**[2013] JMSC Civ 143**

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2013 HCV 01436**

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|---|---|---|
| **BETWEEN** | **JUSTIN O'GILVIE** | **FIRST CLAIMANT** |
| **AND** | **INCOMPARABLE ENTERPRISES LTD** | **SECOND CLAIMANT** |
| **AND** | **BULLS EYE SECURITY SERVICES LTD** | **THIRD CLAIMANT** |
| **AND** | **BANK OF JAMAICA** | **FIRST DEFENDANT** |
| **AND** | **ASSET RECOVERY AGENCY** | **SECOND DEFENDANT** |
| **AND** | **NATIONAL COMMERCIAL BANK LIMITED** | **THIRD DEFENDANT** |
| **AND** | **ATTORNEY GENERAL** | **FOURTH DEFENDANT** |

**IN CHAMBERS**

**Paul Beswick, Carissa Bryan and Kayode Smith instructed by Ballaentyne, Beswick and Co for the claimants**

**Michael Hylton QC and Kevin Powell instructed by Michael Hylton and Associates for the first defendant**

**Sundiata Gibbs instructed by Michael Hylton and Associates for the second defendant**

**Sandra Minott Phillips QC instructed by Myers Fletcher and Gordon for the third defendant**

**Harrington McDermott instructed by the Director of State Proceedings for the fourth defendant**

**September 14 and October 4, 2013**

**CIVIL PROCEDURE – APPLICATION TO STRIKE OUT CLAIM – NO REASONABLE GROUNDS TO BRING CLAIM – ABUSE OF PROCESS – RIGHT TO HAVE A BANK ACCOUNT – CHARTER OF FUNDAMENTAL RIGHTS AND FREEDOMS**

**SYKES J**

**[1]** Mr Justin O'Gilvie is a businessman. In 2010 he was swept up by a current of events which ended with the voluntary departure for the United States of America by Mr Christopher Coke who has since been convicted of very serious offences. Mr O'Gilvie professes to be a friend of Mr Coke. This association caused the Assets Recovery Agency ('ARA') to believe that the property held by Mr O'Gilvie, his family and his companies (the other two claimants) were derived, directly or indirectly, from criminal activity

**[2]** One of the consequences of the events was that the Asset Recovery Agency ('ARA'), acting on information which ultimately proved to be deficient, secured a restraint order of various accounts of Mr O'Gilvie, his family and businesses. After two years, ARA conceded that it could not sustain the allegation that Mr O'Gilvie was in possession of property derived from criminal activity. The restraint orders were discharged on December 14, 2012.

**[3]**Mr O'Gilvie may well have thought that the worst was behind him. That was not to be. By letters dated December 18, 2012, National Commercial Bank ('NCB') informed him that they would be terminating banking relations with him by January 29, 2013. This notice came one week before Christmas and at the peak of the Christmas shopping period. The banking service to be terminated included all of Mr O'Gilvie's personal and business accounts as well as the accounts of the second and third claimants, his wife and children.

**[4]**The accounts have now been closed. He and his companies have brought a claim against NCB alleging that they failed to give him reasonable notice to close his accounts ('Claim NO. 2013 HCV 00149/the first claim'). In that claim he tried, unsuccessfully, to secure an interim injunction preventing the bank from closing his account. That claim is to come to trial.

**[5]**In the meantime Mr O'Gilvie and his companies filed another claim ('the second claim'), the instant claim, alleging that the Bank of Jamaica ('BOJ'), the ('ARA') and ('NCB') have committed various torts and unconstitutional acts against them. In respect of BOJ, it is the failure on the part of the BOJ to instruct NCB that it cannot discriminate against the claimants. By failing to do this, the BOJ breached its statutory duty to the claimants. As against ARA, the allegation is that it showed reckless disregard for the claimants in that it acted upon unreliable evidence and ARA knew that its actions in a small island nation like Jamaica would have adverse consequences on the claimants. In respect of NCB, the case is that it breached the constitutional rights of the claimants by discriminating against them on the basis of their social origins. The Attorney General is said to be liable vicariously for the various misdeeds of BOJ and ARA.

**[6]**BOJ and NCB have moved to rid themselves of these claims on the bases that:

(a) as against BOJ the claim is an abuse of process; discloses no reasonable grounds for bringing the claim and no statutory duties are owed to the claimants;

(b) as against NCB the claim is an abuse of process.

**Abuse of process**

**[7]**Both BOJ and NCB have submitted that this claim is an abuse of process and should be struck out. BOJ submits that it is an abuse of process because any challenge to the way in which BOJ exercises its statutory mandate must be by way of judicial review. Any other way of raising the challenge must of necessity be an abuse of process. BOJ relies on **O'Reilly v Mackman** [1983] 2 AC 237 and **Bahamas Telecommunications Company Ltd v Public Utilities Commission and Systems Resources Limited** PCA No 19/2007 (unreported) (delivered February 12, 2008) for this proposition.

**[8]**NCB submits that the claim is an abuse of process because it rests on the same factual material as the first claim against NCB (**Justin O'Gilvie and others v National Commercial Bank** 2013HCV00149).

**The claimants' propositions**

**[9]** The submissions of BOJ and NCB have to be assessed in light of the claim and the underpinning legal foundations. The claimants, in essence, say that in the modern world and in Jamaica, access to financial services is fundamental to the realisation of your worth and dignity as a person. No person can function effectively without access to financial services. In particular no company or individual can conduct business effectively without the assistance of a financial service provider. If the company or individual does not have a bank account or an account at a financial institution, certain kinds of transactions or business

opportunities cannot be undertaken. This means that financial institutions, in this case NCB, are no longer at liberty to deny persons the opportunity to hold a bank account. Financial institutions are providing a vital service, akin to water, electricity and other essential services.

**[10]**Mr Beswick goes so far to say that the time has come for the law to say that a financial institution should not deny the opportunity to hold an account unless it has good reason. Good reason, for example, would be showing that the potential customer or an existing customer has breached some law relating to the operation of the account or has been convicted of a criminal offence.

**[11]**In support of these propositions Mr Beswick relies on three sources of law: (a) the Constitution of Jamaica; (b) sections 5 and 34A of the Bank of Jamaica Act ('BOJA') and (c) section 29 of the Banking Act ('BA').

**[12]**According to Mr O'Gilvie no reason has been given to him for terminating the relationship between NCB and himself, his family and his companies. The claimants say that they were customers of NCB for many years. So too were his wife and children. At no time did NCB say that it was unhappy with the way the accounts were operated. No hint of impropriety was suggested to him by the bank. His only 'sins' were (a) being friends with Mr Christopher Coke who is now serving a term of imprisonment in a United States of America prison facility and (b) being from Tivoli Gardens/West Kingston. These are the only two reasons Mr O'Gilvie is able to come up with.

**[13]**Mr O'Gilvie has come up with a conspiracy theory and has sought to put the notification of the closure of the account in what he believes to be the proper historical context. The notification that the accounts would close came after the event now called the Tivoli Incident. This was an operation mounted by the Jamaica Constabulary Force and the Jamaica Defence Force, over several days resulting in significant loss of life and damage to property, to take Mr Christopher

Coke into the custody of the state. He was believed to be in Tivoli Gardens. This event took place in 2010.

**[14]**According to Mr O'Gilvie, this incident was followed by ARA applying to freeze his account. These accounts remained frozen until December 2012 when ARA, rather shame facedly, admitted to a judge of the Supreme Court, after more than two years of freezing the accounts, that it did not have sufficient evidence to mount a civil recovery case. A civil recovery case is where the state alleges, at the civil standard of proof, that property in the possession of someone is derived, directly or indirectly, from criminal activity. In other words, from Mr O'Gilvie's standpoint, so hopeless and weak was the case against him that after two years of investigation ARA could not unearth a single link between the claimants' properties and any criminal activity.

**[15]**Mr O'Gilvie strongly feels that it is his social origins and place of origin that led to his maltreatment at the hands, first, of ARA, and secondly, of NCB. He says, had he been born in a more affluent section of the society and had attended more socially acceptable schools with the consequence of hobnobbing with the more genteel, well-heeled members of the Jamaican society, he and his companies would be treated by ARA and NCB with more deference.

**[16]**In relation to the BOJ, Mr O'Gilvie, through his counsel, wrote a letter dated January 22, 2013 to the Governor of the Bank of Jamaica indicating that NCB told Mr O'Gilvie that banking services were being terminated. The letter indicated that the claimants would find it virtually 'impossible for the businesses to continue operating without a current account.' The dire consequences of the closing of the account were pointed out to the Governor. Mr O'Gilvie told the Governor that in over thirty years of banker/customer relationship he and the other claimants had met all the 'know your customer' requirements and nothing can be said by anyone to impugn the claimants' character and business reputations. In effect, the BOJ was being asked to intervene.

**[17]**The BOJ's position, as reflected in a letter from Mr Robin Sykes (no relation to the court) dated January 24, 2013, was that it was essentially a matter of private law and in any event, there was a decision of the Supreme Court (**Rayton Electric Commercial Equipment Limited v Bank of Jamaica** Claim No HCV 02951 of 2008 (unreported) (delivered March 19, 2009 by Sarah Thompson-James J) which concluded that the BOJ's role did not permit it intervene to in the contractual relationship between the customer and the bank. The relevant constitutional and statutory provisions will now be set out.

**The Constitution**

**[18]**The provision of the Constitution in view is section 13 (3) (g) and (i). It reads as follows:

> *(2) Subject to sections 18 and 19, and to subsections (9) and (12) of this section, and save only as may be demonstrably justified in a free and democratic society*
>
> *(a) this Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section …;and*
>
> *(b) Parliament shall pass no law and no organ of State shall take any action which abrogates, abridges or infringes those rights.*
>
> *(3) The rights and freedoms referred to in subsection (2) are as follow –*
>
> *(g) the right to equality before the law;*
>
> *(h) ..*

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

*(i) being male or female*

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

**The Bank of Jamaica Act**

**[19]**The submission here is that the BOJ, as a statutory entity, charged with managing the financial system and supervising commercial banks including NCB are under an obligation to see that its licensees do not discriminate against any customer for unjustifiable reasons. Mr Beswick readily accepts that there is no specific provision that speaks to what he has submitted but he insists that in a modern constitutional democracy founded on principles of equality and freedom from discrimination it would be incongruous if the BOJ was impotent to deal with unwarranted discrimination among its licensees. Learned counsel submitted that the financial system is not an end in itself but a means to an end, namely, the growth and prosperity of Jamaica and Jamaicans and the objectives of growth and prosperity cannot be properly met in an environment where banks are free to discriminate on the grounds of social origins. This kind of social discrimination amounts to a denial of equality before the law.

**[20]**Section 5 of BOJA reads in relevant parts:

> *The principal objects of the Bank shall be to issue and redeem notes and coins, to keep and administer the external reserves of Jamaica, to influence the volume and conditions of supply of credit so as to promote the fullest expansion in production, trade and employment…*

**[21]**Section 34A (1) and (2) reads:

*(1) There shall be established for the purposes of this Act, a department in the Bank to be called the Department of Supervision of Banks and Financial Institutions.*

*(2) The Department shall be charged with supervision and periodic examination of all commercial banks and specified financial institutions*

**The Banking Act**

**[22]**Section 29 (1) of the BA provides:

*(1) The Bank of Jamaica is responsible for the supervision of banks.*

*(2) For the purposes of subsection (1), the Bank of Jamaica shall*

*(a) compile such statistics relating to banking practice in Jamaica as the Minister may require; and maintain a general review of banking practice in Jamaica;*

*(b) examine and report to the Minister on the several returns delivered to him pursuant to section 16;*

*(c) …*

*(d) …*

*(e) …*

*(f) submit to the Minister –*

*(i) an annual report relating generally to the execution of its duties; and*

*(ii) at any time, report relating to the condition of any bank examined by it,*

> *and any such report may contain such recommendations as the Bank of Jamaica considers necessary or desirable to correct any malpractices or deficiencies discovered in the execution of its duties.*

**[23]**The submission here is that under this provision, NCB, unlawfully discriminated against the claimants because its banking practice of being able to shut out a person from what is now an essential service without reasons amounts to a breach of section 13 (3) (g) and (i) because any law that permits NCB to behave in the way that it has without just cause amounts to a denial of equality and is conferring on NCB a right to discriminate using the law of contract.

**BOJ's application**

**[24]**Mr O'Gilvie makes his case on the Charter, the BOJA and BA. In looking at the Charter first, it is the view of this court that the court is not at liberty to read words into any document even on what is now called, in relation to bills of rights, a generous interpretation free from the 'austerity of tabulated legalism' (an expression used by de Smith in *The New Commonwealth and its Constitutions* (1964) p 194 and made famous by Lord Wilberforce in **Minister of Home Affairs v Fisher** [1980] AC 319, 328), whatever this expression means, and in relation to statutes, a purposive interpretation. There is a common fallacy, perhaps unwittingly propagated by advocates of the living document constitutional theory of interpretation, that a bill of rights is supposed to contain provisions dealing with any perceived ill of the day even if the words of the document cannot on any analysis be expanded to provide a remedy for the perceived ill.

**[25]**What Mr Beswick is asking this court to do is to ask itself what is the purpose of the statute or the Charter and look to see whether there are words that give effect to the purpose as the court sees it. The problem with this approach is the ever

present danger that the purpose of the Charter and the statutes may either be as general or specific as the viewer sees it. There is no reason to think that the framers of a constitution or drafters of statutes set out to cure every ill under the sun. They have to make choices about what is worthy of constitutional protections and what is not. They indicate their choices by the words used. It is not for this court to say that the choice is poor. The choices were made according to the democratic process. There is no bill of rights anywhere that covers every single issue that may cause anxiety and distress. The court is now allowed to read into the bill of rights some new right to cure some extant injustice. The framers had to decide which things should be regarded as fundamental rights and worthy of protection under the constitution and which things were not. The same reasoning applies to statutes. Whatever its purpose no statute has ever set itself the task of trying to speak to all nuances on an issue. Choices have to be made.

**[26]**We know what choices are made from the words used. This is why it is said that the purpose of statute or any written document is gathered from the words used and not from any abstract philosophising of what the legislator or the creator of the document meant. When the framers of a constitution and the drafters of a statute write, they do so using the rules of grammar and syntax of their language. They expect interpreters to use the same grammar and syntax when it comes to interpreting the document. This is why the now maligned literal rule makes sense. It is saying that when words are used, the starting point is that the words used should be understood in their normal understanding at the time of their use. It is a starting point. The more specific the meaning of the words the less likely that they are intended to have a wide meaning. The more general the words the more likely it is that the words may even encompass things that were not thought of at the time of the enactment. For example, a constitution may say, ‘Every person has the right to carry weapons.’ The year is 1000 BC. No one knew of Glock pistol then but no one today, if the constitution is still in force, would argue that weapon did not include the pistol.

**[27]**The two statutes in question are about the powers of the BOJ in relation to itself and the powers of the BOJ in relation to regulated entities. This is derived not from an abstract asking of what is the purpose of the statutes but by an examination of the entire legislation. There are many things a regulator may wish to do but at the end of the day, it can only do what the statute authorises it do. The language in the statute outlines the scope of the regulator's remit. There is nothing in the BOJA that remotely suggests that the statute was directed at circumstances as outlined by Mr O'Gilvie.

**[28]**Section 5 of BOJA states unambiguously what the principal objects of the BOJ are. The ability to supervise banks has nothing to do with individual customers of specific banks unless the BOJ sees that the bank has adopted a mode of operation that creates the risk of bank failure or harmful effects on the financial system. In respect of the individual contracts between the bank and its customers the BOJ has no statutory authority to intervene. Anything the BOJ does must be found in the statute expressly or implicitly but in respect of the latter, it must be a necessary power to have so that it can carry out the express power. The BOJ does not need any implied power to interfere with individual contract to carry out its mandate under the BOJA. Indeed the BOJA was enacted against the backdrop of the well known fact that banker/customer relationship is regulated by private law. Why then would the legislators with this background knowledge not provide specifically for that power when it is not a power that is readily granted to a bank regulator?

**[29]**Similarly, there is nothing in the BA that gives the BOJ the power to interfere with individual contracts between the bank and its customers. It is not a necessary power to have. The BA was directed at establishing a legal framework for the licensing and operation of commercial banks. The statute speaks to things like capital base, fit and proper persons to operate the bank, the keeping of records, the role of auditors and such like. It is difficult to see how these provisions translate into a power vested in the BOJ to tell NCB, who is a licensee under the BA, how to relate to its customers. Of course, this is a matter of degree. Thus, if

the BOJ became aware that a bank was granting huge loans to insolvent persons then that may well call for its intervention not because it is interfering with the contract but because there is a risk of bank failure. In the event of an intervention the BOJ could not rewrite the loan contracts but it may say to the bank that its lending practices are imprudent.

**[30]**The closest one comes to seeing in the BA any power to take action in the interest of depositors is section 25 (2) where the BOJ is authorised to give directions to the bank 'in the interest of the bank's depositors and potential depositors, whether for the purposes of safeguarding its assets or otherwise.' As can be gleaned from the words this is dealing with preventing the bank from collapsing but that is not the same thing as interfering in individual contracts.

**[31]**Mr Beswick submitted that the BOJ as the only regulator is under a duty to see that NCB does not discriminate against its customers. That is not the role of the BOJ. Its role as gathered from the relevant statutes is to see that NCB operates in prudent manner. If NCB is discriminating that is not a matter for the BOJ. It was also said that the BOJ failed in its duty to see that NCB did not engage in the conduct which has in fact occurred, namely, taking decisions adverse to the claimants in breach of the constitutional provision that says that government agencies shall not behave in discriminatory matter. Learned counsel accepted that there was no express wording in the BOJA or BA that gave the BOJ the power he contemplated it had. This left the only realistic option which was to say that it was necessarily implied.

**[32]**Counsel's submission is an argument from silence or omission. For him to succeed he would need to show that the power he alleges the BOJ has must necessarily be implied on the basis that it is a necessary and indispensable power to carry out its statutory mandate. That, unfortunately, has not been shown. The BOJ has no statutory or common law duty to Mr O'Gilvie and neither does it have any statutory power to interfere with private arrangements between the bank and

its customers. The claim against BOJ as far as it is based on the two statutes is struck out on the basis that there is no reasonable ground to bring the claim.

**[33]**There is no constitutional provision that confers on the BOJ the power to interfere in the private arrangements between two private citizens. The claim against BOJ based on the Charter of Fundamental Rights and Freedoms is also struck out. The court now addresses the claim application by NCB.

**NCB's Application**

**[34]**Mrs Minott Phillips QC submitted that this claim is the same, in substance, as the first claim where the claimants are the same save that Mrs Maxine O'Gilvie and Mr O'Choy O'Gilvie were part of the that claim.

**[35]**Learned Queen's Counsel submitted that on this basis alone this second claim is automatically an abuse of process and therefore should be struck out. Counsel also submitted that the circumstances are the same as **Yat Tung Investment Co Ltd v Dao Heng Bank Ltd** [1975] AC 581. This decision of the Privy Council it was said was binding on this court because it was a decision of the Privy Council.

**[36]**So far as the proposition is advanced that Privy Council decisions are automatically binding on the Supreme Court of Jamaica even if they are not appeals from any court in Jamaica, this court unhesitatingly rejects such a view. The Privy Council, prior to our independence, sat as a court with an international jurisdiction because the British Empire stretched from India and Pakistan (prior to 1947) to Africa and to the West Indies. One of the objectives of the Privy Council, subject to statutory enactments, was to establish so far as possible uniformity of law throughout the Empire. Now that independence has come the view that the Privy Council's decisions on appeal from other countries is binding on the Supreme Court has no legitimate foundation. The only decisions from the Privy Council binding on Jamaica are those that arise on appeals coming from Jamaica. What makes this submission even more remarkable is that not even the Privy Council makes that assertion. An examination of judgments from the Board

(particularly in the death penalty and good character cases) shows that the language of the Board is consistent with what has been just said. Even if their Lordships apply a previous decision to Jamaica, it is not on the premise that their previous decisions are automatically binding on Jamaica but rather on the basis that having examined the matter afresh there is no need to change their minds. The result may be the same but the analytical route to the result is different. This court is entitled to reject **Yat Tung** if on close examination of the law as developed by the Court of Appeal of Jamaica and any relevant decision of the Privy Council on appeal from Jamaica the court concludes that **Yat Tung** is out of step with those decisions.

**[37]** The Court of Appeal of Jamaica has set out what the law in Jamaica is on the question of abuse of process. The court has done so in two decisions. These are **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. In both cases their Lordships held that **Johnson v Gore Wood & Co (A Firm)** [2002] 2 AC 1 (HL) states the legal position of Jamaica.

**[38]** The House of Lords in **Gore Wood** laid down important markers for determining whether an abuse of process application should be upheld. This court's view of what the law is as gleaned from **Gore Wood** was stated recently in **Assets Recovery Agency v Hamilton** [2013] JMSC Civ 136 (unreported) (delivered September 30, 2013). There is no reason to restate, at length, what was said there. What can be said is that there is no longer any legal proposition which says that the filing of a second claim is, without more, automatically an abuse of process. This way of approaching the matter, according to Lord Bingham, is mechanical and not in keeping with what his Lordship calls 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.'* Lord Bingham asserted that simply because a matter could have been raised in the previous claim is not decisive of

the issue of abuse of process. The conclusion of abuse of process is only arrived at after the court has examined all the facts and circumstances. The court may well conclude that the failure to bring the claim or raise the defence in the previous matter amounts to an abuse of process but that conclusion is not arrived by a box ticking exercise where there is a box that asks, could this matter have been raised in the previous proceeding? If yes, then it's an abuse of process. If no, then it's not. The analysis is far more nuanced. Thus the older cases are no longer to be regarded as models of analysis for abuse of process applications. They are at best instances of where previous courts have held that abuse of process was established. The crucial thing now in respect of these older cases including **Yat Tung** is whether in light of the current analytical method, the reasoning process and conclusion of those courts were correct. It follows that so far as **Yat Tung** appears to say that the fact of bringing the second claim, was ipso facto, an abuse without engaging in any nuanced analysis then it is not to be followed. It would seem that Lord Kilbrandon's dictum in **Yat Tung** which states that 'shutting out of a 'subject of litigation' – a power which no court should exercise but after a scrupulous examination of all the circumstances – is limited to cases where reasonable diligence would have caused a matter to be earlier raised' is no longer acceptable in light of Lord Bingham's analysis.

**[39]**In this particular case, the claimants have indeed brought a second claim against NCB relying on what they say are their Charter rights. The second claim is grounded on the same facts. The mechanical approached condemned by Lord Bingham in **Gore Wood** would simply ask whether the second claim relies on the same facts and could have been brought in the previous claim. If yes, then abuse of process is established and the matter is struck out.

**[40]**The more nuanced and '*broad, merits-based judgment*' takes account of *'the public and private interests involved and also takes account of all the facts of the case.*' What does this look like in practice? In looking at the issue, the court observes that:

(a) the first claim has not far advanced in preparation and a trial imminent that would make it unfair to NCB to change tack to meet a recently thought of claim;

(b) the evidence to be relied on is the same in both claims and the parties are almost identical;

(c) it would appear that both matters can be consolidated so that all findings of fact bind all parties despite the fact that there are two additional claimants in the first claim who are not in the second claim. It may also be that they are heard together and not consolidated;

(d) there is nothing to suggest that NCB has lost evidence which is no longer available which it would have had had the second claim been brought at the same time or included in the first;

(e) the first claim has not been concluded either by final judgment after a trial or by a settlement. It is still in the case preparation mode. No witness statements have been filed in the first claim and there is no reason to believe that any witness statement to be filed now could not deal with the constitutional claim;

(f) the private interest of the parties, from the standpoint of the claimants, that they should not be shut out of court without a hearing of the merits and from the standpoint of the defendant, it should not be subjected to unnecessary

harassment and oppression with the consequence of having to defend against unmeritorious claims;

(g) the public interest is that (a) the right of access to the court is a paramount value; (b) the courts should adjudicate on the merits of matter in a cost efficient and fair manner and (c) cases that ought not to be pursued should be removed from the court system at the earliest opportunity.

**[41]** According to Lord Bingham and Lord Millett in **Gore Wood** a court must hesitate and think deeply and very carefully before turning away a litigant who has not had his matter heard on the merits. The raison d'être of courts is for the resolution of disputes. The Charter of Fundamental Rights and Freedoms of the Jamaican Constitution creates the right of access to the courts and no litigant should be deprived of that right unless there is good reason. Put another way, judicial restraint is called for and if the matter can be resolved in manner that gives both sides the opportunity to advance their cases before a court then that should be the default or preferred position rather than barring access to justice because the second claim was brought when it could have been brought in the first claim.

**[42]** A word must be said about the much overused, abused and misused case of **Henderson v Henderson** 3 Hare 100. This case has more often been cited for a single passage than read and properly understood (the court is not saying that that has happened here). The facts are these. Bethel Henderson and Jordan Henderson were brothers and sons of William Henderson. William was a merchant with interests in Canada, and England. At some point William took both Bethel and Jordan into his partnership. William eventually left the business and it continued with Bethel and Jordan. Jordan got married to Elizabeth Henderson and they had a daughter, Joanna. Joanna got married to one Charles Simms. Thus Elizabeth became the sister in law of Bethel. Bethel became Joanna's

uncle. Jordan eventually died (intestate) and his estate, in England, was administered by J Gadsden.

**[43]**A dispute arose between Elizabeth and Bethel. The family was rent asunder. The suit was filed in equity in the courts of Newfoundland. The claimants were Bethel's sister in law Elizabeth, his niece Joanna and the niece's husband Charles. Bethel was the defendant. The claimants asked the court for an account of (a) William's estate; (b) the partnership transactions; (c) Bethel's dealings with Jordan's estate since his (Jordan's death) and (d) that part of Jordan's estate that was in Bethel's possession. Bethel was either served or not being served nonetheless responded to the bill but failed to file an answer.

**[44]**The court in Newfoundland ordered the Master to take an account. However the Master's efforts were hampered by the fact that Bethel left Newfoundland and did not produce the documents. The court responded by taking the bill pro confesso, that is, in his absence. The bill was referred to the Master to take an account. The significance of the expression pro confesso should not be overlooked. The expression applies to a situation where the defendant was properly served and neglects to answer or not being served, he appears but fails to answer the petition. The bill is then taken pro confesso, that is to say, as if he had confessed. There was no question here of him being unaware of the proceedings.

**[45]**The Master reported that sums of money were due to the claimants. He also reported that no account was taken between Bethel and Jordan's estate. Based on this report, the court ordered that Bethel should pay the sums due to the claimants. Armed with this order, the claimants sought to enforce the judgment in England against Bethel.

**[46]**In response to this enforcement effort, Bethel brought suit against the claimants as well as J Gadsden the administrator of Jordan's estate alleging that Jordan's estate owed money to him both in respect of the partnership and private transactions between them (the English suit). It is this suit that came before the

learned Vice Chancellor. The defendants (claimants in the Newfoundland suit) demurred on the ground that the matters sought to be raised by Bethel ought properly to have been raised by him in Newfoundland. This he failed to do.

**[47]** It was in this context that Wigram VC made his famous statement at pages 114 – 115:

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

**[48]** From the facts and the passage a number of things are clear. This case fits neatly into Lord Bingham's approach. First, Bethel was actually a party to the suit in Newfoundland. Second, he actively participated by either being properly served or if not served, responded to the bill but failed to file an answer. Third, he

fled the jurisdiction and came back to England. Fourth, he refused to provide the documents required so that the matter could be properly decided. Fifth, no reason was advanced by him for (a) not producing the documents; (b) not participating in the Newfoundland hearing. Sixth, Bethel did not show that he could not have had a fair hearing in Newfoundland. Seventh, the claimants had to pursue him across the Atlantic to England and then sought to enforce the judgment they received. Eighth, the very claim he brought in response to the enforcement action in England was in substance what he could have advanced in Newfoundland. In light of all these factors (and there are more), it should come as no surprise the VC Wigram arrived at the decision he did. Bethel's conduct by any measure amounted to an abuse of process. He was properly booted from the English proceedings save that he was now the object of an enforcement proceeding. Bethel could not complain that his right of access to the courts was barred because he was the one who behaved in a reprehensible manner by failing to produce the required documents and running away to England no doubt in the forlorn hope that the Newfoundland proceedings would have been stymied. His non-cooperation imposed additional costs on the claimants which saw then engaging two judicial fora, one in Newfoundland and another in England. He was misusing the process of the court and using it for a purpose for which it was not designed. It may well be said that he had points to raise that were not part of the Newfoundland claim but the problem was one of his own making.

**[49]** As is commonly known but just as commonly forgotten, in the common law system of case law adjudication, judge's comments have to be viewed in light of the facts, issues and submissions. When Wigram VC's comments are properly understood he was really saying, 'Bethel, you are not going to be allowed to raise these matters before me now. You have your opportunity in Newfoundland and you by voluntary and deliberate acts sought to undermine the proceedings there by not producing the documents and then fleeing the jurisdiction. I cannot entertain you. Good bye.' Nothing is wrong with this.

**[50]** There is one final point that needs to be made. Lord Millett in **Gore Wood**, held that res judicata, issue estoppel and cause of action estoppel aside (subject to the unusual circumstances of **Arnold v National Westminster Bank** [1991] 2 AC 93), an application to strike out on the grounds of abuse of process is a procedural matter. From this premise, it seems that this court must consider whether, under the Civil Procedure Rules ('CPR') there is the possibility of managing the cases so that there is no unnecessary expenditure of resources by the parties, no waste of the courts resources while permitting the matter to be heard on the merits. In other words, can both cases be managed effectively in a manner that gives the claimants and NCB the opportunity to deploy their cases are least cost and to their best advantage? It is the view of this court that this is possible and therefore a further reason why a striking out would not be appropriate at this stage. In the circumstances having regard to the courts' extensive case management powers and the broad view to be taken of the matter, the court is to give consideration to this possibility as part of the matters to be considered.

**[51]** In light of what has been said this court declines NCB's invitation to strike out the claim on the ground of abuse of process

**[52]** The final question now is whether this claim is supportable. Mrs Minott Phillips submitted that the case of **Collymore v Attorney General** (1976) 12 WIR 5 puts the claimants out of court. That case involved an interpretation by the Court of Appeal of the Republic of Trinidad and Tobago of their then fundamental rights provisions dealing with freedom of association. It is not necessary for me to question the correctness of this decision or its applicability to Jamaica. What can be said is that Jamaica now has a new bill of rights. Not only is there a new bill of rights there are also some new rights and a clear provision that permits one private citizen to enforce the bill of rights against another private citizen (section 13 (5)). This is called horizontal application in the vocabulary of constitutional lawyers.

**[53]**Section 13 (5) permits the application of the bill of rights against a private citizen and against 'juristic persons, if and to the extent that, it is applicable, taking account of the nature of the right and the nature of any duty imposed by the right.'

**[54]**This provision has made its way to Jamaica via South Africa (section 8 (2) of the Final Constitution). Similar provisions exist in Namibia. Provisions of this nature reflect the influence of German thought on the matter that private law should be influenced by the values expounded in the bill of rights. The influence takes place by indirect horizontal application, that is, by moulding the common law to reflect this position.

**[55]**The point being made is that once upon a time it could be argued with great strength that the bill of rights of a constitution only binds the State (vertical application). The days of arguing that the bill of rights only applies to the State have passed. Old ideas are being cast aside and in their place new ones have arisen. Time has marched on since **Collymore** was decided.

**[56]**This court is not saying that Mr O'Gilvie will succeed. What is being said is that his constitutional claim cannot be dismissed out of hand. There is now a growing body of literature and case law from jurisdictions such as South Africa, Germany, the United States of America and others where the question of private law rights in the context of the constitution has been considered. Mature reflection by a court after full argument is required in this case. The court cannot say that the claim is so beyond the pale that it has no legal foundation.

**Disposition**

**[57]** Application by the Bank of Jamaica to dismiss the claim is granted on the ground that the claim discloses not reasonable grounds to bring the claim. In light of this, the court does not need to consider the other grounds for striking out. Costs to the Bank of Jamaica. Leave to appeal granted to the claimants.

**[58]**The application by National Commercial Bank to strike out the claim on the basis of abuse of process is dismissed with costs to the claimants. Leave to appeal granted to National Commercial Bank.