EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2014/0016

BETWEEN:

[1] CLARVIS JOSEPH
[2] ESWORTH MARTIN
[3] PUBLIC UTITLTIES AUTHORITY

Applicants

and

ANTIGUA POWER COMPANY LIMITED

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mr. Paul Webster, QC	Justice of Appeal [Ag.]

Appearances:

Dr. David Dorsett, with him, Mr. Jarid Hewlett for the Appellant
Mr. Dane Hamilton, QC for the Respondent

2014: July 7.

Leave to appeal order refusing to stay claim commenced in 2013 by respondents – Prior action commenced by respondent in 2007 – Applicants sought stay on basis that 2013 claim based on same facts and claimed same damages already claimed in 2007 proceedings – Re-litigation of issues already finally litigated before Privy Council – Res judicata – Abuse of process

The applicants applied for leave to appeal an order of the learned judge by which he refused to stay a claim commenced by the respondent in 2013 ("the 2013 claim") against the applicants and six other parties ("the defendants"). The 2013 claim followed an earlier claim made by the respondent in 2007 ("the 2007 claim"), which had been fought through the courts all the way to the Privy Council. In that matter, the Privy Council remitted an assessment of compensation for breach of contract to the High Court as well as an issue on accepted repudiation, and the application for assessment is pending before the High Court. In the 2013 claim, the respondent sought damages based on alleged commissions by the defendants of various economic torts of conspiracy to breach a contract and interference with the respondent's contract with the third applicant. The applicants applied to stay the 2013 claim on the basis that the respondent, rather than pursue the

assessment currently pending before the High Court or the determination of the question of accepted repudiation, filed the 2013 claim which was based on the very same facts and claimed the damages that had been already claimed. The applicants contended that by filing the 2013 claim, the respondent was seeking to re-litigate those issues which had already been finally litigated before the Privy Council and in respect of which, the assessment of damages would have brought the matter to conclusion.

The learned judge refused the application for a stay on the basis that the issues raised by the applicant in the stay application would have formed the basis of an application to strike out for res judicata or an abuse of process. He took the view that the application was not one to strike out the 2013 claim because the applicants appreciated that no grounds existed on the facts of the case for striking out the claim for res judicata or abuse of process, and if the applicants were not persuaded that the matters being litigated indeed formed the subject of the earlier litigation, then no grounds existed for staying the claim. The applicants appealed the learned judge's decision.

Held: refusing the applicants' application for leave to appeal the learned judge's order and accordingly refusing the application for a stay, that:

1. The applicants did not assert in their stay application that the alternative claims which the respondent now seeks to advance in the 2013 proceedings should have been brought and ventilated in the 2007 proceedings, and that it would be an abuse of process to allow the respondent to pursue the alternative claims in the 2013 proceedings. Rather, the applicants merely invited the learned judge to consider whether the subject matter of the 2013 claim had been the subject matter of the 2007 claim. Had the application for a stay been advanced on the basis that the alternative claims should have been brought as part of the 2007 proceedings, then it would have been necessary to place considerable material before the judge so that a careful analysis of the claims and all the facts of the case could be carried out. This however, was not done. It is 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 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. The learned judge did not err in refusing to stay the 2013 claim, and an appeal of the judge's order would therefore be hopeless.

   Henderson v Henderson (1843) 3 Hare 100 applied.

ORAL JUDGMENT

[1] PEREIRA, CJ: This is the decision of the court on which all members of the court are agreed.

[2] The applicants seek leave to appeal against the refusal of a stay of the claim no. 784 of 2013, ("the 2013 claim") commenced by the respondent ("APC") against the applicants and six other defendants (some of whom are not within the jurisdiction), on 4th December 2013.

Background

[3] The 2013 claim seeks damages against the various defendants based on alleged commissions by them of various economic torts of conspiracy to breach a contract, and interference with the respondent's contract with the Antigua Public Utilities Authority ("APUA"). This claim follows a claim made in 2007 ("the 2007 claim"), couched as a judicial review claim, against the Attorney General, APUA, Mr. Baldwin Spencer (as Minister of APUA) and the Commissioner of Police. The pith and substance of the 2007 claim was whether or not APC was entitled to the benefit of a Joint Venture Agreement ("JVA") between it and APUA. APC also sought damages in the 2007 claim. The 2007 claim was fought through the courts to the Privy Council. The Privy Council found that the Cabinet of Antigua and Barbuda had approved the JVA and remitted the assessment of compensation for breach of contract to the High Court as well as the issue as to whether the JVA had been determined by accepted repudiation.[1] An application for assessment is pending before the High Court.

[4] On 17th March 2014 the applicants made application for a stay of the 2013 claim. The application appears to have been grounded mainly on the basis that:

(a) APC had failed or refused to pursue the assessment or the determination of the question of accepted repudiation. Rather, says the applicants, APC

[1] See paras. 49 and 50 of the Privy Council judgment (Antigua Power Company Limited v The Attorney General of Antigua and Barbuda and Others [2013] UKPC 23).

filed a 'fresh action based on the very same facts and claiming the damages that had been already claimed, and in respect of which it has failed to pursue';[2]

(b) APC had added several defendants to the 2013 claim, in respect of 'the identical facts and issues, which had been extensively canvassed in the prior action, and in respect of which it could, and should have included the said Defendants'. And that the respondent/claimant is therefore 'raising in this Claim the same, or similar issues as it raised in a claim which is now in train, and in respect of the Board's decision has not been complied with.'[3]

(c) APC, (notwithstanding the Privy Council's criticism of the manner in which the 2007 claim was framed), 'by filing this fresh Claim, seeks to re-litigate those issues which have been finally litigated before the Board, and in respect of which, assessment of damages would bring this matter to conclusion'[4]

(d) The 2013 claim lacked specificity and the third defendant had filed a "Request for further information" in respect of the allegations made in the 2013 claim and that in the event the stay is refused the applicants herein will also request further information because of lack of specificity in respect of the allegations made against the applicants.[5]

[5] The affidavit in support of the application sworn by Mr. Martin, the General Manager of APUA, recited much of the material set out in the grounds and stated in effect that the facts included in APUA's Statement of Claim and which it intends to prove, are the very same facts included in the affidavits of witnesses who gave evidence on the trial of the 2007 claim, and that the 2013 claim – 'is a regurgitating of the facts and issues exhaustively dealt with before the High Court, the [Court of

[2] See para. 6 of the grounds of the stay application.
[3] See para. 7 of the grounds of the stay application.
[4] See para. 8 of the grounds of the stay application.
[5] See para. 9 of the grounds of the stay application.

Appeal] and the [Privy Council]', and that APC 'has merely added a number of persons as defendants, who could and ought to have been included in [the 2007 claim] and were not'[6]. At paragraph 11 Mr. Martin asserts that the 2013 claim discloses no cause of action as against APUA as APUA cannot conspire against itself nor are there pleadings which show that APUA conspired to cause loss to APC by unlawful means. At paragraph 12 Mr. Martin asserts that once the damages as ordered to be assessed are assessed in the 2007 claim, any further damages under the 2013 claim would amount to seeking double compensation in respect of the same breach of contract and would amount to an abuse of process. At paragraph 14 Mr. Martin again asserts that the 2013 claim 'seeks to re-litigate those issues which have been thoroughly litigated all the way to the Privy Council, and in respect of which assessment of damages would bring this matter to an end'. Finally, at paragraph 16 Mr. Martin says that APC should not be allowed to proceed on the 2013 claim until it has taken the necessary steps to comply with the order of the Board by: (a) having its damages assessed; and (b) obtaining a decision on the question of APUA's repudiatory breach and APC's acceptance of it.

[6] The application for a stay came on for hearing before the learned judge on 1st May 2014. He refused the application for a stay of the 2013 claim. No transcript of the proceedings before the judge is available. The learned judge, on 28th May 2014, gave short written reasons in which he stated, in effect, that:

(i.) The application was based on the suggestion that the issues were the subject of earlier proceedings, and considered that this would have formed the basis of an application to strike out for res judicata or an abuse of process.

(ii.) The gravamen of the applicant's complaint was that APC was raising in the 2013 claim the same or similar issues raised in the earlier proceedings;

[6] See para. 10 of the affidavit of Esworth Martin dated 17th March 2014, in support of the stay application.

(iii.) The application was not one to strike out the claim. He then stated that 'This is because they appreciated that no grounds for striking out the present claim for res judicata or abuse of process had been made out on the facts'. He then went on to say this: 'It follows that if the applicants are not persuaded that the matters presently being litigated do indeed form the subject of the earlier litigation, no grounds exist for staying the claim. Certainly no other grounds for a stay were canvassed.'

The learned judge also made mention of the fact that the majority of the other defendants had not joined in the application for a stay.

Permission to appeal

[7] The grounds on which leave to appeal is sought, as set out in the application filed on 16th May 2014, are that the learned judge erred in refusing the grant of a stay:

(1) "in the face of no denial on the part of the Respondent that the instant action was one 'based on the very same facts and claiming the damages that had been already claimed, and in respect of which it has failed to pursue'";

(2) "in the face of a prior application of a party to the action seeking further information which application the learned judge failed and/or neglected to determine"; and

(3) in "making orders that certain Defendants file their defences by a given date when there was no evidence that all of the Defendants had been served with the proceedings."

[8] Admittedly, at the time of submitting the aforementioned grounds, the learned judge's written reasons were not then available. When the reasons became available these grounds were neither changed nor augmented by the applicants. The applicants' written submissions filed at the time of the application for leave very helpfully set out the subheads of their arguments. They asserted and relied in support of ground (1) that the 2013 claim was based on the very same facts as the

2007 claim, and the Privy Council judgment and in essence the fact that those proceedings are still extant before the High Court. They argued therefore that the 2007 claim and the 2013 claim were concurrent claims and thus a stay ought to be granted to avoid duplication of proceedings. The arguments advanced in respect of grounds 2 and 3 of the leave application will not be addressed in detail as these two remaining grounds were not advanced on the hearing of the application for leave. Ground (1) or a variation of ground one which will be considered in further detail became the focus of the application for leave.

The test for the grant of leave

[9] The test for the grant of leave to appeal is well established. The applicant must demonstrate that he has a realistic prospect of succeeding on the appeal.[7]

Discussion

[10] The basis of the applicant's application for a stay has been set out so as to show what was plainly before the learned judge for his consideration on 1st May 2014. In our view it is pellucid that the learned judge had been invited to consider whether the subject matter of the 2013 claim had been the subject matter on the 2007 claim. That could only be the basis on which the applicants were asserting that the APC was seeking to re-litigate the very same issues that the courts had thoroughly litigated all the way up to the Privy Council. It is therefore no surprise that the learned judge was of the view that such an assertion ought properly to form the basis of an application to strike out for res judicata and abuse of process in seeking to re-litigate the same issues which the applicants say had been so thoroughly litigated through all the courts in the 2007 claim which is still not concluded. He made plain that no other grounds for a stay were canvassed.

[11] It is to be noted that nowhere in the application before the learned judge was it being asserted, whether by way of a stated ground, or in the affidavit in support, that the alternative claims which APC now seeks to advance in the 2013 claim were claims and issues which could and should have been brought and ventilated in the

[7] See: Smith v Cosworth Casting Processes Ltd. Practice Note [1997] 1 WLR 1538.

2007 claim and that it would thus be an abuse of process to allow APC to pursue the alternative claims in the 2013 claim. This is the principle emanating from the seminal case of Henderson v Henderson[8]. The reliance on the Henderson principle finds its way into the discussion, not before the learned judge, but before this court in supplemental submissions filed on 16th June 2014. At paragraph 7 of those supplemental submissions appear a skillfully crafted detour from the manner in which the application was pitched before the learned judge. The applicants state there (and it is reasonable to conclude, based on the prior submissions and grounds advanced, for the first time), that 'The Applicants had filed an application seeking a stay of proceedings on the ground that the 2013 action brought by [the] respondent constituted an abuse of the process of the court, that is, that the 2013 action offended the rule in Henderson v Henderson.'

[12] It cannot be doubted that where an application is advanced on this basis, considerable material must of necessity be placed before the judge so that a careful analysis of the claims and all the facts of the case are taken into account. That is surely not the case here as the only material exhibited before the judge appears to be the Privy Council decision in the 2007 claim, apart from the very generalised statements made in the application and the affidavit evidence in support. The learned judge, in our view, would have been hard-put to carry out the kind of careful analysis required based on the paucity of material before him. This lack of a fulsome and detailed factual foundation reinforces our view that the application was not put before the judge in reliance on the Henderson principle. If it was, then the applicants would have been alive to the need to provide and put all the facts of the case and issues before the judge for his consideration as it related to the claims and the parties concerned. The necessary factual foundation which would have enabled the judge to address his mind to all the facts and issues relating to the claims and the parties was woefully lacking. The passage from the judgment of

[8] (1843) 3 Hare 100.

Lord Bingham of Cornhill in the case of Johnson v Gore Wood & Co (A Firm)[9] is quite apt:

> "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 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 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." (emphasis added)

[13] The remaining grounds 2 and 3 advanced in the application for leave, in our view, add nothing to the applicants' prospects. They merely highlight that other defendants have been taking steps in relation to the preparation of their defences. Further, the fact that certain defendants had not yet been served similarly does

[9] [2002] 2 AC 1 at 30-31.

nothing by way of bolstering a case for a stay. It is trite that a party is unable to take any steps in default against a party who has not been served with a claim. But that does not provide a good ground for the staying of a claim as against other parties who have been duly served with the claim. Further, the learned judge, in our view rightly, remarked that the majority of the other defendants had not made or joined in the application. If the application was indeed grounded in the Henderson principle then the position of the other defendants in the claim would have been a relevant factor in assessing all the relevant facts and circumstances of the claim, the parties and the issues as they affected and related to all the parties.

Conclusion

[14] Based on the foregoing, we are of the view that an appeal from the refusal of the learned judge to stay the 2013 claim would be hopeless. As such the applicants have not met the threshold test for the grant of leave. Permission to appeal is accordingly refused. It follows that the application for a stay is also refused.

Costs

[15] The applicants shall bear the costs of this application fixed in the sum of $2,500.00, as agreed.

Dame Janice M. Pereira, DBE
Chief Justice

Mario Michel
Justice of Appeal

Paul Webster, QC
Justice of Appeal [Ag.]