[2016] JMSC COMM 12

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2014CD00128

BETWEEN	**JMMB MERCHANT BANK LIMITED**	**CLAIMANT**
AND	**GEROGICS INVESTMENTS LIMITED**	**FIRST DEFENDANT**
AND	**EXCLUSIVE HOLIDAYS OF ELEGANCE LIMITED**	**SECOND DEFENDANT**
AND	**FRED SMITH**	**THIRD DEFENDANT**

IN CHAMBERS

Michael Hylton QC and Shanique Scott instructed by Hylton Powell for the claimant

Gordon Robinson instructed by Winsome Marsh for all the defendants

April 27, May 9 and May 20, 2016

CIVIL PROCEDURE – ABUSE OF PROCESS – STRIKING OUT – CLAIMANT DISCONTINUING FIRST TRIAL – CLAIMANT SEEKING SAME REMEDY IN SECOND CLAIM – WHETHER AN ABUSE OF PROCESS

SYKES J

The nature of the problem

[1] The issue that has arisen is whether JMMB Merchant Bank (formerly Capital & Credit Merchant Bank) ('the bank') should be barred from pursuing this second claim on the ground that the matter has already been decided in previous claim; or (b) there is an agreement between the parties that the bank would not pursue the claim after it was discontinued or (c) the second claim is an abuse of process.

[2] In order to determine this matter the following issues were put as preliminary issues to be decided in this hearing. The issues are:

(a) *whether this claim is estopped by virtue of the res judicata rule based on the order made at trial in Claim No 2012CD00035 (the previous claim);*

(b) *whether the causes of action raised herein by the claimant have already been extinguished as a result of a settlement agreement entered into during the trial of the previous claim;*

(c) *whether the filing of this claim is in breach of the settlement agreement and if, if so, whether the defendants are entitled to have this claim struck out or to damages for breach of the settlement agreement in the sum of any damages, costs and interests which may be awarded in this claim;*

(d) *whether the filing of this claim which is an attempt to re-litigate the previous claim, an abuse of the process of the court, an inappropriate use of the courts' resources, discloses any reasonable ground for bringing this claim, or is frivolous or vexatious and accordingly ought to be struck out.*

[3] A close examination of both claims, the transcript (such as is available) and affidavits will now commence.

The first claim

[4] In May 2012 Capital & Credit Merchant Bank Limited sued the defendants in Claim No 2012CD00035 (**Capital & Credit Merchant Bank v Gerogics and others**).

[5] The claim form stated that it was suing on an amount (irrelevant for present purposes) being principal and interest accrued as well as recoverable expenses. The claim was brought 'pursuant to promissory notes issued by the 1st defendant in favour of the claimant and the (sic) pursuant to guarantees issued by the 2nd and 3rd defendant in respect of the 1st defendant's indebtedness to the claimant.'

[6] The particulars of claim were amended. It alleged that on or around November 1, 2006, the bank agreed to lend and Gerogics Investments Limited ('Gerogics') agreed to borrow a sum of money repayable over 24 months from the date of initial disbursement. The interest rate was variable. It was further alleged that on or about March 2007 Gerogics borrowed further sums. In respect of both loans Gerogics issued a promissory note (one in respect of each loan). It was further alleged that Exclusive Holiday of Elegance Limited ('Elegance') and Mr Fred Smith would guarantee the loans.

[7] The bank pleaded that in May 2009 ('the first restructured agreement') and May 2010 ('the second restructured agreement' (which replaced the first restructured agreement)) the bank and Gerogics agreed to restructure both loans. Gerogics it is said breached the May 2010 restructuring agreement by failing to pay the sum agreed at the time intervals specified. In addition, Gerogics failed to sign the May 2010 agreement.

[8] The particulars of claim alleged that Capital & Credit Merchant Bank ('the bank') agreed to lend to the first defendant a sum money repayable over 24 months from the date of disbursement at an initial interest rate of 10.75% per annum.

This was the first loan. The first defendant issued a promissory note in favour the bank. The loan was secured by a registered mortgage over property owned by the first defendant. The loan was guaranteed by second and third defendants.

[9] The amended particulars of claim closed by claiming against all the defendants individually and jointly (a) the sums borrowed; (b) the recoverable expenses; (c) interest; (d) costs on an indemnity basis and (e) such further or other relief.

[10] The defendants put in a robust defence and counterclaim. In the counter claim, the defendants sought declarations that the interest was excessive; an order that the transactions be reopened and an account taken; an order that they be relieved from payment of any sum found to be owed by the court; an order that the bank repay Elegance US$1.8m approximately with interest' costs and such further relief as the court sees fit.

[11] The first and second defendants brought an ancillary claim against the bank. That claim sought (a) an indemnity against the bank's claim and costs of the claim; or (b) a contribution in respect of any sum the bank may recover and (c) damages. The defendants filed defences to the claim.

[12] On Monday, December 9, 2013 a trial commenced before Mangatal J. As will be detailed below difficulties of proof arose for the bank during the trial. Mrs Symone Mayhew, counsel for the bank, advised the bank and it accepted the advice, to discontinue the claim.

[13] There is a joint notice of discontinuance signed by counsel for both parties. It states that 'the claimant and ancillary claimants will no longer proceed with the claim and ancillary claim and wholly discontinue them.'

[14] The minute of order dated December 10, 2012 states that it was the bank that applied for the claim to be discontinued with costs to the defendants to be taxed if not agreed. The second paragraph of the minute of order states that 'consequent on the discontinuance of the claim the ancillary claim is withdrawn

with no order to costs.' The third paragraphs read 'joint notice of discontinuance to be filed and served by the claimant (sic) attorney by December 12, 2013.'

[15] In 2014, the bank issued this second claim.

The second claim

[16] In the claim form the bank seeks to recover specified sums, interest and 'recoverable expenses' 'incurred by the claimant.' Other than the sum sought to be recovered and the rate of interest, the claim form in this second claim is identical to the first claim.

[17] The particulars of claim in this second claim is in substance the same as the particulars in the first claim. It just gives more detail about the subject matter of the claim. The particulars of claim ends by seeking (a) the sums borrowed plus interest up to a particular date; (b) interest from a stated date to date of payment; (c) the recoverable expenses; (d) costs and (e) such further and other relief as the court thinks fit.

[18] It is clear then that other than the sums of money claimed whether as principal, interest or recoverable expenses the claims are identical. The parties are the same except for the name change of the claimant from Capital & Credit Merchant Bank to JMMB Merchant Bank Limited. There was no new cause of actionin the second claim.

The defendants' position

[19] Mr Gordon Robinson was his usual pointed and economical self. The fundamental point made by counsel was that the bank got into trial court, began to lead evidence in support of its claim, could not prove the case (the reason is irrelevant), discontinued the claim and therefore should not be allowed to put forward this second claim since it was based on the same facts and circumstances as the first claim. The label is unimportant; what is crucial is the

conduct. It is wrong in principle for a claimant to elect to discontinue a claim because it could not prove the claim when called upon to do so, put itself in a better positon having learnt from the first claim and then launch a second claim seeking the same remedies.

The bank's position

[20] Mr Hylton QC too was economical and incisive. The bank's position is that res judicata does not apply because there was no decision on the merits. Res judicata can only apply if the previous claim was decided on the merits by a court of competent jurisdiction. The second claim is not an abuse of process.

The details of the first trial

[21] This will involve detailed examination of the affidavits and the portions of the transcript of the trial that are available. The parts that are available are from the mornings of Monday, December 9 and Tuesday, December 10, 2013. The transcripts for the post-lunch sessions of Monday, December 9, 2013 and Tuesday, December 10, 2013 are unavailable.

[22] Despite not having the post-lunch sessions on both days the matter proceeded, there is sufficient information to understand what took place in the mornings and so this court is able to get a very clear picture of the problems that bank encountered and why. In respect of the post-lunch session of Tuesday, December 9, 2013, there are (a) the affidavit of filed on behalf the bank by Mrs Symone Mayhew, attorney at law, and counsel for the bank at the trial, and (b) the affidavit of Mr Deryck Rose, an employee of the bank.

[23] From the transcript it appears that on the Friday, December 6, 2013, Mr Robinson's junior left Mrs Mayhew with the impression that the matter would not proceed on Monday, December 9, 2013. However, by Saturday, December 7, 2013, Mr Robinson sought to set matters straight. He sent two emails to Mrs Mayhew indicating that the matter would be proceeding to trial.

[24] The transcript of the morning of Monday, December 9, 2013 shows Mrs Mayhew telling the court that she had yet not contacted all her witnesses. This portion of the transcript is now quoted.

> *My Lady, we are scheduled for trial today to Wednesday my Lady. My Lady, I am in a position where I am unable to start this morning. My Lady, you will recall that at the pre-trial review we had agreed to go to mediation; we actually have had two sessions of mediation, the last one ended just about 4:30 on Friday. At the end of that mediation, my Lady, we had agreed, the persons present, to go in a particular direction which would involved (sic) the adjournment of the trial today and the continuation of mediation in January, before Miss Pauline Findlay.*
>
> *[Exchange between bench and counsel]*
>
> *Based on where we had reached at mediation Friday, I, essentially advised my witnesses not to attend court today based on the agreement reached. When I read the briefing I was unable to reach them, so I sent an email this morning; I tried to reach them by phone to confirm what their positions were, my Lady. I have only so far reached two out of the four witnesses that I have, my Lady; and so, I don't have them here this morning. I am not opposed to doing the trial, but I am unable to start this morning. I think the earliest I could reasonably start getting my house in order would be tomorrow morning.*
>
> *The difficulty also, in light of the fact that my learned friend has not agreed the documents, I have had to re retrieve (sic) the original documents from the bank – which I did not keep in my custody …*
>
> *I am concerned I have not reached one or two witnesses. I am hoping she would receive my voice mail. I told her to be on standby, and I don't know what she has done --- she no longer works in the bank. That is the difficulty, some are employees, some not; some no longer there, that makes it difficult, my Lady. So that is my position this morning.*
>
> *[Exchange between bench and counsel]*

[25] Mr Robinson contributed this:

> *I apologise in advance, my Lady, but I tend to take a very obstinate position. No 1, let me talk about the documents. My position – no, that is most unreasonable of me – the defendants' position, re documents were (sic) taken long before the last trial date. I would not have expected the claimant or the claimant's counsel to be straddling around (sic) this morning collecting documents.*
>
> *No 2, witnesses: my learned friend has just advised the court that some of the witnesses still work for the bank. I expect the bank to have those witnesses here this morning --- we will worry about those who don't work for the bank on another day --- but the bank, who brought the defendant here, need to bring their witnesses here.*

[26] Mr Robinson went on to say that on the Friday he was absent at the mediation but he thought that for all practical purposes the matter was settled. However, during the mediation sessions the bank sent a representative (who we now know to be Mr Deryck Rose) who, apparently, did not have the authority to make any decisions and it was this disability of Mr Rose that made a further mediation session necessary. Mr Robinson went on to say that after he received a report from his junior he decided that the matter should go to trial on the Monday as scheduled.

[27] From exchanges between Mrs Mayhew and the trial judge, the problem was that the bank's witnesses were not available on the Monday. There were four witnesses and only two were contacted before court on the Monday but they were not actually present in court at the time court began sitting.

[28] Mrs Mayhew attributed the difficulty with witnesses to the view that she had formed namely that both sides would not be pressing to have the matter commence on the Monday. However, Mr Robinson cleared this up by the Saturday. This means that on the Saturday the bank was put on notice that defendants would be pressing for the trial to commence.

[29] Mrs Mayhew also mentioned that documents were not agreed. However, as will be seen this was not a new position of the defendants. They had taken their stand on the documents from the previous trial dates. The implications were ominous of the bank. The bank certainly knew that it would have to prove the documents the old fashioned way, namely, calling the maker, or someone who was present when they were made and executed or seek refuge under any applicable common law exception or by statute. The storm clouds had begun to gather.

[30] The court has read the witness statements of all the witnesses that the bank selected, that is those who gave witness statements, and the court is not surprised that the bank encountered such severe difficulty in having the documents admitted into evidence. The witnesses (all of them) were not the appropriate persons through whom the documents could be tendered into evidence.

[31] As will be seen, Mangatal J came to that conclusion herself. So too did the bank. To return to the narrative of events of Monday, December 9, 2013. According to the transcript the proceedings stopped at approximately 10:40am in order for the bank to secure the attendance of the available witnesses. The court resumed at 12:05pm. The practical effect of this was that the bank secured an adjournment of just over an hour.

[32] After the resumption at 12:05pm and before the first witness was called there was discussion about bundles and documents. There is this telling passage from the learned judge. Her Ladyship was addressing Mrs Mayhew:

> *So, you have looked at everything and thought about every position and settlement discussion, and we are ready to go? You talked about the documents situation and who is working where, and who is available and who is not available?*

[33] In other words the trial judge was asking if the bank had taken all matters into account, including matters related to the documents and availability of witnesses. Mrs Mayhew answered 'Yes, my Lady.'

[34] To Mr Robinson the learned judge addressed these questions and comments:

> *And Mr Robinson you have thought about whether any money may be found due? Sometimes when the Court, when everything is in the Court's hand, now, of course, everybody knows that at the end of the day the Court could come up with a figure that [to] your client can look monumental.*

[35] Mr Robinson after complementing her Ladyship on her judicial abilities indicated that an offer was made and was rejected. Her Ladyship responded by saying:

> *I see, I take everything you say to be accurate except, the best of judges part.*

[36] There were further exchanges and then there are these important passages from the learned trial judge:

> *Her Ladyship: And sometimes you can give them some straight up view [referring to litigants and counsel's advice] that the Court, wearing this hat of adjudicator, can't do --- we are not magicians. They need to know you the lawyers are not magicians, you can only work with what you have, and more so the Court; so you get it so you give it to me.*
>
> *Mrs S Mayhew: So you tek it.*
>
> *Her Ladyship: My Lady, how it come in it comes back out, hopefully accurately, competently and fairly, but it can only be fairly on what is there; everybody needs to understand that, we can only prove what we can prove.*
>
> *Mrs Mayhew: Yes, my Lady, that advice had been given. My Lady, certainly on my side.*

Her Ladyship: Well, I have been counsel and been in some positions myself, where just because of the rules of evidence and the rules of law what can look like a good case on the initial papers disappear and become dusts (sic). ..

[37] The trial judge was suggesting that difficulties of proof can arise.

[38] The court will add a further extract from Mr Robinson's comments. Learned counsel is recorded as saying:

Mr Robinson: Precisely. And I have told my client after he wins this case today, on the assumption that he wins it, and he gets away with having to pay zero of this money that he did borrow, he now has to continue business in Jamaica and operate with other banks and nobody will lend him a dollar, so we are anxious to pay; but the truth of the matter is we cannot pay what we don't have. I don't know what the bank thinks is available to it, but it seems to believe that bad debts are the same as good debts, so less (sic) go.

Her Ladyship: Well, I have been counsel and been in some positions myself, where just because of the rules of evidence and the rules of law, what can look like a good case on the initial papers disappear and become dusts (sic). I have taken points and succeeded on them on the other side, in a number of claims, serious millions of dollars and we took the point, because the person who came to present the evidence was not the author of the documents and the entire case became a case of five hundred thousand dollars instead of thirty millions of dollars….

[39] All this occurred before the bank called its first witness, Mr Owen Ferguson. Very early in his evidence objection was taken to some of his testimony. Unsurprisingly, this related to the documents. The morning session on Monday, December 9, 2013, ended at 1:15pm. It is fair to say that the bank had not made much progress in getting into evidence important documents necessary

documents to prove the case. As noted earlier, there is no transcript for the afternoon session.

[40] The court wishes to say that from its examination of the transcript of the morning session of Monday, December 9, 2013, (unless the transcript is incomplete) there is nothing there that shows a clear and unambiguous application for an adjournment. What happened was that Mrs Mayhew had suggested a Tuesday start but her Ladyship was not minded to grant that adjournment and instead stood the matter down until midday.

[41] The morning of Tuesday, December 10, 2013, brought no joy to the bank. Mr Ferguson eventually completed his testimony but had not advanced the bank's case significantly. The bank's case got bogged down. The vital documents were not in evidence. It was not easy to see how the bank was going to get out of this problem.

[42] Her Ladyship engaged in the following exchange with Mr Gordon Robinson.

> *Her Ladyship: Thank you, Mr Ferguson, you can come down. I have been asking Mr Robinson and I know I interrupted him and probably throw (sic) him off about the original loan documentation because when I look at the papers it seems to be that there are omissions and even your line of questioning is what prompted me to look back at it and I understand that evidence is different from pleadings, but under our rules, if certain things are admitted and documents and so on, seems to me that given also the overriding objective of the apparent (inaudible) rating with the court, that whatever the true issues are, then let us deal with them, but if there are, indeed, documents and positions that are admitted, then in so far those matters are admitted, then let them be before the court because I feel as if I am being asked to adjudicate in a very strange way in this case and also I was given a bundle of documents and not one of them, nothing is agreed and on top of it, Mr Robinson, whether you say so, or didn't say so, it has been admitted that over 5, what five million US dollars was handed to the Gerogies (sic), so at least --- so whatever the guarantees legal points are, and*

whatever the failings in the pleadings of the bank, and whatever all other failings there are, I can't sit here as a judge and ignore those facts. Now I am beginning to understand better why you had, at time, said perhaps the judge should really be more incline (sic) to try and mediate this matter.

Mr Gordon Robinson: I am still open to that.

Her Ladyship: But I can't ignore these massive issues, and if it even means I need to invite counsel to fix their case, or do something, or think about it, then I have to. Can't sit here in this extraordinary confusion where I am being asked to rely on every document and there are somethings admitted, and I understand now that the restricting aspect of this case looks like if it's floundering on a certain aspect, there must be certain things in law as accepted. It can't be that money hand over; there are payments at certain points that make this thing not yet statufied (sic), and this is not a proper way to deal with this case, whether it's a bank case; it not properly drafted or keeping a pace with what I don't know, or given the defendant has the absolute legal right to take all legal points, especially if he has great counsel, other than that, let us be real, even if I don't raise these points, …

…

It can't be the way. Its' not the right way to approach this case; it is not the best use of any our time or resources, and scarce resource in Jamaica has value.

Mr Gordon Robinson: What I will say at this point and nothing further is that the loan is agreed. The documentation is not.

Her Ladyship: And I understand that.

Mr Gordon Robinson: And I have a purpose and a reason. This is a most peculiar matter.

Her Ladyship: It is

Mr Gordon Robinson: …

It is a most usual loan which is the reason why Mr Ferguson can't recall and I promise you faithfully that when Mr Wint comes, he won't be able to recall either because this is a most unusual loan.

Her Ladyship: I have read enough to see what you are saying.

Mr Gordon Robinson: It's one thing to say money has been loan (sic), you know, ma'am. Money has been loaned. The issue is, can a loan agreement be enforced against the borrower. This is why we have court.

Her Ladyship: That is the issue on pleadings as they seem to have put forward by the bank.

Mr Gordon Robinson: And what has been paid and why.

....

....

Mr Gordon Robinson: ...

...I remain open to any reasonable settlement that takes into account the reality.

...

...

Mr Gordon Robinson: In my humble opinion, ma'am, the bank needs to understand the difficulty in proving documents in court. Especially documents. I don't want to say anything more.

...

...

Her Ladyship: As you mentioned Mr Curtis Martin who, quite obviously, I wondered from the start how I do not have anything and I --- anyway. I can't give evidence. ...He is not there on the witness statement. I can't part-hear this matter. Let me repeat. I can't part-hear this matter. There is no witness statement from him. If you need him to fill your case, Ms Mayhew, you going to have

find a way to negotiate this case and finish it because I can't, unless Mr Robinson is agreeing that you just can put in Mr Curtis Martin at midnight tonight, or whenever it is, but on what I have here, on the three day case, with no witness statement from him, no witness summons.

[43] From this portion of the transcript, it is too plain that the defendants took their stand on the documentation. In examining the totality of the extracts the issue of the documentation was there before the trial (hence no agreement on them) and before the first witness was called.

[44] From the very last extract, it is clear that her Ladyship had formed the view that Mr Curtis Martin was the appropriate witness to deal with the documentation from the bank's perspective. However, as her Ladyship also observed, there was no witness statement from him.

[45] It appears that Mr Ferguson took the whole morning on the Tuesday or a substantial part of it. There is material to suggest that a second witness was called before the lunch break on the Tuesday.

[46] What is beyond doubt is that after lunch on Tuesday, December 10, 2013, the bank eventually abandoned its efforts to try to get the documents into evidence and told the trial judge that it was discontinuing the case.

[47] It is at this point that the affidavits of Mrs Mayhew and Mr Rose become important. They tell what the bank's though process was. Mrs Mayhew says this at paragraphs 13- 19:

13. On the second day of the trial, I sought permission to call an additional witness to tender the original loan transaction documents into evidence because the defendant's counsel objection to the admission of those documents into evidence.

14. Justice Mangatal refused to grant permission and as a result, during the lunch break I advised the bank to discontinue the claim and that the matter be started de novo. I feared that without all the

loan documents being tendered into evidence, I could not prove the case as claimed in the claim form. I was therefore concerned about proceeding in those circumstances and the defendants making a successful no case submission.

15. I therefore thought it best to discontinue the claim at that point so as to avoid the risk of the claim being dismissed. I was deliberately trying to avoid a situation where the defendants would be in a position to plead res judicata at a later date if the bank brought back the claim.

16. Having received the approval from the bank to discontinue the claim, I informed the defendants' counsel, Mr Robinson and Stephanie Gordon that the bank would be discontinuing the claim as we could not prove the case.

17. When I said that the bank could not prove the case it was because we were not then able to call the further witness to tender the documents into evidence. I did not represent or suggest that the bank could never prove the case.

18. Having spoken to Mr Robinson, we agreed to discontinue the claim and the ancillary claim, with costs being awarded to the defendants, to be agreed or taxed.

19. When the matter resumed after the lunch break, I indicated to Justice Mangatal that we had agreed to discontinue the claim on the terms indicated above. A consent order was therefore made in those terms.

[48] The additional witness referred to by Mrs Mayhew could not possibly have been those from whom witness statements were secured. The witness would have to be a completely new witness the bank wanted to introduce at that late stage. This means that the bank did not intend to call this witness before. The inability to call the correct witness sealed the bank's fate.

[49] Mr Deryck Rose swore an affidavit on behalf of the bank. He says that on December 6, 2013, the parties agreed to continue mediation in January 2014 and therefore the matter would be adjourned come December 9, 2013. He attended

the mediation sessions on November 28, 2013 and December 6, 2013. According to Mr Rose, when the matter came up on the Monday, the bank's attorney applied for an adjournment and it was refused. The trial commenced. He says that the application was made because two of the bank's witnesses were not available on that day. On the second day, he says, counsel advised the bank to discontinue the claim and that advice was taken. He states that Mrs Mayhew '*advised me that it would be best to discontinue this claim rather than risk proceeding without all our witnesses.*' The question is which witnesses. It could not have been the four witnesses identified by the bank from whom witness statements were taken since the record and affidavits do not say that any of these four witnesses were available. The case was not discontinued because these witnesses could not be found or were unavailable. The problem was that the available witnesses could not prove the case in terms of getting the vital documents into evidence since the documents were not agreed.

[50] Mr Rose says that it was never the intention of the bank not to pursue recovery of the debt and in fact continued to take steps to do so after the claim was discontinued.

[51] The reason advanced by Mr Rose for the application for the adjournment is important. He is saying that the application was made because two witnesses needed by the bank were unavailable that day. However this was on the Monday and it is now known that the case was stood down till midday. Mr Ferguson arrived and took the witness stand. The case went over to the Tuesday. The point is that even if it is correct to say that the judge refused the adjournment on the Monday, the fact that the case went over to the Tuesday was a de facto adjournment to the following day – the very thing that the bank wanted.

[52] Based on the affidavit evidence, it is not being said by the bank that the witnesses missing on the Monday were still missing on the Tuesday.

[53] Mr Fred Smith swore that on the second day of the trial, the bank's lawyers approached his lawyer with a proposal to drop the case. He also says that the bank's lawyer sought the judge's permission to withdraw the case as she was unable to prove the case. The judge is no longer in this jurisdiction. According to Mr Smith, his lawyer submitted a draft formal order which he says was rejected by the Registrar because it had the words 'on trial' in it. He says that the Registrar insisted on those words being deleted and the end result according to him is that the formal order does not accurately reflect what the judge actually ordered.

[54] The court has seen the minute of order signed by the judge and it does indeed say that the claimant applied to have the matter discontinued. Mr Smith also said that his attorneys applied for the transcript. Some were produced but some portions are outstanding even now.

[55] Mrs Mayhew denies giving the impression as alleged by the defendants that the bank would not refile its claim. Counsel added that even after the claim was discontinued she and the defendants' representatives discussed continuing the mediation in January 2014.

[56] In response to counsel's affidavit, Mr Smith, while saying that he is reluctant to challenge counsel's version of events in the absence of the official transcript, he has no recollection of the trial judge refusing to allow the bank to call any witness.

[57] This detail became necessary because this court has to look at things in the round. It does not appear to this court than an explicit application was made for an adjournment on either day. This court's conclusion, based on the transcripts and the affidavits, is that, on the Monday morning, a discussion was going on between the bench and bar about the best way to deal with the matter having regard to the developments on the previous Friday leading up to the Monday. Eventually, it was decided that the trial would commence. The bank was given

time to get the witness who was available. When the witness arrived, the trial judge explicitly asked if the bank had taken into account all matter including who was working where and who was available. In the context of the non-agreement of documents her Ladyship could only have been referring to the difficulties of proof now that the documents were not agreed and the bank was being put to proof of them the usual common law way. The bank's counsel indicated that she had advised the bank on this.

[58] The trial judge even went as far as warning that lawyers are not magicians and they can only prove what can be proved from the material available. The trial judge addressed Mr Robinson about the possibility that at the end of the trial the court may find that the defendants are liable for a huge sum. If there was an application for an adjournment (which this court does not see in the transcript) then it was not pursued with any real vigour.

[59] By the time Mr Ferguson was called the trial judge had called to the attention of both parties the attendant risks of a judicial determination in the context of the case.

Whether res judicata applies

[60] McDonald Bishop J (now Justice of Appeal) in **Fletcher & Company Ltd v Billy Craig Investments Limited and another** [2012] JMSC Civ 128 gave an excellent outline of the law on res judicata at **[26]** – **[78]** which this court gratefully adopts. Her Ladyship noted that res judicata is considered under two main headings: cause of action estoppel and issue estoppel. Under either head, the first requirement is that there is a judicial decision by a competent court or tribunal. In this case, there has not been any judicial decision. The bank discontinued the case before the judge could make a decision. This means that res judicata does not arise in this case. Thus the claim is not estopped by virtue of the res judicata rule.

Whether there was a settlement agreement

[61] The defendants have sought to say that there was an agreement between themselves and the bank that is supposed to have resulted in the claim being discontinued. The bank has denied that there was any agreement.

[62] Mr Smith's affidavit evidence on this score is too vague. He speaks of exchange of proposals and counter proposals without saying what they were. He speaks of the bank's implied promise not to sue again. He uses language such as 'I was under the clear impression at the time that the agreement to withdraw the defendants' counterclaim in return for the offer by the claimant to withdraw its claim and pay the defendants' costs was binding on both parties and had put an end to the original cause of action by way of agreed settlement.'

[63] The minute of order has no words suggesting an agreement between the parties. The formal order makes no mention of the counter claim of the defendants. It simply speaks to the claim and ancillary claim. If Mr Smith is correct that there was an agreement to withdraw the counter claim it does seem odd that such an important feature of the agreement is not reflected in the formal order.

[64] This court concludes that there was no agreement between the parties. All that happened is that Mrs Mayhew informed the defendants' counsel that the bank would be discontinuing the claim. The final issue now is whether this second claim is an abuse of process.

Whether the second claim is an abuse of process

[65] In a series of decisions beginning in 2007 the Court of Appeal of Jamaica has made it abundantly clear that the House of Lords' decision in **Johnson v Gore Wood & Co (a firm)** [2002] AC 1 is now the authoritative decision to be used in Jamaica when the issue of abuse of process is being considered (**S & T Distributors Limited v CIBC Jamaica Ltd** SCCA No 112/2004 (unreported) (delivered July 31, 2007); **Hon Gordon Stewart OJ v Independent Radio**

Company Ltd [2012] JMCA Civ 2; **Lilieth Turnquest v Henlin Gibson Henlin (A firm)** [2014] JMCA Civ 38; **National Commercial Bank v Justin O'Gilvie** [2015] JMCA Civ 45).

[66] In the **O'Gilvie** case, Brooks JA, who delivered the leading judgment, rejected the submission that **Gore Wood** was a special-facts type of case. His Lordship was emphatically of the view that **Gore Wood** embodied the correct approach to these types of cases.

[67] The approach requires a careful examination of all the facts and circumstances of the case before the conclusion that there is an abuse of process is arrived at. One of the main reasons for this is that a conclusion that the second claim is an abuse of process may lead to the claim being struck out or stayed. It would be incongruous for a court to conclude that there is an abuse of process in the second claim and then permit it to proceed thereby encouraging the abuse. Lord Bingham and Lord Millett in **Gore Wood** made it very clear that a court must be very careful before concluding that there is an abuse of process because the reason for the existence of the courts is to resolve disputes between the parties that they are not able to resolve themselves.

[68] To stop a matter from proceeding is always a strong thing. In Jamaica, litigants have a constitutionally guaranteed right of access to the court. For all these reasons great restraint is required when considering such an application. On the other hand, if the court comes to the conclusion that there is abuse of its process then it should not be diffident about so finding and taking the appropriate action.

[69] One of the points that emerged from **Gore Wood** is that the bringing of a second claim in and of itself cannot lead to the automatic conclusion that the second claim must necessarily be an abuse of process. The very facts of **Gore Wood** made that point. In that case the claimant, Mr Johnson, a businessman, conducted his affairs through a number of companies including W Ltd. On behalf of W Ltd, Mr Johnson instructed a firm of solicitors to act for the company in

relation to the purchase of a parcel of land. The solicitors did not act to the satisfaction of W Ltd and a claim in professional negligence was brought against them. Mr Johnson also had a personal action against the same firm of solicitors arising out of the same facts. The company's claim was settled but the settlement did not include Mr Johnson's personal claim. Interestingly, the evidence showed that it was the lawyers for the solicitors who suggested that the personal claim could be dealt with afterwards. When the personal claim was brought it was argued that it was an abuse of process. The House rejected the submission.

[70] On the point of caution before ruling that there is an abuse of process Lord Bingham observed at page 22:

> *The rule of law depends upon the existence and availability of courts and tribunals to which citizens may resort for the determination of differences between them which they cannot otherwise resolve. Litigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court*

[71] Lord Bingham accepted the proposition that there can be an abuse of process even though res judicata does not apply. Mr Robinson's submission on this point is supported by strong dicta from Lord Bingham. His Lordship at pp 29 to 30 cited these passages from Auld LJ in **Bradford and Bingley Building Society v Seddon** [1999] 1 WLR 1482, 1490 – 1491 and 1482-1493:

> *In the course of a judgment with which Nourse and Ward LJJ agreed, Auld LJ said, at pp 1490-1491:*
>
> *"In my judgment, it is important to distinguish clearly between res judicata and abuse of process not qualifying as res judicata, a distinction delayed by the blurring of the two in the courts' subsequent application of the above dictum [of Sir James Wigram V-C in Henderson v Henderson 3 Hare 100] . The former, in its cause of action estoppel form, is an absolute bar to relitigation, and in its issue estoppel form also, save in 'special cases' or 'special circumstances': see Thoday v Thoday [1964] P 181, 197-198, per*

Diplock LJ, and Arnold v National Westminster Bank plc [1991] 2 AC 93. The latter, which may arise where there is no cause of action or issue estoppel, is not subject to the same test, the task of the court being to draw the balance between the competing claims of one party to put his case before the court and of the other not to be unjustly hounded given the earlier history of the matter ...

"Thus, abuse of process may arise where there has been no earlier decision capable of amounting to res judicata (either or both because the parties or the issues are different) for example, where liability between new parties and/or determination of new issues should have been resolved in the earlier proceedings. It may also arise where there is such an inconsistency between the two that it would be unjust to permit the later one to continue."

Auld LJ continued, at pp 1492-1493:

"In my judgment mere 're'-litigation, in circumstances not giving rise to cause of action or issue estoppel, does not necessarily give rise to abuse of process. Equally, the maintenance of a second claim which could have been part of an earlier one, or which conflicts with an earlier one, should not, per se, be regarded as an abuse of process. Rules of such rigidity would be to deny its very concept and purpose. As Kerr LJ and Sir David Cairns emphasised in Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd [1982] 2 Lloyd's Rep 132, 137, 138-139 respectively, the courts should not attempt to define or categorise fully what may amount to an abuse of process; see also per Stuart-Smith LJ in Ashmore v British Coal Corpn [1992] 2 QB 338, 352. Sir Thomas Bingham MR underlined this in Barrow v Bankside Agency Ltd [1996] 1 WLR 257, stating, at p 263b, that the doctrine should not be 'circumscribed by unnecessarily restrictive rules' since its purpose was the prevention of abuse and it should not endanger the maintenance of genuine claims; see also per Saville LJ, at p 266d-e.

"Some additional element is required, such as a collateral attack on a previous decision (see e g Hunter v Chief Constable of the West Midlands Police [1982] AC 529; Bragg's case [1982] 2 Lloyd's Rep 132, per Kerr LJ and Sir David Cairns, at pp 137 and 139

respectively, and Ashmore's case [1990] 2 QB 338), some dishonesty (see e g per Stephenson LJ in Bragg's case, at p 139, and Potter LJ in Morris v Wentworth-Stanley [1999] 2 WLR 470, 480 and 481; or successive actions amounting to unjust harassment (see e g Manson v Vooght [1999] BPIR 376 ...))."

[72] Lord Bingham continued at pp 30 – 31:

It may very well be, as has been convincingly argued (Watt, "The Danger and Deceit of the Rule in Henderson v Henderson: A new approach to successive civil actions arising from the same factual matter" (2000) 19 CLJ 287), that what is now taken to be the rule in Henderson v Henderson has diverged from the ruling which Wigram V-C made, which was addressed to res judicata. But Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the

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

[73] Here, his Lordship is saying that despite the differences between issue estoppel and cause of action estoppel on the one hand and abuse of process on the other, they have much in common and the underlying public interest is the same, namely, finality to litigation and a party should not be 'twice vexed in the same matter.' Lord Bingham, in the passage just cited, corrected the view of Auld LJ that before abuse of process can be established outside of res judicata or issue estoppel there needs to be an additional element such as collateral attack on a previous judgment. On the other hand, his Lordship was also rejecting the idea that simply because something could have been raised in a previous claim then to raise it in a second claim automatically meant an abuse of process. Lord Bingham also indicated that the correct analytical question to ask is whether the conduct complained of in all the circumstances is an abuse of process rather than whether the conduct is an abuse and then ask whether it is excused or justified by special circumstances.

[74] In the **Gore Wood** case counsel for Mr Johnson submitted that abuse of process could not apply because the company's claim ended in a compromise and not a judgment. Lord Bingham held at pp 32 - 33:

. This argument also was rightly rejected. An important purpose of the rule is to protect a defendant against the harassment necessarily involved in repeated actions concerning the same subject matter. A second action is not the less harassing because the defendant has been driven or thought it prudent to settle the first; often, indeed, that outcome would make a second action the more harassing.

[75] The fact that the previous case did not result in a formal adjudication did not mean that abuse of process cannot arise. Lord Bingham is saying that the previous matter does not have to culminate in a judgment for or against a party.

[76] Lord Millett, the only other judge who dealt with abuse of process in great detail, added this consideration, at pp 58 – 59:

In describing the proceedings brought by Mr Johnson as an abuse of the process of the court, the Court of Appeal was seeking to apply the well known principle which Sir James Wigram V-C formulated in Henderson v Henderson (1843) 3 Hare 100, 114-115:

"... 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." (My emphasis.)

As the passages which I have emphasised indicate, Sir James Wigram V-C did not consider that he was laying down a new principle, but rather that he was explaining the true extent of the

existing plea of res judicata. Thus he was careful to limit what he was saying to cases which had proceeded to judgment, and not, as in the present case, to an out-of-court settlement. Later decisions have doubted the correctness of treating the principle as an application of the doctrine of res judicata, while describing it as an extension of the doctrine or analogous to it. In Barrow v Bankside Members Agency Ltd [1996] 1 WLR 257, Sir Thomas Bingham MR explained that it is not based on the doctrine in a narrow sense, nor on the strict doctrines of issue or cause of action estoppel. As May LJ observed in Manson v Vooght [1999] BPIR 376, 387, it is not concerned with cases where a court has decided the matter, but rather cases where the court has not decided the matter. But these various defences are all designed to serve the same purpose: to bring finality to litigation and avoid the oppression of subjecting a defendant unnecessarily to successive actions. While the exact relationship between the principle expounded by Sir James Wigram V-C and the defences of res judicata and cause of action and issue estoppel may be obscure, I am inclined to regard it as primarily an ancillary and salutary principle necessary to protect the integrity of those defences and prevent them from being deliberately or inadvertently circumvented.

In one respect, however, the principle goes further than the strict doctrine of res judicata or the formulation adopted by Sir James Wigram V-C, for I agree that it is capable of applying even where the first action concluded in a settlement. Here it is necessary to protect the integrity of the settlement and to prevent the defendant from being misled into believing that he was achieving a complete settlement of the matter in dispute when an unsuspected part remained outstanding.

However this may be, the difference to which I have drawn attention is of critical importance. 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.*

[77] His Lordship accepted that the principle expounded by Wigram VC in **Henderson v Henderson** (1843) 3 Hare 100, 114 – 115, was undoubtedly applicable to cases that had proceeded to judgment. Lord Millett had no doubt that abuse of process can apply to cases that had not gone to judgment. Abuse of process can apply in instances where the first case had ended with settlement. Also, Lord Millett was emphasising that barring a claimant from bringing the second claim after the first claim had been decided is quite different from not having the matter adjudicated on at all and hence the need for caution before barring a litigant from bringing a claim that had not gone all the way to judgment.

Analysis of the present case

[78] The matter had been set down for trial for three days commencing Monday, December 9, 2013. On Friday, December 6, 2013, the defendants led the bank to believe that they would not be pressing for the trial to commence and thus the bank instructed its witnesses not to attend. However, by the next day the defendants made it clear that the trial must proceed. One of Mr Robinson's concerns was that on the Friday, nothing was said about capping interest or that interest would no longer accrue while mediation was being pursued.

[79] The parties had the obligation to be ready for trial. There was no guarantee that the trial judge would have agreed to any postponement. Any understanding to adjourn the matter must be subject to the approval of the court particularly in a case management system where the court has an integral role in the management of cases. As it turned out the trial judge was not enamoured with the idea of an adjournment to January of 2014 and neither was her Ladyship

excited about the idea of a part heard trial. Her Ladyship was concerned that the court's time allocated for the case should be properly utilised. What happened here was that her Ladyship was giving effect to the principle of trial date certainty, namely, when a matter is set for trial it should commence on the date set for trial and end in the time allotted barring very exceptional circumstances.

[80] The defendants were ready for trial and had their witness. The bank eventually got a witness and the trial commenced on Monday, December 9.

[81] It was known before the trial that the defendants had not agreed any of the documents. This meant that leading up to the trial and in the days immediately preceding the trial, the bank should have been prepared to prove the matter the old fashioned common law way in the absence of agreement about the documents to be used at trial. There were also the provisions of the Evidence Act which might have been used to get the documents into evidence. Whether the bank would have met the statutory criterion would be a matter for the trial court judge.

[82] A perusal of the record for the morning of December 9 does not reveal any explicit application for an adjournment on the basis that the bank could not present its case at all. The bank wanted time to get witnesses. The trial judge gave the time. The matter was stood down to midday and the witness arrived. It turned out that the witness was not the correct one through whom the vital documents could be tendered.

[83] The case continued into the second day. There is nothing in the record to show that the witnesses who were not available on the Monday were never ever available for the period the matter was set down for trial. In fact, Mrs Mayhew wanted to begin on the Tuesday which itself would suggest that the witnesses who were not available for the Monday would have been available for the Tuesday. Counsel had said that she was not seeking an adjournment to January 2014. From this court's perspective, the practical effect of the trial going to

Tuesday was that the bank although beginning its case on the Monday in fact got until the Tuesday to present the witnesses who were unavailable on the Monday. The real problem was that the bank could not prove the case through the witnesses it had selected to prove the case at trial (those present at trial and those absent) because of the non-agreement of documents. It was not a lack of opportunity to prove the case but rather it was one in which the case could not be proved because it appears that none of the bank's witnesses would ever be able to provide the foundation for admissibility of the crucial documents.

[84] Mr Hylton QC submitted that the bank's failure to call witnesses and prove its case was caused by the defendants conduct and not from any default of the bank. The court does not agree. The objective fact is that none of the bank's known witnesses, that is to say those who gave witness statements, would have been able to lay the evidential foundation for admitting many of the banks crucial documents. In other words, even if the defendants had not given the indication on Friday December 6, 2013 that the case may not be going on the bank was always going to be struggling to prove the case with the slate of witnesses it had. The conduct of the defendants did not affect the bank's choice of witnesses because those witnesses were chosen by the bank well before Friday, December 6.

[85] The very fact that the bank decided to discontinue the case after calling one or two witnesses and not calling or attempting to call the other witnesses from whom witness statements were secured proves the point. The reason given by Mrs Mayhew for discontinuing the trial was not lack of identifiable witnesses but the inability to prove the case. This means that based on the witnesses already called the case was not proved and as far as the witnesses left were concerned they could not assist; this was the assessment made by counsel. It was this reality that led to the discontinuance.

[86] Realistically, the bank was faced with three options, none of which was palatable: (a) continue with the trial and take the risk of judgment being entered for the

defendants; (b) continue with the trial and take the risk of a successful no case submission and (c) discontinue the trial, issue a second claim and take one's chances on an abuse of process point being raised. The bank chose the third option.

[87] The bank explicitly said that, via the affidavit of Mrs Mayhew, its reason for terminating the trial was to avoid the adverse decision of a judgment against it. In other words it was an explicit strategy to avoid the application of the strict and technical doctrine of res judicata. What this means is that the bank on the second day fully appreciated that it could not prove the case with the witnesses it had and then sought to extricate itself from that problem.

[88] Mr Hylton pointed out to the court that the defence in the present claim is different from the defence in the previous claim. That may well be true but this case is not about whether the defendants have no defence but about whether it is an abuse of process for the bank to commence a new second claim after discontinuing the first one after it has started because of difficulties of proof.

[89] Mr Hylton submitted that the comments of the judge may have influenced the decision of the bank. Perhaps they did but the comments of the judge as this court understands them is that her Ladyship was pointing out that the bank's case was in trouble and perhaps some other way of dealing with the matter ought to be pursued. Any litigant that cannot get his evidence before the court is always going to be in trouble.

[90] By midday on the Tuesday, the bank was in no doubt that the trial judge was not impressed with the proof presented up to that time. The judge even named who should have been the correct witness to prove the documents. The problem was that no witness statement was taken from him. In other words, the bank never contemplated using him at all. This court has seen the witness statements and from this court's previous experience there was no way these witnesses were going to be able to get many documents into evidence or even the crucial

documents into evidence. Clearly, Mrs Mayhew realised this. At this point the bank's options were to (a) get Mr Curtis Martin or (b) seek to rely on section 31F of the Evidence Act, if it could.

[91] Mr Hylton submitted that the case law shows that the important question in abuse of process cases is what was the intention of the parties at the time of the discontinuance? If that is so (and this court is not agreeing with this statement of principle), then what Mrs Mayhew has said in her affidavit shows what her intention and the bank's were. Reference has already been made to her affidavit and that of Mr Rose. The intention was to avoid an adverse decision.

[92] Finally, on the question of whether discontinuance can amount to an abuse of process in some circumstances, that question has been asked and answered in the affirmative in **Gilham v Browning** [1998] 1 WLR 682 by the Court of Appeal of England and Wales and by the Supreme Court of Jamaica in **Coffee Industry Board v FSC and others** Claim no 2004HCV01657 (delivered on October 16, 2004) (Sinclair-Haynes J (Ag) (now Justice of Appeal).

Disposition

[93] The application is granted. The claim is dismissed. Costs to the defendants to be agreed if not taxed.