IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1999 - D-052

IN CHAMBERS

BETWEEN	DYOLL GROUP LTD.	1ST PLAINTIFF
A N D	DYOLL INSURANCE CO. LTD.	2ND PLAINTIFF
A N D	DYOLL CARIBBEAN FINANCIAL SERVICES LTD.	3RD PLAINTIFF
A N D	NEAL & MASSEY GROUP JA. LTD.	1ST DEFENDANT
A N D	HUGH HART	2ND DEFENDANT
A N D	CHARLES VENDRYES	3RD DEFENDANT
A N D	VINCENT CHIN	4TH DEFENDANT
A N D	PETER MILLINGEN	5TH DEFENDANT
A N D	HOWARD MITCHELL	6TH DEFENDANT
A N D	MICHAEL MATTHEWS	7TH DEFENDANT
A N D	THALIA LYN	8TH DEFENDANT
A N D	IAN MURRAY	9TH DEFENDANT

Dr. R. B. Manderson-Jones for the first and second Plaintiffs.
Mr. H. Robinson instructed by Messrs. Patterson, Phillipson and Graham for 5th and 9th Defendants.

Mr. Wong Ken instructed by Messrs. Wong Ken & Company for 6th and 8th Defendants.

Heard: 23.9.99,1.11.99 & 2.11.99

Marsh, J.

By Summons to strike out statement of claim and/or dismiss action or stay proceedings dated 17th day of June, 1999, Summons to strike out statement of claim and/or dismiss action or stay proceedings dated 22nd September, 1999 and undated Summons to strike out Statement of claim and/or dismiss action or stay proceedings filed August 4, 1999 respectively, the 5th and 9th Defendants, the 6th and 8th Defendants and the 4th Defendant sought the following orders:-

1. That pursuant to Section 238 or alternatively section 191 of the Judicature (Civil Procedure Code) Law of the inherent jurisdiction of the Court the Statement of claim herein or such portions of the statement of claim as this Honourable Court may deem appropriate be struck out and the action against the 4th, 5th, 6th 8th and 9th Defendants respectively be dismissed for disclosing no reasonable cause of action against them and/or on the grounds of being frivolous, vexatious and an abuse of the process of the Court and/or on the grounds that the Statement of Claim tends to prejudice, embarrass or delay the fair trial of the action.

2. Alternatively that the proceedings herein be stayed pending the submission by the Plaintiffs of the dispute which is the subject matter of these proceedings to arbitration in accordance with clause 8.00 of the Agreement to merge companies dated the 26th day of April, 1996.

Affidavit in support of these Summonses were filed by Ian Murray, Peter Milligen and Vincent Chen and Howard Mitchell. Appended to the affidavit of Ian Murray was a copy of the "Merger Agreement".

The affidavit of Ronald Brandis Manderson-Jones, against the summons and to strike out/or dismiss action or to stay proceedings was filed on September 17, 1999

Mr. Hector Robinson for the 5th and 9th Defendants referred the Court to Sections 191 and 238 of the Judicature (Civil Procedure Code) Law under which he made application. I will recite the provision of the two (2) sections - Section 191 reads thus:

"The Court or a Judge may at any stage of the proceedings order to be struck out or amended any matter in any endorsement or pleading which may be unnecessary or scandalous or which my tend to prejudice, embarrass or delay the fair trial of the action, and may in any such case, if they or he shall think fit, order the costs of the application to be paid as between solicitor and client".

S. 238 - "The Court or Judge may order any pleading to be struck out on the ground that it discloses no reasonable clause of action or answers; and in any such case, or in the case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a Judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just".

Section 5 of the Arbitration Act provided

"If any party to a submission, or any person claiming through or under him, commences any legal proceedings in the Court against any other party to the submission, or any other person claiming through or under him in respect of any other matter agreed or referred , any party to such legal proceedings, may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the Court to stay the proceedings, and the Court or Judge thereof is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was at the time when proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings".

The question, Mr. Robinson submits, is whether as a matter of Law, the facts as pleaded disclose a reasonable cause of action or whether the undisputed affidavit evidence demonstrates that those or anyone of the causes of action is frivolous, vexatious or may tend to embarrass or prejudice or delay fair trial of the action.
The Court has power to strike out any of the causes of action as pleaded.
He identifies 3 causes of action in the pleadings namely:-

1. Fraud and deceit
2. Neglicence and
3. Money paid on the Defendant's request.

Each ought to be struck out - Fraud and deceit and negligence - because each is frivolous and vexatious and tends to prejudice embarrass or delay the fair trial of the action.
Re money pay at Defendant's request, it should be struck out as disclosing no reasonable cause of action.

A detailed rewiew of the affidavit of Ian Murray was embarked on and clauses of the appended Merger Agreement were referred to to support his contention that the 3 identified causes of action should be struck out.
Further by written submission Mr. Robinson was at pains to indicate why the causes of action would fail both in Law and on the facts.
Mr. Wong Ken adopted Mr. Robinson's submission on behalf of the 6th and 8th Defendants.

Alternatively, were Court not minded to dismiss the action in its entirety then the Court should consider a stay of proceedings pending submission of the dispute to arbitration.
I will deal with this alternative request at this point.
Section 5 of the Abritration Act, under which this alternative application is made, requires inter alia that the Court be satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was at the time when the proceedings were commenced, and still remains ready and willing to do all things necessary to the proper conduct of the arbitration.

I am not satisfied that a sufficient reason has been advanced why the matter should be referred to arbitration in accordance with the submission.

There is no evidence in any of the affidavits of the applicants, that they were, at the commencement of the proceedings, and were still ready and willing to do all things necessary to the proper conduct of the arbitration. I am therefore unable to make an order staying the proceedings and referring the matter to arbitration.

"There was no departure from the principle that the order for striking out should only be made if it becomes plain and obvious that the claim or defence cannot succeed....."

Per Pearson L.J. Drummond-Jackson v B.M.A. - 1970 1 AER 1094 at Page 1101

> "....reasonable cause of action means a cause of action, with some chance of success, when (as required by R19 (2) only the allegations in the pleadings are considered. If when the allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out" - per Pearson L.J. (Supra).

In Nagle v. Fielder (1966) 1 AER at Page 697

Salmon L.J stated , "It is well settled that a statement of claim should not be struck out and the plaintiff driven from the Judgment seat unless the case is unarguable".

Moulton L.J in Dyson v. A.G. (1911) 1KB 410 at Page 419 said

"Differences of law, just as differences of fact are normally to be decided by trial after hearing in Court, and not to be refused a hearing in Court by an order of the Judge in Chambers".

In the instant case, did the Defendant's counsel have to go to extrinsic evidence to show that the pleadings is bad?. The answer must be in the affirmative as Mr. Robinson relied heavily upon the affidavit of Ian Murray with the appended Merger Agreement and also the affidavit of Peter Millingen.

It is also not a proper exercise to embark on any detailed and extended examination of the documents and facts of the case to ascertain whether the plaintiff has a cause of action.

"In the case of the inherent power of the Court to prevent abuse of its procedure by frivolous or vexatious proceedings or proceedings which were shown to be an abuse of the process of the Court, an affidavit could be filed to show why the action was objectionable"

per **Danckwerts** L.J. **Wenlock v. Moloney (1965) 1 WLR 965, at page 1243.**

The Court's inherent jurisdiction to dismiss an action "which is an abuse of its process is undoubted".

However, as **Danckwerts** L.J. said in **Wenlock v. Moloney (Supra)** "It's a jurisdiction which ought to be very sparingly applied".

Applying the principle extracted from the abovementioned authorities to the instant case, I am constrained to hold that the issue involved should not and cannot be terminated in proceedings in Chambers but should be properly ventilated in open Court where oral evidence may be presented and where necessary cross examination may ensue.

The application to strike out the Statement of Claim therefore fails.

Cost to be Plaintiffs' against the 4th, 5th, 6th, 8th and 9th Defendants to be taxed and if not, agreed.