. Indeed Longmore LJ went as far as saying in paragraph 64:

> *The fact that the Crown acts in the public interest does, in my view, militate against the sanction of discharging an order if, after consideration of all the evidence, the court thinks that an order is appropriate. That is not to say that there could never be a case where the Crown's failure might be so appalling that the ultimate sanction of discharge would be justified.*

[60] What this is saying is that the courts should be very reluctant to discharge a restraint order on the grounds of non-disclosure. This court agrees with this proposition. It should be observed that the Court of Appeal's decision was affirmed by the House of Lords ([2008] 1 AC 1046).

[61] The ultimate outcome of this application must take place within the fundamental principles stated much earlier and in light of observations in **Jennings** while having due regard to reasons advanced by ARA and any other relevant factor. ARA, like any other litigant, has the constitutional right to have its claim against the respondents decided on the merits. As noted earlier in **Gore Wood**, merely to say that a second claim has been brought in respect of the same subject matter or arising from the same facts is not without more an abuse of process. There is no automatic presumption against ARA bringing a second claim (assuming there was in fact a second claim). On the facts of this case, ARA sought pre-action relief but the claim itself was never filed. This non-filing of the claim is deprecated but it is not fatal to bringing a properly constituted claim. The overarching principle here is that a litigant should not be deprived of having his matter resolved by the courts unless after a very careful examination of all the facts and circumstances the court concludes that the second action is oppressive or an abuse of process. This right to have disputes adjudicated on by the court applies in full measure to government agencies seeking to enforce the law.

[62] The filing of the claim in this case is not in and of itself an abuse of process. The reasons given by ARA for filing the claim are to be taken into account. They formed the view that in light of Marsh J's decision not to hear the written application and the outcome of non-extension of the restraint orders ARA formed the view that there was nothing in being before the court.

[63] Learned Queen's Counsel suggested that asking for leave to appeal and then not following through and then filing this claim is an abuse of process. This court does not agree. It is well known that counsel who receives an adverse ruling in these kinds of applications usually asks for leave to appeal and sometimes a stay of execution of the order made. This is usually to preserve his or her position while using the time to assess carefully the options. It is also well known that counsel may quite legitimately decide not to pursue the appeal.

[64] This court would also say that the lack of notification that a second application was to be made for a restraint order was not justified but having regard to the greater public interest in trying to undermine criminal organisations by gnawing at their economic capacity to engage in serious crime, this omission is not sufficient to warrant a discharge of the restraint order. Also the court cannot ignore that fact that Mr Andrew Hamilton is now awaiting sentence on serious charges including conspiracy to launder money. The possible risk of dissipation is self-evidence. The failure to inform the respondents' counsel of the second application ought not to have occurred but no authority has been cited that remotely suggests that it can amount to an abuse of process that should lead to dismissal of the claim in proceeds of crime enforcement litigation.

[65] As noted earlier, it is now well established that making striking out a claim on the ground of abuse of process is a discretionary power. It is the view of this court that one of the material considerations in exercising the discretion is the conduct of the parties in the matter so far. The respondents have highlighted the sins of ARA which have been noted above. There is nothing to suggest ARA has been acting in bad faith. Failure to adhere to the CPR without more is not proof of bad faith.

[66] So far as the respondents are concerned, Campbell J, in August 2012, had ordered 'the respondents do forthwith disclose with full particulars the nature and location of all assets owned by them, whether or not identified in the order and whether they are held in their name or by nominees or otherwise on their behalf, such disclosure to be verified by affidavit and served on the applicants' attorney at law within fourteen (14) days of service of this order' (para 3). There is no evidence that the respondents have complied with the order. There is no evidence that the respondents applied to be relieved from complying with the order.

[67] The respondents successfully prevented from being heard an application to compel compliance with the order of Campbell J having been in breach from August 2012 until May 2013.

[68] Parliament has enacted legislation that has as its primary object crime reduction by means of undermining the economic capability of criminals to wage criminal activity. It has reflected this in POCA. One of the powers given to ARA is the ability to secure restraint orders against possibly criminally derived property. It is vital that 'bad money' or money derived from unlawful activity be kept out of the financial system because of the severe distorting effects that it can have on both macro and micro economy. It is vital that criminals and their associates be deprived of their property not for the purpose of enriching the State but for crippling their ability to continue as a criminal economic enterprise. In keeping with this policy, the respondents were asked to disclose their assets and their location.

[69] This does not necessarily mean that the respondents are engaged in money laundering or the holding of property derived from criminal activity. The order is designed to assist in the investigative process. The respondents have simply ignored this aspect of Campbell J's order.

[70] At the end of the day what the court has before it is ARA whose handling of the matter has been less than ideal and respondents who complain about abuse of process. On the one hand, the court has ARA that, despite its imperfections and missteps, has sought to use the law to achieve a legitimate purpose. There is no evidence of malafides on the part of the agency. On the other hand, there are the respondents who have sought protection of law by invoking a discretionary power of the court in circumstances when they have failed to comply with a critical paragraph of Campbell J's order made in August 2012. The disclosure of assets is vital to the investigative process.

[71] Looking at matter broadly as directed by Lord Bingham, this court concludes that there is no abuse of process. The application to strike out the claim and particulars of claim and to discharge the restraint order on the ground of abuse of process is dismissed.

Discharge of restraint order on the basis that there is no nexus between Mr Hamilton's criminality and the property held by the respondents

[72] Section 32 (1) (d) authorises the court to make a restraint order in support of a civil recovery application. It does not state the standard that must be met before a restraint order is granted. However, the standard must be less than that required for the making of the civil recovery order which is on a balance of probability. At this stage ARA does not have to prove the connection as if this were the final hearing. It simply has to adduce sufficient evidence to make the inference reasonable; reasonable because these kinds of cases, the world over, are proved largely by inferences drawn established fact. The prima facie inference at this stage can rest on the common experience derived from the accumulated experience of investigators, cases and typologies done by reputable anti-money laundering agencies such as the Financial Action Task Force ('FATF') and the Caribbean Financial Action Task Force ('CFATF')

[73] ARA relies on the proposition that persons engaged in criminal activity from which they derive property seek to put it in the name of relatives and associates. These persons do not usually have the means to acquire the property and their primary quality is loyalty to the criminal and/or susceptible to his control. Although not stated by ARA, this reasoning is supported by the literature on the subject. The purpose of managing the proceeds in this way is to make it appear that the property was acquired by legitimate means. On the evidence put forward, it is not clear that any of the respondents generated enough income to purchase either by cash or by way of loan the properties listed in their names.

[74] In the context of this case, this is not an unreasonable chain of reasoning since the second affidavit of Mr Rose shows that the holders of the property are

relatives, friends, associates, minors via a trust and companies with insufficient economic activity to generate the revenue to make the purchases of property registered in their names. Having regard to Mr Andrew Hamilton's close association with these persons, having regard to their lack of financial means (they have not filed any affidavit evidence in rebuttal of ARA's assertions) ARA is suggesting that at this stage the court should adopt the chain of reasoning (see paras 48 – 67). This court agrees with this analysis.

Disposition

[75] The applications by Mr Andrew Hamilton, Miss Dorothy Hamilton, Mr Andre Hamilton, AHCL, ASCL, Miss Janet Ramsay, Miss Paulette Higgins and Miss Annmarie Cleary to strike out the claim form and particulars of claim on the ground of abuse of process is dismissed. No application was filed on behalf of Mr Devon Cleary.

[76] The application by Mr Andrew Hamilton, Miss Dorothy Hamilton, Mr Andre Hamilton, AHCL, ASCL, Miss Janet Ramsay and Miss Paulette Higgins to discharge the restraint order is dismissed.

[77] ARA's application to extend the restraint order in granted. The restraint order is extended until judgment or further order. Costs of these applications to ARA to be agreed or taxed. Costs to be paid when claim is concluded.

[78] Leave to appeal granted to all affected respondents. Case management conference adjourned pending outcome of appeal.