[2023] JMCC Comm 12

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. SU2020CD00174

BETWEEN CHINA SINOPHARM INTERNATIONAL CORPORATION CLAIMANT

AND RIVI GARDNER & ASSOCIATES LIMITED DEFENDANT

IN CHAMBERS BY VIDEO-CONFERENCE

Appearances: Mr. Hadrian Christie and Ashley Clarke instructed by Mesdames Georgia Hamilton & Co. Attorneys-at-law for the Claimant

Mr. Abe Dabdoub instructed by Dabdoub, Dabdoub & Co. for the Defendant

Mr. Kwame Gordon instructed by Samuda & Johnson for the Interested Party

Heard: 28th February and 17th March 2023

Application to Strike Out Claim – Abuse of Process

BROWN BECKFORD J

BACKGROUND

[1] The Claimant, China Sinopharm International Corporation, instituted a claim for damages, filed 1st May 2020, against the Defendant, Rivi Gardner & Associated Limited, for Breach of Agreement. This agreement was made by way of compromise of an earlier claim by the Claimant against the Defendant. The Defendant having failed to file an Acknowledgement of Service after being duly served, the Claimant obtained a Judgment

in Default on 21st May 2020. The Defendant filed a Notice of Application for Court Orders on 7th October 2022 seeking the following Orders:

1. That the service of the Claim Form and Particulars of Claim filed on the 1st day of May 2020 be set aside as the Claimant's Attorneys-at-Law failed to serve the Claim Form and Particulars of Claim of the Defendant's Attorneys-at-Law.

2. That the Claim and Particulars of Claim herein filed on the 1st day of May 2020 be struck out as being an abuse of process and all subsequent proceedings, including but not limited to the Default Judgment be declared null and void and set aside.

3. Costs to the Defendant to be paid by the Claimant to be taxed or agreed.

4. Such further order as The Honourable Court shall deem fit.

[2] In the course of submissions, Mr. Abe Dabdoub, Counsel for the Defendant agreed that the Claimant was not pursuing the Orders seeking to set aside service of the Claim Form and Particulars of Claim in Paragraph 1 of the Notice of Application. His Submissions were limited to Paragraph 2 seeking that the Claim form and Particulars of Claim be struck out as an abuse of process. As indicated to the parties, the relatively short time in which this matter is to be dealt with precludes a judgment with a full exposition of the law. Reference will therefore only be made to the cases and the principles extracted.

SUBMISSIONS

[3] Mr. Dabdoub submitted that the Claimant had previously instituted claim SU2019CD00060 relating to the issues raised in this claim. Counsel contends that ignoring the previous claim is an abuse of process as the deed of settlement was arrived at in the old claim, as such, the proper course was to take steps to enforce it, not institute a new claim for the very same issue. Further, the matter had been sent to arbitration and was still pending. Additionally, no Notice of Discontinuance had been filed. Mr. Dabdoub submits that had the Court been aware of the foregoing, the claim would have struck out

on its own motion. To this effect he relied on **Henderson v Henderson** [1843-1860] ALL ER 378, **Gordon Stewart v Independent Radio Company Limited and Wilmot Perkins** [2012] JMCA Civ. 2, **National Commercial Bank Ltd v Justin O'Gilvie** [2015] JMCA Civ 45 and **Scott, Sean v Brown, Meva, Waynette Brown and Danielle Allen** [2022] JMSC Civ 9.

[4] Counsel Mr. Hadrian Christie argued on behalf of the Claimant that enforcement proceedings could not be taken in the earlier case. The present claim arose on a fresh contract, which the parties entered into after the earlier claim. The Defendant's breach of this contract was a fresh cause of action. This claim did not rely on the historical facts grounding the earlier claim. The pleadings in fact would show that the factual basis was different. Counsel submits that the Claimant was not seeking two judgments on the same issue. The situation would be different with a Tomlin Order which could be enforced in the same action.

THE LEGAL PRINCIPLES

[5] The power of the court to strike out a statement of case is provided for by Rule **26.3(1)(b) of the CPR**, which states that:

> *26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court – … (b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings…*

[6] This entire area was canvassed by the Court of Appeal in the very recent judgment of G. Fraser JA (Ag) in **West Indies Petroleum Limited v Courtney Wilkinson and John Levy** [2023] JMCA Civ 2. She conducted an admirable review of the law as it stands today and I am guided by it and in particular the following:[1]

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[1] [2023] JMCA Civ 2, paras 26-27 & 29

> *[26] Rule 1.1(1) of the CPR states that the overall objective of the CPR is to enable the court "to deal with cases justly." Rule 1.1(2) further explains that:*
>
> *"(2) Dealing with cases justly includes –*
>
> *(a) ensuring, so far as is practicable, that all parties are on an equal footing and are not prejudiced by their financial position;*
>
> *(b) saving expense;*
>
> *(c) dealing with it in ways which take into consideration –*
>
> *i. the amount of money involved*
>
> *ii. to the importance of the case;*
>
> *iii. to the complexity of the issues; and*
>
> *iv. to the financial position of each party;*
>
> *(d) ensuring that the case is dealt with speedily and fairly; and*
>
> *(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."*
>
> *[27] Litigants should therefore give serious consideration to whether it is necessary and/or economic to bring multiple claims.*
>
> *…*
>
> *[29] Striking out is often described as a draconian step, as it usually means that either the whole or part of that litigant's case is at an end. Since the discretion to strike out is considered a nuclear option the discretion ought not to be utilized except in the clearest of cases. The reason for proceeding cautiously is that, the exercise of this discretion deprives a party of his right to a trial with respect to the portions of his case that are struck out. Therefore, a decision to strike out a party's statement of case should only be done in exceptional circumstances.*

[7] The case of **Henderson v Henderson** [1843-1860] ALL ER 378 is well established as the foundation for a determination as to whether or not a party's case should be struck out. The following quote from **West Indies Petroleum** sets out the position:[2]

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[2] [2023] JMCA Civ 2, paras 32-34

[32] I believe the starting point in considering the law on this subject is the view of the English court expressed in Henderson v Henderson, which was one of the earliest decisions to shed light on the issue of abuse of process. In that case, JH died intestate and his wife/administratrix, EH, brought three separate claims against BH, the brother of the deceased, in the Colonial court in Newfoundland. Ultimately, the three claims were joined, heard, and determined by the courts in Newfoundland, and BH was ordered to pay the sum of £26,650.00 to EH and her family. EH then brought subsequent proceedings in England in an attempt to enforce the debt. In those proceedings BH sought to resist the claim, alleging that the decree of the Colonial Court in Newfoundland was irregular. He further alleged that in fact, it was EH (as administratrix of JH's estate) who owed money to him. However, BH had not sought to advance any of these claims in the legal proceedings before the Colonial Court in Newfoundland. The court refused to allow BH to impugn the proceedings of the Colonial Court by seeking an injunction to restrain enforcement. Sir James Wigram VC, in delivering the judgment of the court, held that any action to challenge that judgment could only be made by way of appeal and enunciated that:

> *"… In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and adjudication by, a Court of competent jurisdiction, the Court requires the parties to the litigation to bring forward their whole case and will not (except under special circumstance) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."*

[33] The law in Henderson v Henderson remains relevant, however, in recent times, it appears that the courts have moved away from treating matters of abuse of process with the "iron fist" approach applied in that decision, and have adopted a more relaxed stance. This evolved approach was demonstrated by Lord Bingham in the case of Johnson v Gore Wood where, at page 31, he opined:

> *"The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to an 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 the 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 judgement 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 off 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."*
>
> *[34] Thus, the approach recommended by Lord Bingham is that, in deciding whether subsequent proceedings amount to an abuse of process, the court should concentrate on the intrinsic justice of the case in the light of the overriding objective, taking into account all the relevant circumstances and make a broad-based judgment after considering the available possibilities.*

[8] Moorjani & Ors v Durban Estates Ltd & Anor [2019] EWHC 1229, was also referenced for the proper approach to be taken by the court. It was stated:[3]

> *Accordingly, the proper approach to this case is as follows:*
>
> *17.1 The starting point is to consider whether the second claim is brought upon the same cause of action as the first.*
>
> *17.2 The focus is upon comparing the causes of action relied upon in each case and not the particulars of breach or loss and damage. New particulars are not particulars of a new cause of action if they seek to plead further particulars of breach of the same promise or tort or further particulars of loss and damage.*
>
> *17.3 Both cause of action estoppel and merger operate to prevent a second action based on the same cause of action. Such bar is absolute and applies*

[3] [2019] EWHC 1229, para 17

> *even if the claimant was not aware of the grounds for seeking further relief, unless the judgment in the first case can be set aside.*
>
> *17.4 Even if the cause of action is different, the second action may nevertheless be struck out as an abuse under the rule in Henderson v. Henderson where the claim in the second action should have been raised in the earlier proceedings if it was to be raised at all. In considering such an application:*
>
> *a) The onus is upon the applicant to establish abuse.*
>
> *b) The mere fact that the claimant could with reasonable diligence have taken the new point in the first action does not necessarily mean that the second action is abusive.*
>
> *c) The court is required to undertake a broad, merits-based assessment taking account of the public and private interests involved and all of the facts of the case.*
>
> *d) The court's focus must be on whether, in all the circumstances, the claimant is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.*
>
> *e) The court will rarely find abuse unless the second action involves "unjust harassment" of the defendant.*

[9] In **Danny Balkissoon v Roopnarin Persaud and J.S.P Holdings Limited** (unreported), High Court of Justice, Trinidad and Tobago, Claim No. CV 2006-00639, delivered 5 July 2007, another case referenced by G. Fraser JA (Ag), Jamadar J said:[4]

> *A fourth category: two or more proceedings in respect of the same claims. A fourth category of the abuse of the process of the court is where a party commences two or more sets of proceedings in respect of the same subject matter, and which amount to a harassment of a defendant because of the attendant multiplication of costs, time and stress.*
>
> *…*
>
> *Before considering these cases a few general comments on the court's power to strike out proceedings as an abuse of the process of the court may be pertinent.*

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[4] **(unreported), High Court of Justice, Trinidad and Tobago, Claim No. CV 2006-00639, delivered 5 July 2007, pg 9-10**

> *First, it is clear that the onus of proof is on the party who is alleging the abuse. Second, under the CPR even the power to strike out proceedings as an abuse of the process of the court ought to be considered in light of the overriding objective25 and the function of the court to deal with cases justly. Thus, even 22 See the background set out above for the collateral steps that the Claimant had been taking. 23 See Johnson v Gore Wood & Co (a firm) [2002] 2 AC 1, Lord Bingham at page 32 H. 24 See, Demerara Bauxite Co. Ltd v Lilian De Clou (1965) 23 W.I.R. 13; St. Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Civil Appeal No. 6 of 2002; and Deryck Mahabir v Courtney Phillips Civil Appeal No. 30 of 2002. 25 See Part 1, CPR. Page 10 of 14 where there may be abuse of process that does not mean that the only correct response is to strike out a claim or statement of case (or part thereof). Third, the jurisdiction and power of the court to strike out proceedings as an abuse of the process of the court is discretionary; and given the status of the constitutional right of access to the courts26 it would appear that striking out a claim should be the last option.*
>
> *Indeed, in the context of res judicata Lord Millet had this to say:*
>
> > *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).* [Emphasis mine]

[10] Applying these authorities to the instant facts, it would appear that two proceedings co-existing for the same cause of action between the same parties raises a question of abuse of process of the Court. Such a situation at least requires some explanation and justification. The Court would otherwise consider forcing an election, staying or striking out one or the other claim.

[11] Finally, the Court must exercise the power to strike out claim in the context of the overriding objective as opined by G. Fraser JA (Ag).

CASES CITED BY DEFENDANT

[12] Referring to **National Commercial Bank Ltd v Justin O'Gilvie** [2015] JMCA Civ 45, the Court agrees with Mr. Christie that the finding by Sykes J (as he then was) that there was no abuse of process, was not overturned on the basis that the two claims were the same. The Court of Appeal indicated that Sykes J had not considered that there was no foundation of fact for the second claim and also said that the claimant hoped to go on a fishing expedition.[5] Brook JA stated:[6]

> *[68] The second claim, despite the fact that it arose from the same set of circumstances as the first, would not have been an abuse of the process of the court if there had been a factual basis on which it could be brought. An examination of all the circumstances, as recommended by Gore Wood, could have warranted Sykes J making the orders that he did, had there been a factual basis to support the second claim.*

This case is also a good read as to the exposition on the law.

[13] Mr. Dabdoub also relied on the statement of Mott Tulloch-Reid J in **Scott, Sean v Brown, Meva, Waynette Brown and Danielle Allen** [2022] JMSC Civ 92, where she stated:[7]

> *[8] On February 26, 2021, the Claimant applied for summary judgment on the issue of liability. When the matter came up for hearing on January 12, 2022 before Master Harris, the application was withdrawn. Master Harris set the matter for January 18, 2022 when it came up before me for hearing. On that day I struck out the claim.* ***The law is clear that identical claims concerning the same parties, incident, cause of action and remedy sought cannot be running at the same time. This is an abuse of the process of the Court****. Meva Brown being the sole Defendant in this claim on the incident which happened on June 8, 2013 was and is one and the same as Meva Brown in Claim 2013 HCV 06842 which concerned an accident in which she is alleged to be involved, which took place on June 8, 2013. To have both claims running at the same time is not just an abuse of the Court's process and a waste of the Court's time and resources but also prejudicial to Ms Brown who will be required to defend both claims.* [Emphasis mine]

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[5] **[**2015] JMCA Civ 45, para 60
[6] [2015] JMCA Civ 45, para 68
[7] [2022] JMSC Civ 92, para 8

This bald statement does not reflect the nuanced approach to be taken. As Brooks JA (as he then was) said in **National Commercial Bank Ltd v O'Gilvie (Justin) et al** [2015] JMCA Civ 45: [8]

> *…Lord Bingham at page 31 B-C stated what he deemed to be the preferred approach. He said:*
>
> > *…The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all…It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion* ***be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.…*** [Emphasis mine]
>
> *He then set out, at page 31 E-F the difference between the approach that he preferred and the approach that had been formerly used by the courts, (including this court as exemplified by* ***Ricketts v Tropigas)****:*
>
> > *While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.…*
>
> *[36] Lord Millett also preferred a more nuanced approach****. He said that there was no presumption of abuse when two claims in respect of the same subject matter were filed. He said at pages 59H-60A: "***

[8] [2015] JMCA Civ 45, para 35-38

> ***...In so far as the so-called rule in Henderson v Henderson suggests that there is a presumption against the bringing of successive actions, I consider that it is a distortion of the true position****. The burden should always rest upon the defendant to establish that it is oppressive or an abuse of process for him to be subjected to the second claim....* [Emphasis mine]
>
> *…Both Lord Bingham and Lord Millett made broad statements of principle which went beyond the facts of that case.*
>
> *[37] There was, therefore, a shift to the more nuanced approach to which Sykes J referred. The shift was, however, not as dramatic as the learned judge seemed to have understood it.* ***The older approach did not propound, as the learned judge suggested that it did, "any legal proposition which says that the filing of a second claim is, without more, automatically an abuse of process"****.* ***The inquiry as to special circumstances was an essential element of the approach.*** *As Lord Bingham stated in Gore Wood, the result in each approach "may often be the same". It may be that the application of the former approach in some of the previous cases did amount to, what Lord Bingham described as "too mechanical an approach". [Emphasis mine]*
>
> *[38] This court has adopted the reasoning in Gore Wood.*

APPLICATION TO FACTS

[14] Against this background, the Court now considers the particular facts of this case. The Claimant commenced Claim No SU2019CD00060 and filed an Amended Claim Form and Particulars of Claim on 8th April 2016 seeking the following relief:

1. A declaration that the Defendant has repudiated the Agreement for the Construction of Infrastructure Works & Houses ("the Works") at Orchards Phase I ("Orchard Project") for the Contract Price entered between the parties on or about 15 March 2018 and varied by Addendum executed by the parties on 23 July 2018 ("the Works Agreement/Addendum"), and the Claimant has accepted this repudiation.
2. A declaration that the Defendant has no right to withhold payments due under Interim Payment Certificate 5 or any Interim Payment Certificate issued under the

said Works Agreement/Addendum on the basis of payments made to nominated Subcontractors.

3. A declaration that the Defendant is liable to pay over to the Claimant the retention sum of JMD78,933,612.67 less a reasonable sum for curing any defects in the Works.
4. A debt of JMD201,965,732.90 being amounts due and owing under Interim Payment Certificates Nos. 4, 5 and 6 of the said Works Agreement/Addendum or alternatively damages.
5. The sum of JMD183,239,901.99 for works carried out by the Claimant pursuant to the said Works Agreement/Addendum for the period 1 November to 15 December 2018 or alternatively damages.
6. Damages for loss of profits in the amount of JMD91,246,546.45 owing to the Claimant's acceptance of the Defendant's repudiation of the Works Agreement Addendum and its consequential inability to complete performance or such other sum as this Honourable Court deems fit.
7. The sum of JMD36,616,017.44 for additional works carried out on 103 housing units in the Orchard Project pursuant to the Addendum or, alternatively, damages.
8. The sum of JMD9,150,275.94 for the costs of repairs to cure defective works delivered by previous contractors on the Orchard Project or, alternatively, compensation based on a quantum meruit in such amount as this Honourable Court deems just.
9. Interest on such amounts found due to the Claimant at the contractual rate and calculated in accordance with the Works Agreement or at such rate and for such period as this Honourable Court deems just.
10. Costs and Attorneys' Costs.
11. Such further and/ or other relief as this Honourable Court deems just.

[15] Before this matter was determined, the parties entered into a compromise Agreement. It is reflected as thus –

> *THIS DEED OF SETTLEMENT is made on the day of 2019*

BETWEEN

***CHINA SINOPHARM INTERNATIONAL CORPORATION**, a limited liability company registered under the laws of the Republic of China and having its principal place of business at No. 4 Huixin Dongjie, Chaoyang District, Beijing in the jurisdiction of China, (" the Contractor"), of the ONE PART,*

AND

***RIVI GARDNER & ASSOCIATES LIMITED**, a company organized and existing under the laws of Jamaica and having its registered office at 7 Belmont Road Kingston 5, St. Andrew, ("the "Developer"), of the OTHER PART.*

WHEREAS

The Contractor and the Developer entered into an Agreement for the Construction of Infrastructure Works & Houses ("the Works") at Orchards Phase I ("Orchard Project") on or about 15 March 2018 and varied by Addendum executed by the parties on 23 July 2018 ("the Works Agreement/Addendum") (the "Project");

The Developer terminated the Contractor's employment under the Works Agreement on 18 December 2018 by notice of that date;

*Differences and disputes have arisen. between the Contractor and the Developer as to the liability of each of the parties to the other as a result of the termination of the Contractor's Employment under the Works Agreement and it has been agreed between the parties that the Developer shall pay to the Contractor the **SUM OF JMD40,000,000.00** in the manner hereinafter appearing in full satisfaction of all claims which each may have against the other arising directly and indirectly from the termination of the Contractor's Employment under the Works Agreement and the action filed by the Contractor against the Developer shall be discontinued.*

NOW THIS DEED WITNESSETH AS FOLLOWS:

*In consideration of the payment by the Investor/Developer of the said sum of **JMD40,000,000.00** to the Contractor in the following manner:*

*The sum of **JMD20,000,000.00** on or before 31 December 2019; AND*

*The further sum of **JMD20,000,000.00** on or before 31 January 2020; and; each of the parties hereto hereby releases the other of them from all sums of money, actions, proceedings, accounts, claims and demands whatsoever which each of them has against the other arising directly or indirectly from the termination of the Contractor's employment under the Works Agreement and on payment of the sum of JMD40,000,000.00.*

In the event of non-payment in full of any of the sums payable on the dates agreed, the Contractor shall be entitled to the payment of interest on the balance outstanding at the rate of ten percent (10%) per annum from the due date until payment in full, together with all reasonable attorneys' costs incurred by the Contractor in enforcing its rights with respect to any sums outstanding.

The Developer acknowledges and agrees in the event of non-payment of any sum due under paragraph 1 on the due date, the Contractor shall be entitled to apply to the court for Summary Judgment and to take all actions available to the Contractor to recover any monies owing to the Contractor by the Developer under this Deed of Settlement.

Any and all actions filed by the Contractor against the Developer in connection with the Project shall be discontinued by the Contractor within seven days of the second and final installment being paid in full on or before the date agreed herein.

The Claimant's claim is for the said global sum together with interest at the contractual rate along with Costs and Attorneys' Costs.

[16] The Defendant failing to honour the compromise agreement, the Claimant commenced this claim seeking inter alia:

	$
	$40,000,000.00
	882,191.45
Together with interest at the contractual rate of 10% on the amount of $20,000,000.00 from 1 to 31 January 2020 and thereafter on $40,000,000.00 from 1 February 2020 to today's date (Daily rate since today = $10,958.90)	
Court Fees	20,000.00
Attorney's Fixed Costs on issue	8,000.00
TOTAL AMOUNT	**40,910,191.45**

[17] The relief sought in the first claim is for specific relief flowing from the breach of contract between the parties. The second claim is based on the same substratum of facts, but the breach relates to the settlement agreement rather than the original contract. In

these terms the claims are different. Panton P, in **Magwall Jamaica Limited and Others v Glenn Clydesdale and Anor** [2013] JMCA Civ 4, makes this clear. He stated that:[9]

> *The case **Green v Rozen** [1955] 2 All ER 797 was considered by the court.*
>
> *[17] Lord Denning, MR said:*
>
> > *"Now the defendants appeal to this court, saying that the official referee had no jurisdiction to make such an order. **When an action is compromised by an agreement to pay a sum in satisfaction, it gives rise to a new cause of action. This arises since the writ in the first action, and must be the subject of a new action. The plaintiff, in order to get judgment, has to sue on the compromise. That is the only course which the plaintiff can take in order to enforce the settlement**, unless of course he can go further and get the defendant to consent to an order of the court. In the absence of a consent to the order, as distinct from a consent to the agreement, I do not think the court has jurisdiction to make an order. I think that is borne out by the decision to which Winn L.J referred – Green v. Rozen. Of course, if there could have been found a consent to the order being made, it would have been a different matter."*
>
> *Winn LJ, in agreeing that the appeal should be allowed, supported the reasons expressed by the Master of the Rolls. Danckwerts LJ dissented.*
>
> *[18] In **Green v Rozen**, referred to above, the plaintiff brought an action to recover money lent to the defendants. When the matter came before Slade J for trial, counsel announced that the matter had been settled in terms endorsed on counsel's briefs and signed by counsel. The defendants were to pay the sum by installments on stated dates. If any installment was in arrear, the entire debt and costs became due and payable immediately. Slade J was not requested to make an order. Hence, no order was made staying all further proceedings. The defendants having failed to pay the last installment and the costs, the plaintiff made an application in the original action asking for judgment for the amount. The learned judge held that "the application must be refused because, the court not having made an order in the action, the agreement compromising the action between the parties completely superseded the original cause of action and the court had no further jurisdiction in respect of that cause of action. Per curiam: the*

[9] [2013] JMCA Civ 4, paras 16-18

> *plaintiff's only remedy was to bring an action on the agreement of compromise." (page 797F)*

[18] I also take into account the specific circumstance of this case, that the settlement agreement contained a term providing that until the settlement agreement was satisfied, the first claim would remain in existence. It seems to me that this means, the Claimant intended to preserve its right to pursue the full extent of its remedies against the Defendant for its alleged breach of contract until the settlement agreement was satisfied. Guidance in interpreting settlement agreements may be found at **Schofield v Smith** [2022] EWCA Civ 824.[10]

> ***Interpretation of the Settlement Agreement***
>
> *General principles*
>
> *In recent years, the Supreme Court and, before it, the House of Lords have discussed contractual interpretation on a number of occasions: see Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 ("ICS"), Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101 ("Chartbrook"), Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2011] 1 WLR 2900, Arnold v Britton [2015] UKSC 36, [2015] AC 1619 and Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] AC 1173 ("Wood"). It can be seen from the authorities that the process involves assessment of "the objective meaning of the language which the parties have chosen to express their agreement" (to quote Lord Hodge in Wood at paragraph 10) or, in the words of Lord Hoffmann in ICS at 912, "ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract".*
>
> *In Wood, Lord Hodge said this about how contracts are to be interpreted at paragraph 13:*
>
> > *Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary*

[10] [2022] EWCA Civ 824, paras 19-21

> *according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type.*

In Bank of Credit and Commerce International SA v Ali [2001] UKHL 8, [2002] 1 AC 251, the House of Lords confirmed that ordinary principles of contractual interpretation apply to releases. At paragraph 8, Lord Bingham, with whom Lord Browne-Wilkinson agreed, endorsed the application to general releases of "the general principles summarised by Lord Hoffmann in [ICS]". In paragraph 26, Lord Nicholls said:

> *there is no room today for the application of any special 'rules' of interpretation in the case of general releases. There is no room for any special rules because there is now no occasion for them. A general release is a term in a contract. The meaning to be given to the words used in a contract is the meaning which ought reasonably to be ascribed to those words having due regard to the purpose of the contract and the circumstances in which the contract was made. This general principle is as much applicable to a general release as to any other contractual term. Why ever should it not be?*

Lord Nicholls added at paragraph 29:

> *Over the years different judges have used different language when referring to what is now commonly described as the context, or the matrix of facts, in which a contract was made. But, although expressed in different words, the constant theme is that the scope of general words of a release depends upon the context furnished by the surrounding circumstances in which the release was*

> *given. The generality of the wording has no greater reach than this context indicates.*

This case reminds the Court to give effect to clear contractual wording, especially where there is a plausible commercial reason for using the particular words or phrase.

[19] Taking account of an agreement between the parties was considered a special circumstance in **Clarence Ricketts v. Tropigas SA Ltd and others** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 109/1999 delivered 31 July 2000, where Langrin JA stated:[11]

> *Examples of what would constitute special circumstances were given by Stuart-Smith L.J. in the Tabot case (supra) and these were stated as follows:*
>
> *(a) the plaintiff may not have known of the claim at that time;*
>
> *(b)* ***there may have been some agreement between the parties that the claim should be held in abeyance to abide the outcome of the first proceedings;*** [Emphasis mine]

[20] I have no doubt that were the Claimant to actively pursue both claims at the same time, it should be put to its election as to which it would proceed with, as it would be recovering twice. Additionally, the defendant would be put to unnecessary expense defending both claims, and neither would it be in the interest of justice to so utilize the courts resources. It would also be open to the Defendant to apply for a stay of the earlier proceeding while the later claim was being pursued.

[21] The Defendant has failed to satisfy the Court that in all the circumstances the Claimant is misusing or abusing the Court or is an unjust harassment to the Defendant. On these premises, the application is refused with costs to the Claimant.

ORDERS

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[11] **(unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 109/1999 judgment delivered 31 July 2000, pg 15**

1. The Notice of Application for Court Orders filed October 7, 2022 is refused.
2. Costs of the Application to the Claimant.
3. Leave to appeal refused.
4. Claimant's Attorneys-at-Law to prepare, file and serve this Order.

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Brown Beckford J

Puisne Judge