[2019] **JMSC CIV. 155**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2017 HCV 04248

IN THE MATTER of an Application by the Assets Recovery Agency for a Civil Recovery Order pursuant to Section 57 and 58 of the Proceeds of Crime Act, 2007.

BETWEEN	**THE ASSETS RECOVERY AGENCY**	**CLAIMANT**
AND	**THE ADMINISTRATOR GENERAL OF JAMAICA (Administrator of the estate of YOWO MORLE, deceased)**	**1st DEFENDANT**
AND	**HAZEL CLARKE**	**2ND DEFENDANT**
AND	**NOMORA MORLE**	**3RD DEFENDANT**

IN CHAMBERS

MATTER HEARD ON PAPER

Alethia Whyte, instructed by the Assets Recovery Agency, for the claimant

Geraldine Bradford, instructed by Administrator General, for the 1st defendant

Clive Mullings, of counsel, for the 2nd defendant

Ann Marie Fuertado-Richards watching proceedings on behalf of estate of Alicia Tamanaha

April 16, 2018 and July 31, 2019

Earlier claim struck out arising from breach of unless order – Whether subsequent claim made on same basis as earlier claim is an abuse of process – Constitutional rights of access to court for resolution of disputes – Need for there to be appropriate use of the court's limited resources – Proceeds of crime case – Need for party in default of compliance to file affidavit evidence

ANDERSON, J.

General Comments

[1] I adopt the factual substratum of this matter, as set out in paragraphs 1-6 of the claimant's submissions which were filed on March 2, 2018.

[2] Rule 26.3(1)(b) of the **Court Procedure Rule (C.P.R.)** provides this court with the power to strike out a statement of case, if that statement of case, constitutes an abuse of the process of the court.

[3] The 1st and 2nd defendant are therefore, seeking to strike out the claimant's statement of case, on the basis that the relitigation of same, is an abuse of process.

[4] In **Yat Tung Investment Co. Ltd. v Dao Heng Bank Ltd and another** [1975] AC 581, it was stated by Ld. Kilbrandon that, the power to shut out, '*a subject of litigation*,' is one, '*which no court should exercise but after a scrupulous examination of all circumstances*.' (Italicized for emphasis) Ld. Wilberforce, in **Brisbane City Council and another v Attorney General for Queensland** – [1978] 3 All ER 30, stated similarly.

[5] The leading British common-law authority on this area of the law, is **Johnson v Gore Wood and Co. (A Firm) –** [2002] 2 AC 1. That case has been applied by our Court of Appeal in **S and T Distributors Ltd and another v CIBC Jamaica Ltd. and another** – Supreme Court Civil Appeal No. 112/2004, see esp. at pp. 46-52; and **Hon. Gordon Stewart, OJ, Air Jamaica Acquisition Group Ltd. and another v Independent Radio Company Ltd. and another** – [2002] JMCA Civ.

2, esp. at paragraphs 24-38, and **Andrew Hamilton, et al and The Assets Recovery Agency** – [2017] JMCA Civ 46.

[6] I adopt the legal principles which emanate from the **Johnson and Gore Wood and Co.** case, as to how a court should consider the question of abuse of process. Those principles were summarized by Sykes, J. (as he then was), at first instance in the **Andrew Hamilton case** and were repeated by Morrison JA. (as he then was), in the leading judgment which he wrote and announced, in the **Andrew Hamilton, Court of Appeal case**. They were repeated with approval, by the Court of Appeal, in that judgment. See paragraphs 87-89 of the C.A. judgment in the **Hamilton** case, in that regard.

Abuse of process and access to courts

[7] Since access to courts is a fundamental right, for the purpose of the resolution of disputes between parties, if there is to be any limitation placed on that right, such limitation must be shown to this court's satisfaction, to be demonstrably justifiable in a free and democratic society. **Section 16(2) of Jamaica's Charter of Fundamental Rights and Freedoms**, when read along with **section 13(2)** of same, makes that clear.

[8] The burden of proof is on the party who is seeking to restrict another party's constitutional rights, to justify any such restriction. On that point, see: **Julian Robinson v Attorney General of Jamaica** (2019) JMSC Full 04, at paragraphs 111 to 124, per Sykes, C.J.

[9] Also, as was stated by Sykes J. (as he then was) at first instance, in **the Andrew Hamilton case**, at paragraph 25, if the matter was not yet adjudicated upon, that is an important consideration in deciding whether there is an abuse of process. As Ld. Millett stated in **Johnson v Gore Wood and Company (op. cit)**, as reported at page 59,

'*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] In this matter though, at this stage, it is undisputed that the claimant is not now seeking to litigate, for the first time, a question which has not previously been adjudicated upon. Rather, the claimant is here and now litigating for a second time, a question/dispute between the parties, which has not yet been adjudicated on. That is a nuance which did not exist in the **Johnson v Gore Wood and Co.** (op. cit) case.

[11] In that case, the plaintiff was a property developer. Both he and a company controlled by him retained the defendants as their solicitors in certain transactions. Problems having arisen, the company filed action against the solicitors for damages for negligence and that action, was settled in the company's favour, for a substantial sum. The plaintiff then brought proceedings to recover his personal losses, having made a deliberate decision, for financial reasons, to defer his personal claims until the company's claim had been disposed of. The defendants were well aware that a personal action was contemplated by the plaintiff when they settled the company's action. In fact, the possibility of an overall settlement of both the company's and the plaintiff's personal claims had been discussed during the settlement negotiations. Those discussions were not, however, pursued, because

of a paucity of information at that time as regards the quantification of the plaintiff's claims.

[12] After the personal action had been pending for over four years, the solicitors applied for an order dismissing it summarily as an abuse of process. They lost at first instance, but succeeded on appeal. The Court of Appeal accordingly, ordered summary dismissal of the action on the ground that it was an abuse of process. The plaintiff subsequently appealed to the House of Lords and thus, the order dismissing the plaintiff's personal action, for abuse of process, was reversed.

[13] Ld. Bingham, who delivered the House of Lords' leading judgment in that case, wisely opined as follows:

'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 … It is, however, wrong to hold that because a matter could have been raised in early 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 of the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is 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.'

[14] The House of Lords, after having taken into account all of the circumstances of that case, concluded that the plaintiff's action to recover his personal losses, was not an abuse of process and should therefore be allowed to proceed.

[15] The taking into account of all of the circumstances of the particular case, is very important, because it is by doing so, that the court can best ensure that a person's constitutional right of access to the court, in order to resolve a dispute, is not either unduly, or unfairly restricted.

[16] It would be though, to my mind, only if a person/entity has contended that his/her or their constitutional right to access the court, has been denied, by means of the striking out of his/her or their statement of case, that the issue of the legal basis for the restriction of such right could or should properly be considered by this court. It would therefore be at that time that the issue as to whether or not the restriction on the constitutional right, which arises as a consequence of the striking out of a party's statement of case, is a restriction which would, '*be demonstrably justified, in a free and democratic society*' as per **section 13(2) (a) of the Charter of Rights**, read along with **section 16** of same.

[17] That is not an issue which this court needs to address at all, as regards this matter, firstly, because this is not a constitutional claim and secondly, because, the claimant has not contended either that there has been, or that there is expected to be, any violation of any of its constitutional rights.

Whether the re-litigation of a claim which has not yet been adjudicated on will constitute an abuse of process

[18] What is instead before this court now, is an application to strike out this renewed claim, on the ground that the same constitutes an abuse of process.

[19] It is my understanding of the law, that,

> '… *where a claim is struck out for delay, the claimant is entitled to issue fresh proceedings, based on the same cause of action, which will not have been determined on its merits. Such a second claim may be met by an application to strike out if the limitation period has expired. Even if the limitation period has not expired, the court has the power to strike out the second claim as an abuse of*

process if doing so accords with the overriding objective, particularly on the ground that it constitutes a misuse of the court's resources.'

That quotation has been extracted from Blackstone's Civil Practice 2014, at paragraph 33-27.

[20] It is not, as I understand it, that the same matter/dispute between the same parties, cannot be re-litigated, especially if there was no determination of the dispute, in terms of, there having been a judgment on the merits, rendered at the time when the said matter/dispute, was first being litigated. To prevent the re-litigation of all disputes, in all circumstances, has never been the focus of the common law, in so far as, '*abuse of process'* is concerned. What must be considered very carefully, is what are the particular circumstances of each particular case and ultimately, the question as to whether a particular claim constitutes an abuse of process or not, has to be determined, not by using a dogmatic approach, but rather, an approach which is broad and merits based, taking into account, the public and private interests involved and also taking into account, all of the facts of that particular case. In a case such as this present one, the crucial question will be: In all the circumstances, is the claimant abusing this court's processes by raising before it now, a claim which had been previously raised, but which had been struck out and thus, had not been determined on its merits, as a consequence of the claimant's failure to comply with an unless order?

[21] That is exactly what the first defendant, in particular, has asked this court, by means of the written submission which that office filed, pursuant to this court's order that same be done, to adopt as its approach to the question as to whether or not this second claim is an abuse of process. In that office's submissions, it is contended that when that approach is adopted, the claimant's claim amounts to an abuse of process.

[22] The 1st defendant has, in that context, placed reliance on the unreported judgment in the case: **Security Finance Ltd. v Ashton and another** [2001] Ch. 291, in

particular, the dicta at paragraphs. 31 and 52 of that judgment, per Chadwick, L.J. Those paragraphs, are set out, immediately below:

31. *'The effect on other litigants of delay in the proceedings in which that delay has occurred, is, now, a factor to which the court must have regard when considering whether to strike out those proceedings. But equally, the fact that earlier proceedings have been struck out on the grounds of delay is a factor to which the court must have regard when considering whether to strike out fresh proceedings brought to enforce some claim. The reason, as it seems to me, is that, when considering whether to allow the fresh proceedings to continue, the court must address the question whether that is an appropriate use of the court's resources having regard:*

(i) to the fact that the claimant has already had a share of those resources in the first action; and

(ii) that his claim to a further share must be balanced against the demands of other litigants.'

52. 'It is an abuse because it is a misuse of the court's limited resources. Resources which could be used for the resolution of disputes between other parties will (if the second action proceeds) have to be used to allow the Bank a "second bite at the cherry." That is an unnecessary and wasteful use of those resources.'

[23] As was stated by Ld Bingham of Cornhill, in **Johnson v Gore Wood and Co.** (op. cit), at p. 495, the law as regards abuse of process, is a rule of public policy, based on the desirability, in the general interest, as well as that of the parties themselves, that litigation, should not drag on forever and that a defendant should not be oppressed by successive suits, when one would do. According to Ld. Bingham, '*that is the abuse at which the rule is directed*.'

Whether this claim constitutes an abuse of process

[24] With respect to this particular matter, the original claim was filed in 2008. At that time, the parties were the same, save and except that Yowo Morle, the original first defendant, was then alive. He died thereafter and the Administrator General of Jamaica, in the capacity of administrator of the deceased's estate, now the 1st defendant, has been added as a party to this claim, in that context.

[25] As of October 6, 2017, the claimant's original claim stood as struck out, arising from the claimant's failure to comply with an unless order which had been made by this court and which required compliance by October 5, 2017, failing which, in respect of any party in default of compliance with that order, save and except for the Administrator-General, the defaulting party's statement of case, was to stand as struck out, without the need for any further court order. Incidentally and interestingly enough, the statement of case of all of the parties was struck out, due to a non-compliance with the court's unless orders.

[26] As such therefore, the claim against the defendants was, until it had been struck out, arising from the claimant's failure to comply with that unless order, languishing for nine years.

[27] The claimant had applied for relief from sanctions, but that relief was not granted. The claimant had been granted leave to appeal this court's order, refusing the claimant's application for relief from sanctions, but the claimant did not appeal that order. Subsequently, the claimant filed this claim on December 15, 2017.

[28] To my mind therefore, with the claim having been struck out, due to delay on the claimant's part, with respect to an unless order, which had not been complied with, within the timeframe that was prescribed by this court and with the claimant's 'new' claim, also pending, thus far, for nearly another two years, it was incumbent on the claimant to have explained by means of affidavit evidence, in response to the 1st and 2nd defendant's present application to strike out this claim, why it was that this

court's earlier unless order, was not complied with. It was also, to my mind, incumbent on the claimant, to have placed before this court, sufficient evidence, based upon which this court could properly conclude that it is unlikely that in that party's intended future conduct of this claim, it is unlikely that this court's orders, will not be fully complied with.

[29] The claimant needed to have done that, in response to the defendant's oral application to strike out this claim. The claimant though, like the 1st and 2nd defendant, filed no affidavit evidence in response to the oral application of those defendants to strike out the Agency's claim against them.

[30] The claimant instead chose to rely on legal submissions which in large measure, have been accepted by this court, as being valid. Counsel involved in this matter, as the parties' legal representatives before this court, had informed me on April 16, 2018, that they were not of the view that any affidavit evidence from either party, was necessary, with respect to the striking out application, which is presently under consideration. The parties' counsel were therefore, only ordered to file submissions and the claimant's counsel was ordered to file a bundle pertaining to the prior claim.

[31] It is though, the conclusion reached by the claimant's counsel arising from those submissions, which this court disagrees with. It must be stated that the skeleton submissions which were filed by the 2nd defendant's counsel and which consisted of only seven (7) paragraphs, were too skeletal in nature, to be of much assistance to this court.

[32] The claimant's counsel, in their written response to the 1st and 2nd defendant's written submissions, had stated as follows:

> *'It is in the public interest to allow this claim to proceed because this claim raises critical public policy objectives of depriving persons of the proceeds of their crimes. This claim is not frivolous and raises serious allegations*

against the defendants of holding property that was obtained from defrauding a victim of United States six hundred and twenty-two thousand, three hundred and fifty dollars (US$622,350.00) through the illicit lottery scam. The striking out of the claim would not only have the effect of merely punishing the Crown for our breach in the previous claim, but would have the added effect of barring the operation of the Proceeds of Crime Act to an ill that it was designed to cure. There would be no adjudication on the merits and, if in fact the properties in question were obtained from unlawful conduct, the defendants would be allowed to retain the fruits of the crime.'

[33] In addressing that contention of theirs, only two points need to be made by this court and they are that firstly, the reference to, 'the crown' is inappropriate, since the Assets Recovery Agency is a statutory body, which is not in my considered view, a crown servant or agent, albeit that it is staffed by persons who are legally categorized as, 'public officers.' It is because it is neither a crown servant nor agent, why it can sue, or be sued, in its own name. It would be otherwise, if it were a crown servant or agent. The legal standing of the Assets Recovery Agency to sue and be sued in its own name, was addressed by the Court of Appeal, in the **Andrew Hamilton case** (op. cit.) especially at paragraphs 35 to 57, per Morrison, J.A. (as he then was). Secondly and most importantly, it is because the earlier claim was of such importance to the public interest, that it behoved the Assets Recovery Agency to ensure that it complied with this court's case management orders and/or any unless order made by this court. The Assets Recovery Agency, clearly failed in that respect and having so failed, just as did the other, then defendants, their respective statements of case, were all struck out. That was not an order made to punish either of those parties. It was instead, an order which was made, in order to effectively manage the claim, so as to ensure that it did not disproportionately result in this court utilizing far more of its limited resources than it should have had to, in order to bring the matter to a resolution, before this court.

[34] As has been stated in the text: Blackstone's Civil Practice 2014, at para. 33 27 – '*In* ***Janov v Morris*** *– [1981] 1 WLR 1389 it was held to be an abuse of process to commence a second claim after a first claim based on the same cause of action, had been struck out for failing to comply with an unless order where no explanation was advanced for the failure to comply with the unless order. As explained by Dunn LJ, the second claim could be an abuse were there had been intentional and contumacious default, for example, disobedience of a peremptory order, or where there had been inordinate or inexcusable delay. Intentional and contumacious default can also be established where there has been a wholesale disregard of court orders* ***Arbuthnot Lathan Bank Ltd v Trafalgar Holdings Ltd.*** *[1998] 1 WLR 1426*.'

[35] In the matter at hand, the claimant's original claim was struck out, arising from the claimant's disobedience of a peremptory order of this court. The reason for that disobedience is unknown to this court, at this time. It matters not, that the claimant was, through its' counsel, a day late in respect of the filing of their bundle of submissions and authorities. The fact remains that the claimant was not in compliance with that peremptory order of this court and no explanation for that non-compliance has been provided to this court, in response to the 1st and 2nd defendant's application to strike out this claim.

Conclusion

[36] Court orders are made to be complied with and are made to ensure that the court's processes are reasonably utilized by each of the parties to a claim and ultimately to ensure that justice is done, for all of those parties. As such, and with there having been no explanation given by the claimant as to why the unless order made in the prior claim pertaining to the same cause of action, was not complied with and with there being no basis upon which this court can properly feel assured as to the conduct of this claim by the claimant, in the sense of being assured that the

claimant will not deliberately, fail to comply with any of this court's orders in respect of this, 'new' claim, this court ought, in exercise of its discretion, to strike out this claim.

[37] As was stated in **Tolley v Morris** (1979) 1 WLR 592, by Ld. Diplock, at 603, '*Disobedience to a peremptory order would generally amount to such 'contumelious' conduct as is referred to in* ***Birkett v James*** *[1978] A.C. 297 and would justify striking out a fresh action for the same cause of action, as an abuse, of the process of the court*.'

[38] As was stated by their Lordships in the **Janov case** (op. cit), it would be unfortunate if it were otherwise, for if it were, a litigant could disobey and disregard orders of the court, have his action struck out, and provided he was within the limitation period, he could immediately start another action; and even if another peremptory order was made in the second action and that action dismissed, then if the logic of **Birkett v James** [1978] AC 297 is taken to its ultimate, he could start a third or any number of actions provided they were within the limitation period and none would be regarded as an abuse of the process of the court. I adopt the inescapable logic of that court's disapproval of such a likely possibility, if a contrary approach to such a matter, were to be adopted.

[39] In the exercise of this court's discretion therefore, this claim will be and is, struck out and the costs of this claim will be awarded to the 1st and 2nd defendant. It is the 1st defendant who will be required to file and serve this order.

Order

1. This claim is struck out.

2. The costs of this claim are awarded in favour of the 1st and 2nd defendants.

3. Leave to appeal is granted.

4. The 1st defendant shall file and serve this order.

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Hon. K. Anderson, J.