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 20

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THE

SUPREME COURT PRACTICE 1979

VOLUME 1

PART 1

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but such grounds must be specified. Moreover, the application may be, and frequently is, made both under this Rule and under the inherent jurisdiction of the Court at the same time: and although it is not strictly necessary to put the words "under the inherent jurisdiction of the Court" in the application, a properly drawn application would expressly invoke the powers of the Court under this Rule and under its inherent jurisdiction (see *Vinson* v. *The Prior Fibres Consolidated, Ltd.*, [1906] W. N. 209).

Where the only ground on which the application is made is that the pleading discloses no reasonable cause of action or defence, no evidence is admitted (para. (2), *supra*; *A.-G. of Duchy of Lancaster* v. *L. & N. W. Ry.*, [1892] 3 Ch. 278; *Republic of Peru* v. *Peruvian Guano Co.* (1887), 36 Ch. D. 489, 498): and where the only ground on which the statement of claim can be said to disclose no reasonable cause of action is that the action is unlikely to succeed, affidavit evidence is equally inadmissible (*Wenlock* v. *Moloney*), [1965] 1 W. L. R. 1238; [1965] 2 All E. R. 871, C. A. But in applications on any of the other grounds mentioned in the Rule or where the inherent jurisdiction of the Court is invoked, affidavit evidence may be and ordinarily is used.

18/19/3 **Exercise of Powers under this Rule.**—It is only in plain and obvious cases that recourse should be had to the summary process under this Rule, *per* Lindley, M.R. in *Hubbuck* v. *Wilkinson*, [1899] 1 Q. B. 86 at p. 91 (*Mayor, etc., of the City of London* v. *Horner* (1914), 111 L. T. 512, C. A.). See also *Kemsley* v. *Foot and Ors.*, [1951] 2 K. B. 34, C. A. The summary procedure under this Rule can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable" (*A.-G. of Duchy of Lancaster* v. *L. & N. W. Ry. Co.*, [1892] 3 Ch. 274, C.A.). The summary remedy under this rule is only to be applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process or the case unarguable (see *per* Danckwerts and Salmon L.JJ. in *Nagle* v. *Feilden* [1966] 2 Q.B. 633 at pp. 648, 651, applied in *Drummond-Jackson* v. *British Medical Association* [1970] 1 W.L.R. 688; [1970] 1 All E.R. 1094, C.A.). It cannot 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 (*Wenlock* v. *Moloney* [1965] 1 W.L.R. 1238; [1965] 2 All E.R. 871, C. A.). So, a claim for relief against forfeiture in the case of a lease of chattels will not be struck out under this Rule, since it is not plain and obvious that such a claim is not maintainable as a matter of law (*Barton Thompson & Co. Ltd.* v. *Stapling Machines Co.* [1966] Ch. 499). If there is a point of law which requires serious discussion, an objection should be taken on the pleadings, and the point set down for argument under O. 33, r. 3, *infra* (*Hubbuck* v. *Wilkinson* [1899] 1 Q.B. p. 91). The powers conferred by this Rule will only be exercised where the case is clear beyond doubt (*per* Lindley L.J. in *Kellaway* v. *Bury* (1892) 66 L.T. 599 at p. 602). The Court must be satisfied that there is no reasonable cause of action (as in *South Hetton Coal Co.* v. *Haswell, etc., Co.* [1898] 1 Ch. 465; *cf. Dominion Steel, etc., Co.* v. *Invernairn* [1927] W.N. 276), or that the proceedings are frivolous or vexatious (as in *Lawrance* v. *Norreys*, 15 App. Cas. 210; *Wyatt* v. *Palmer* [1899] 2 Q.B. 106; *Lea* v. *Thursby* (1904) 90 L.T. 65; *Emerson* v. *Grimsby Times, etc., Co.* (1926) 42 T.L.R. 238); or that the defences raised are not arguable (*Waters* v. *Sunday Pictorial Newspapers* [1961] 1 W.L.R. 967; [1961] 2 All E.R. 758, C.A.). The former O. 25 abolished demurrers and substituted a more summary process of getting rid of pleadings which show no reasonable cause of action or defence (*per* Lindley M.R. in *Hubbuck* v. *Wilkinson* [1899] 1 Q.B. 86 at p. 91); but a pleading will not be struck out under this rule "unless it is not only demurrable but something worse than demurrable," *i.e.* such that no legitimate amendment can save it from being demurrable (*per* Chitty J. in *Rep. of Peru* v. *Peruvian Guano Co.*, 36 Ch.D. 498; and see *Dadswell* v. *Jacobs*, 34 Ch.D. 278; *Worthington* v. *Belton*, 18 T.L.R. 438). This rule "ought not to be applied to an action involving serious investigations of ancient law and questions of general importance" (*Dyson* v. *Att.-Gen.* [1911] 1 K.B. 414); for a border-line case, see *Evans* v. *Barclays Bank* [1924] W.N. 97.

On an application to strike out the statement of claim and to dismiss the action, it is not permissible to try the action on affidavits when the facts and issues are in dispute (*Wenlock* v. *Moloney*, [1965] 1 W. L. R. 1238; [1965] 2 All E. R. 871, C. A.).

18/19/3A It has been said that the Court will not permit a plaintiff to be "driven from the judgment seat" except where the cause of action is obviously bad and almost incontestably bad (*per* Fletcher Moulton, L.J., in *Dyson* v. *Att.-Gen.*, [1911] 1 K. B. at p. 419). On the other hand, a stay or even dismissal of proceedings may "often be required by the very essence of justice to be done" (*per* Lord Blackburn in *Metropolitan Bank* v. *Pooley* (1885), 10 App. Cas. at p. 221) so as to prevent parties being harassed and put to expense by frivolous, vexatious or hopeless litigation (cited

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1 W.L.R. 1019, 1027; [1973]
The power to strike out
is not mandatory, but perm
exercised having regard to
offending plea: *Carl Zeiss*
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declaration that in the event
extinguished but is still ex
process (*Hampshire County*
865; [1970] 2 All E.R. 144);
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struck out (*J. Bollinger S.A.*
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Court, however, ought not to
vexatious, with the alternativ
of money into Court by way
get a verdict (*per* Wills, J.,
v. *Killey*, 16 T. L. R. 559).
heard evidence before staying
If a defendant is added
admitted debt from the origin
his defence may be struck out
of which he was added (see *Fo*
166).
Where a Master ordered th
the defendant delivered certain
on the twenty-first day follow
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Q. B. 557, C. A.).

Amendment.—The Court wi
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13 T. L. R. 398; *Edwards* v.
Weeks, [1913] 1 Ch. 486). Le
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unless there is reason to suppo
will not be given (*Hubbuck* v.

Appeal.—An order to strike
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ton, 6 T. L. R. 267; *Re Pag*
[1956] 1 W. L. R. 1326, C. A
The circumstances in which
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Osenton & Co. v. *Johnson*, [19
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[1963] 1 W.L.R. 1391; [1966]
[1937] A.C. 473.

No Reasonable Cause of Acti
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reasonable one" (*per* Chitty, J.
495). A reasonable cause of a

with approval by Lawton L.J. in *Riches* v. *Director of Public Prosecutions* [1973]
1 W.L.R. 1019, 1027; [1973] 2 All E.R. 935, 942).
The power to strike out any pleading or any part of a pleading under this rule
is not mandatory, but permissive, and confers a discretionary jurisdiction to be
exercised having regard to the quality and all the circumstances relating to the
offending plea: *Carl Zeiss Stiftung* v. *Rayner & Keeler Ltd.* (*No.* 3) [1970] Ch.
506; [1969] 3 W.L.R. 991. Thus, as a matter of discretion, an action for a
declaration that in the events which have happened a right of way has not become
extinguished but is still exercisable will not be struck out as being an abuse of
process (*Hampshire County Council* v. *Shonleigh Nominees Ltd.* [1970] 1 W.L.R.
865; [1970] 2 All E.R. 144); but in ordinary circumstances a plea in one action that
a claim in another action which has not yet been heard is unjustifiable should be
struck out (*J. Bollinger S.A.* v. *Goldwell Ltd.* [1971] R.P.C. 412).
Plea by acceptor of set-off for damages for defects in goods supplied by drawer of
bill of exchange not struck out (*O. Harris* v. *Vallarman & Co.*, 56 T. L. R. 302).
The fact that since issue of writ plaintiff has become an enemy alien does not
prevent the Court from striking out statement of claim and dismissing action as
frivolous and vexatious (*Eichengruen* v. *Mond*, [1940] Ch. 785, C. A.).
The Court "may order the action to be stayed or dismissed, or judgment to be
entered". See Chitty & Jacob, Forms 1114 and 1115. Thus in *Salomons* v.
Knight, 8 T. L. R. 472, the Court not only struck out the defence, but also granted the
plaintiff an injunction. In *Rep. of Peru* v. *Peruvian Guano Co.*, 36 Ch. D. 489, the
action was dismissed with costs, although notice of motion did not in terms ask it. The
Court, however, ought not to make an order dismissing an action as frivolous and
vexatious, with the alternative that the plaintiff may proceed on payment of a sum
of money into Court by way of security for the defendant's costs if the latter should
get a verdict (*per* Wills, J., *Mittens* v. *Foreman*, 58 L. J. Q. B. 40; and see *Bright*
v. *Killey*, 16 T. L. R. 559). In *Birch* v. *Birch*, [1902] P. 130, the Court of Appeal
heard evidence before staying proceedings.

If a defendant is added on his own application on the ground that, *e.g.*, an
admitted debt from the original defendant to two plaintiffs is in fact payable to him,
his defence may be struck out if it does not in terms raise the contention in respect
of which he was added (see *Fondsenbesit, etc.* v. *Shell Transport Co.*, [1923] 2 K. B.
166).

Where a Master ordered the striking out of certain paragraphs of a defence unless
the defendant delivered certain further and better particulars not later than 4.0 p.m.
on the twenty-first day following, it was held that the paragraphs were not auto-
matically struck out if within the time specified the defendant delivered a document
in good faith which could fairly be entitled particulars (*Reiss* v. *Woolf*, [1952] 2
Q. B. 557, C. A.).

Amendment.—The Court will generally give leave to amend a defect in pleading 18/19/4
rather than give judgment in ignorance of facts which ought to be known before
rights are definitely decided (*Steeds* v. *S.*, 22 Q. B. D. p. 542; and see *Reid* v. *Hooley*,
18 T. L. R. 898; *Edwards* v. *Pneumatic Tyre Co.*, 16 T. L. R. 309; *Thornhill* v.
Weeks, [1913] 1 Ch. 438). Leave was given to amend after an argument under this
Rule in *Griffiths* v. *London and St. K. Docks Co.*, 13 Q. B. D. p. 261, n. (2). But
unless there is reason to suppose that the case can be improved by amendment, leave
will not be given (*Hubbuck* v. *Wilkinson*, [1899] 1 Q. B. p. 94. C. A.).

Appeal.—An order to strike out or stay proceedings under this Rule is interlocutory,
and no appeal lies without leave (*Price* v. *Phillips*, 11 T. L. R. 86; *Hind* v. *Harting-
ton*, 6 T. L. R. 267; *Re Page*, [1910] 1 Ch. 489; *Hunt* v. *Allied Bakeries, Ltd.*,
[1956] 1 W. L. R. 1326, C. A.; [1956] 3 All E. R. 513, C. A.
The circumstances in which the Court of Appeal can and will interfere with the
discretion of the Judge in Chambers have been laid down by Lord Denning M.R.,
in *Ward* v. *James*, [1966] 1 Q.B. 273, at p. 293. It will interfere not only where
the Judge has gone wrong in principle but also if it is satisfied that the Judge is
wrong, *e.g.*, if it can see either that the Judge has given no weight or no sufficient
weight to those considerations which ought to have weighed with him (see *Charles
Osenton & Co.* v. *Johnson*, [1942] A.C. 130, particularly *per* Lord Wright at p. 148)
or that he has been influenced by other considerations which ought not to have
weighed with him or not weighed so much with him (see *Hennell* v. *Ranaboldo*,
[1963] 1 W.L.R. 1391; [1963] 3 All E.R. 684, C.A.). See also *Evans* v. *Bartlam*,
[1937] A.C. 473.

No Reasonable Cause of Action or Defence.—"There is some difficulty in affixing 18/19/5
a precise meaning to" this term. "In point of law, . . . every cause of action is a
reasonable one" (*per* Chitty, J., *Rep. of Peru* v. *Peruvian Guano Co.*, 36 Ch. D. p.
495). A reasonable cause of action means a cause of action with some chance of