UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA S. ANWAR, *et al.*, Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendant. This Document Relates To: All Actions	Master File No. 09-cv-118 (VM)

Affidavit of Mark A C Diel

Tab 13

[1965] 2 All ER 871

Wenlock v Moloney and Others

ADMINISTRATION OF JUSTICE: Courts: CIVIL PROCEDURE

COURT OF APPEAL
SELLERS, DANCKWERTS AND DIPLOCK LJJ
27, 28, 31 MAY 1965

Practice – Striking out – Pleading – Statement of claim – Affidavit evidence – RSC, Ord 18, r 19.

Practice – Striking out – Pleading – Statement of claim – Frivolous and vexatious – No cause of action – Inherent jurisdiction – Statement of claim disclosing cause of action – Application, on which many affidavits were filed, was really on the ground that action was unlikely to succeed – Not a plain and obvious case – Trial in chambers on affidavit evidence – Improper exercise of jurisdiction – RSC, Ord 18, r 19.

A plaintiff issued a writ, and delivered a statement of claim, alleging conspiracy which had caused him damage, against three defendants. His statement of claim was a long and wandering document which he prepared himself, but his writ and statement of claim disclosed a cause of action. After this had been remodelled and re-delivered the defendants delivered lengthy defences, admitting some allegations, denying others, and making various affirmative allegations, and the plaintiff delivered replies to these defences. Although the plaintiff's claim seemed unlikely to succeed, the case was not a plain and obvious one. The defendants applied under RSC, Ord 18, r 19[a], and under the inherent jurisdiction of the court, to strike out the writ, statement of claim, and replies and to stay or dismiss the action on the grounds that these pleadings disclosed no reasonable cause of action, and were vexatious and an abuse of process. Eventually ten affidavits

were filed on this application, five on each side. After a hearing which took more than two full days, and at which there was no oral evidence or cross-examination, the master delivered a twenty-two page judgment and struck out the plaintiff's pleadings. On appeal by the plaintiff,

[a] RSC, Ord 18, r 19, as far as material, is set out at p 873, letter *e*, post

Held – The appeal must be allowed, because the course taken by the master amounted to a trial of the case in chambers, without discovery, oral evidence or cross-examination, and so was neither authorised by the rules nor a proper exercise of the inherent jurisdiction of the court (see p 873, letter *i*, and p 874, letters *a* and *g*, post).

Semble: if the only ground on which a statement of claim can be said to disclose no reasonable cause of action is that the action is unlikely to succeed, affidavit evidence is inadmissible on an application to strike it out (see p 873, letter *h*, post).

Willis v Earl Howe ([1893] 2 Ch 545) and *Lawrance v Lord Norreys* ([1886–90] All ER Rep 858), distinguished, and principle stated in the latter case by Lord Herschell ([1886–90] All ER Rep at p 863) applied.

Notes

As to staying proceedings under the rules of court, and under the inherent jurisdiction, see 30 *Halsbury's Laws* (3rd Edn) 37–39, paras 76–78, and 407, paras 766, 767.

Cases referred to in judgment

Lawrance v Norreys (Lord) [1886–90] All ER Rep 858, (1890), 15 App Cas 210, 59 LJCh 681, 62 LT 706, 54 JP 708, 32 *Digest* (Repl) 609, *1916*.

Willis v Howe (Earl) [1893] 2 Ch 545, 62 LJCh 690, 69 LT 358, 32 *Digest* (Repl) 609, *1908*.

Appeal

The plaintiff appealed from the order of Melford Stevenson J given in chambers on 8 April 1965, which was made on the application of the three defendants to the action and which affirmed the order of Master Jacob striking **871** out the plaintiff's writ, statement of claim and replies. The facts are set out in the judgment of Sellers LJ

The plaintiff appeared in person.

F W I Barnes for the first and second defendants.

G Slynn for the third defendant.

31 May 1965. The following judgments were delivered.

SELLERS LJ. We have already given leave to appeal out of time and have now heard the appeal from Melford Stevenson J affirming Master Jacob. In my judgment the appeal of the plaintiff (who has appeared in person in this court) should be allowed. What has taken place here is, I think, without precedent and far from encouraging it, as learned counsel have submitted, I would disapprove it. It is not the practice in the civil administration of our courts to have a preliminary hearing, as it is in crime.

The facts here are quite unusual. The writ was issued by the plaintiff (who was then conducting his own litigation) on 29 April 1964. In that writ he makes a claim in respect of his losses, which he sets out, and then says that these losses were caused by conspiracy by the defendants to deprive the plaintiff of his fifty per cent share in the property and business of the Holy Well Spring, Malvern, Worcestershire. On 13 May 1964, he delivered a long, inartistic and wandering statement of claim consisting of some thirty-one paragraphs, which he had settled himself. Objection to that was made by letter, as being something which was not sufficiently intelligible or sufficiently revealing of what was being claimed to permit it to be pleaded to. In response to those communications from the defendants (of whom there were three) the plaintiff remodelled his statement of claim. That was re-delivered on 21 May 1964, and in it he set out his claim against the three defendants whom he had sued. They were Mr Moloney, the first defendant, with whom he had a close business relationship; Mr Duce, the second defendant, who was a solicitor; and Mr Leopard, the third defendant, who was a chartered accountant, and who had become concerned in some of the activities with which the first defendant and the plaintiff either were or had been associated.

Following that statement of claim (which I need not read but which again is drawn in a home-made manner by the plaintiff himself) the defendants pleaded and put in their defences. The first and second defendants joined in their defences and delivered a document of 21 July 1964. That defence by para 3 denied the allegations of conspiracy and set up affirmative allegations. It said that:

> "The first defendant was at all material times the managing director of Trades Exhibitions, Ltd., the moneys of which he was investing in the first-named company and as agent of which he subsequently became a principal shareholder in the second named company. The second defendant was acting at all material times as solicitor to the first defendant."

Then particulars are given setting out various allegations of fact extending down the alphabet as far as (j). Under para 4 both the defendants deny the matters set out in one paragraph of the statement of claim and then continue to say that they "will say as follows": and they set out averments from (a) to (e). Paragraph 6 says, while denying the allegations of the statement of claim, that these defendants "will say the following": and they set out various matters which they wish to advance, (a), (b) and (c). The third defendant had put in his defence earlier, on July 1. His is a traverse, coupled with an admission. In addition to those defences there were also applications for particulars, and a

large number of particulars were given by the plaintiff. He put in a reply on 20 July to the third defendant's defence and on 28 July to the defence of the first and second defendants.

On 4 August in the ordinary sequence of the action, the plaintiff took out a summons for directions which fixed the hearing for 2 November 1964. On 28 October as that date was approaching, the first two defendants took out a summons that the [872] plaintiff should attend on an application on the part of the first and second defendants for an order that

> "(i) the endorsement of the writ of summons herein, (ii) the statement of claim dated May 13, 1964, (iii) the statement of claim dated May 21, 1964, and (iv) the reply dated July 28, 1964, be struck out under R.S.C., Ord. 18, r. 19, upon the grounds that they and each of them disclose no reasonable cause of action, are vexatious and an abuse of the process of the court, and upon like grounds under the inherent jurisdiction of the court, and that the plaintiff's action against [those two defendants] be stayed or dismissed."

Following that (no doubt encouraged by it) the third defendant, on 16 November took out a similar summons. Instead of the hearing on 2 November there was an adjournment to 20 November and either on that day or just before the first defendant produced an affidavit, in support of his application to strike out the statement of claim and the writ. The matter was adjourned from that day. From then onwards counter-affidavits appeared; and further affidavits appeared on the side of the defendants. Hearings took place on 14 December 1964, 8 February 1965, and 18 February 1965, with a judgment on 4 March. There were in all ten affidavits produced, five for the plaintiff and five for the prospective defendants; and the judgment given on 4 March occupies no less than twenty-two pages. It reveals that the learned master, approaching this matter originally with very much caution and doubt, in the end was persuaded to hear and try the action on affidavits, and he gave a judgment thereon. There was no oral evidence and no cross-examination.

The rule under which the defendants' application to the court was made is RSC, Ord 18, r 19, and reads as follows:

> "(1) The court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that (a) it discloses no reasonable cause of action or defence, as the case may be; or (b) it is scandalous, frivolous or vexatious ... [then (c) is not relied on, but (d) is] or (d) it is otherwise an abuse of the process of the court; and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

Paragraph (2) of r 19 says that no evidence shall be admissible on an application under para (1) (a)—that is, that the writ and the pleadings disclose no reasonable cause of action. On the face of it the writ and the statement of claim did disclose a cause of action, and all the defendants pleaded to the statement of claim, as I have said, by their two defences. In the judgment no reference is made to r 19(2), which provides that no evidence should be admissible on an application under para (1) (a).

It is said before this court (and no doubt was said before the master) that the affidavits were put in not under (a) but under (b) and (d) of r 19(1). If, as here, the only ground on

which the action can be said to disclose no reasonable cause of action is that it is not one which is likely to succeed, then I doubt whether affidavit evidence was admissible. There have been cases where affidavits have been used to show that an action was vexatious or an abuse of the process of the court but not, as far as we have been informed, or as I know, where it has involved the trial of the whole action when facts and issues had been raised and were in dispute. To try the issues in this way is to usurp the function of the trial judge. *Lawrance v Lord Norreys* and *Willis v Earl Howe*, which were referred to, were in my view quite different cases based on affidavit evidence establishing that they were frivolous or vexatious, not that they disclosed no cause of action. Our practice is to have discovery and to hear the case on oral evidence subject to cross-examination. Master Jacob acceded to the request of the defendants on the ground that he was saving the defendants from costs and the burden of litigation; **873** but it involved him and the parties in the trial of the action by affidavit on more than two full days of hearing. It was not, therefore, a plain and obvious case on its face.

It may well be a case which will fail and what has taken place may well discourage the plaintiff from continuing; but I feel no doubt that the procedure has been wrong and that the plaintiff's action cannot be stifled at this stage. I think that this appeal must be allowed and that the learned judge fell into the same error as the master.

DANCKWERTS LJ. I agree.

The practice under the former rule,[b] RSC, Ord 25, r 4, and under the inherent jurisdiction of the court, was well settled. Under the rule it had to appear on the face of the plaintiff's pleading that the action could not succeed or was objectionable for some other reason. No evidence could be filed. 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 procedure of the court, an affidavit could be filed to show why the action was objectionable. The commonest case was where a plaintiff was seeking to bring an action on a point which had already been decided or was obviously wholly imaginary. An example of that is *Willis v Earl Howe*; but, as the procedure was of a summary nature, the party was not to be deprived of his right to have his case tried by a proper trial, unless the matter was clear.

[b] The present Ord 18, r 19, which was introduced by the RSC (Revision) 1962, amalgamated and replaced the former RSC, Ord 19, r 27 and the former RSC, Ord 25, r 4

The position is very clearly expressed by Lord Herschell in *Lawrance v Lord Norreys*. He said ([1886–90] All ER Rep at p 863; (1890), 15 App Cas at p 219.):

> "It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved."

In that case the application succeeded in the Court of Appeal and the House of Lords because those courts concluded that the story told in the proceedings was a myth, and so

the action was an abuse of the process of the court. It was a plain and obvious case.

The position under two former rules (3) has been incorporated in the present RSC, Ord 18, r 19 of the new rules. There is no doubt that the inherent power of the court remains; but this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power. The learned master stated the relevant principles and practice correctly enough, and then, I am afraid, failed to apply them to the case.

In my view, the way in which this case has been dealt with is quite contrary to the practice of the court, and is thoroughly undesirable. I therefore also would allow the appeal.

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DIPLOCK LJ. I agree, and have nothing to add.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *G A Fry & Co* agents for *Ratcliffe, Duce & Gammer*, Reading (for the first and second defendants); *Bird & Bird* agents for *Harrisons*, Worcester (for the third defendant).

Henry Summerfield Esq Barrister.

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end of selection