**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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

# Affidavit of Mark A C Diel

# Tab 15

# IN THE COURT OF APPEAL FOR BERMUDA

**CIVIL APPEAL No. 1 of 1998**

**BETWEEN:**

**INOVA HEALTH SYSTEM FOUNDATION**
**INOVA HEALTH CARE SERVICES and**
**INOVA HEALTH SYSTEM SERVICES**

**Applicants**

**-and-**

**FIRST VIRGINIA REINSURANCE LIMITED** **Respondents**

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**Before:** **Astwood, P.**
**Kempster, J.A.**
**Zacca, J.A.**

**Dates of Hearing:** **12th and 13th March, 1998**
**Date of Judgment:** **13th March, 1998**

## J U D G M E N T

**KEMPSTER, J.A.**

This is the judgment of the Court. On 30 April, 1997, the applicants, the second of whom, being a non-stock corporation was, it is common ground, entitled to require the respondent company to buy their shares in such company, in accordance with its bye-laws and pursuant to a "Subscription Agreement" dated December, 1986, issued an Originating Summons directed to the respondents. The relief sought was the determination by the Supreme Court of the manner in which that part of the respondents' retained earnings designated in their accounts as "appropriated surplus" or "appropriated retained earnings" should be treated in the valuation of the shares. The Summons, which on its face disclosed a cause of action, was supported by the affidavit, sworn on 21 April, 1997, of Richard C. Magenheimer the Senior Vice-President and Chief Financial Officer of the first applicants who, together with John O'Brien, represented the applicants on the respondents' Board of Directors.

By Summons dated 6 June the respondents, contending that the Court lacked jurisdiction to grant the relief sought by the applicants, applied to strike-out the proceedings. Though the Summons refers to RSC Order 18 rule 21 they relied upon the terms of RSC Order 18 rule 19 and upon the inherent jurisdiction. This was on the footing that on or about 4 November, 1996, by agreement between the parties, the material question had jointly been referred to a well-known firm of chartered accountants, Coopers & Lybrand, acting as

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experts, for determination. The respondents' auditors, required by by-law 50(1)(h)(ii) to value the shares, on a going concern basis, had declined to act on grounds of conflict of interest. Initially reliance was placed on an undated affidavit sworn by William F. Jacobs, the respondents' President and Chief Executive Officer, but before the application came on for hearing before Meerabux, J. on 23 December further written evidence was filed by both sides. There was no cross-examination and no attempt to adduce oral evidence.

The learned judge, doubtless relying on the concession made by Mr. Diel for the applicants, found that the parties had agreed to refer the question of valuation, as at 27 September, 1996, to Coopers & Lybrand as experts. He also found that their reasoned valuation, dated 15 May, 1997, after the issue of the Originating Summons, and asset based, was binding on the applicants. Accepting representations made by the respondents, Coopers & Lybrand had excluded from the monies available to shareholders "appropriated earnings" of $24,975,000. The respondents' Board was authorised "to eliminate this appropriation at its sole discretion." The applicants contend that this exclusion was a mistake on the part of the accountants.

The judge held, in effect, that the proceedings were an abuse of the process and ordered them to be struck-out. On 14 January, 1998 he refused the applicants leave to appeal. Their application is now renewed before us; the respondents having consented to being served and represented.

It has been submitted that the applicants should succeed on the eventual hearing of the Originating Summons on a variety of legal and factual grounds. Likewise submissions have been made to the contrary including the contentions that the relief claimed in the Originating Summons is hypothetical and that the Court has no jurisdiction to dictate machinery for the resolution of the dispute. In general it is undesirable to pre-judge such issues on an interlocutory hearing albeit it is clear in the instant case that Coopers & Lybrand's letter dated 9 January, 1997, accepting engagement and their report in draft (we assume) and final form were addressed and presented only to the respondents. This is not obviously consistent with a joint appointment and there is nothing presently before us to suggest explicit agreement that the report was to be final and conclusive as between the parties.

The judgment of the English Court of Appeal in *Wenlock -v- Moloney* [1965] 1 WLR 1238 remains good law in relation to strike-out applications both in that jurisdiction and this. As Danckwerts, L.J. observed at p. 1244 " . . . 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."

We are satisfied not only that there is an arguable case by way of appeal but also that it is not possible to determine on affidavit evidence that it is plain and obvious that the parties agreed to be bound by Coopers & Lybrand's valuation whatever the objections or that the relief claimed in the Originating Summons cannot be granted and that the applicants cannot, therefore, succeed on the hearing of their Originating Summons. We not only grant the leave sought by the applicants, but, as we have the consent of the parties, treat this hearing as that of the appeal which we allow. The judge's order of 23 December, 1997 should be set aside.

Applicants to have the costs of the application and appeal and before the Judge below.

M. Kempster

KEMPSTER, J.A.

A.L. Astwood

ASTWOOD, P.

ZACCA, J.A.

Mark Diel (Diel & Myers) for the Applicants
Narinder Hargun (Conyers, Dill & Pearman) for the Respondent