JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 112/04

BEFORE: **THE HON. MR. JUSTICE HARRISON, P.**
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.

BETWEEN:	**S & T DISTRIBUTORS LIMITED**	**1ST APPELLANT**
AND	**S & T LIMITED**	**2ND APPELLANT**
AND	**CIBC JAMAICA LIMITED**	**1ST RESPONDENT**
AND	**ROYAL & SUN ALLIANCE**	**2ND RESPONDENT**

Miss Carol Davis for appellants

W. John Vassell, Q.C. & Miss Shena Stubbs instructed by DunnCox for 1st respondent

Conrad George instructed by Hart, Muirhead Fatta for 2nd respondent

31ST May, 1st, 2nd June 2006 & 31st July, 2007

HARRISON, P.

These appellants appeal against the judgment of Sykes, J on 19th November 2004 in which it was ordered in respect of the claimant's notice of application for court orders dated 16th April 2004:

> "i. That the Order of this Honourable Court made on 11th July, 2002 in which the Claim against the 2nd Defendant herein was struck out, be set aside.
>
> ii. Claim struck out as it discloses no reasonable cause of action.

> iii. Cost [sic] to Royal and Sun Alliance to be agreed or taxed.
>
> ...
>
> With respect to the 1st Defendant's Notice of Application for Court Orders filed on 13th August, 2004, IT IS HEREBY ORDERED AS FOLLOWS:
>
> "i S & T Distributors' Claim in contract against CIBC Jamaica Limited struck out...
>
> v. S & T Limited's claim in contract against CIBC Jamaica Limited struck out on the basis that it discloses no reasonable cause of action.
>
> vi. CIBC granted permission to amend Defence to the rest of the Claim.
>
> vii. Costs to CIBC to be agreed or taxed.
>
> vii. Leave granted to CIBC to amend defence.
>
> ..."

Mr. Vassell, Q.C., for the first respondent, raised a preliminary issue. He submitted, that this Court had no jurisdiction to hear this appeal because it was a procedural appeal pursuant to rule 1.1(8) of the Court of Appeal Rules 2002 ("the Rules") and no notice of appeal was filed within the requisite seven (7) days of the judgment.

Mr. George for the second respondent adopted the arguments of learned Queen's Counsel.

Miss Davis, for the appellants, argued that the court below did decide the substantive issues in the case by striking out the entire claim in negligence and

aspects of the claim for the breach of contract alleged. She submitted that it was not a procedural appeal, that the record and submissions had been filed and case management order had been made. However, if this Court finds that it is a procedural appeal, she said, she was seeking, pursuant to rule 1.11(2), an order to extend the time to file the appeal and that this Court hears the appeal.

This Court considered this point in limine. We found that, pursuant to rule 1.1(8) of the Rules, this matter was a procedural appeal in that the striking out, "... decision of the court below ...[did] not directly decide the substantive issues... " in the claim, in the court below. All parties accepted that leave to appeal was granted in the Court below, on 19th November 2004 by Sykes, J., pursuant to section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act.

Therefore, the notice of appeal herein should have been filed and served within seven (7) days of the decision of Sykes, J. Notice was filed on 6th December 2004, outside of the statutory period.

The notice having been filed out of time, there is merit to the point in limine. The strict rules were not followed.

We were of the view however, because the Registrar, treating the matter as an appeal, referred it to a single judge who himself treated it as an appeal and made orders, we will treat the matter as if it had been properly referred to this Court by the single judge pursuant to rule 2.4(5). The said rule reads:

> "The Judge may, however, direct that the parties be entitled to make oral submissions and may direct that the appeal be heard by the Court."

We therefore extended the time for filing, treated the matter as if it had been filed within time, and decided that this Court would hear the appeal. We made no order as to costs.

The relevant facts are that the first appellant S&T Distributors Ltd ("STD") and the second appellant S&T Ltd ("S&T") were both registered companies conducting the business of manufacturing at premises 56 Brentford Road Kingston 5 owned by and registered in the name of STD.

In about 1982 both appellants STD and S&T, by agreement, obtained overdraft loan facilities from the first respondent, CIBC Jamaica Limited ("CIBC"). As a condition of such facilities STD used the said premises and an apartment of Turtle Towers, Ocho Rios as security and placed CIBC as mortgagee thereon.

In addition, the Brentford Road premises was insured against certain risks, including fire, with Royal & Sun Alliance ("Royal"), as further security. This policy of insurance was assigned to CIBC.

In July 1993, a fire destroyed the factory premises. Royal refused to pay on the contract of insurance, contending that arson and fraud were committed. STD and S&T sued Royal in 1994 to recover the insurance proceeds (Suit. C.L. 1994/S206). Royal made two interim payments of insurance monies to CIBC in the amounts of $1,390,000.00 and $1,485,000.00 on 10th March 1994 and 20th July 1994, respectively. Subsequently in 1998, the appellants obtained judgment in their favour against Royal.

By letter dated 30th May 1994, CIBC, as mortgagee, agreed with STD and S&T that it would go to arbitration with Royal in accordance with a clause in the

insurance policy. The appellants contend, in addition, that there were oral agreements made between Anthony Simmons, the managing director of both appellants and Basil Payne, the agent of CIBC, that CIBC would not seek to exercise its power of sale as mortgagee in respect of the said mortgaged properties, until arbitration proceedings were completed and the proceeds of the arbitration proceedings had been recovered. If such proceeds were insufficient to cover the indebtedness then CIBC would proceed. The appellants paid CIBC the sum of $200,000.00 towards the estimated costs of the arbitration proceedings, agreed at $350,000.00.

On 30th June 1994 CIBC commenced arbitration proceedings against Royal to determine the sum due under the insurance policy assigned to it. However, Royal filed a suit (CL 1994/W321) and obtained an injunction therein staying the arbitration proceedings. In that suit Royal sought a declaration that the arbitration clause in the insurance policy did not extend to CIBC, but related only to the appellants STD and S&T. CIBC did not challenge the injunction and after the summons for directions Royal did not proceed with the said suit.

On 25th January 1996 CIBC as mortgagee published its intention to exercise its powers of sale under the mortgage of STD's premises, at 56 Brentford Road, by public auction on 8th February 1996. Suit C.L. 1994/S206 S&T and STD v. Royal was scheduled to commence on 19th February 1996. The properties were sold in February 1996.

On 1st February 1996 STD filed suit CL 1996/S023 against CIBC seeking a declaration that CIBC was not entitled to exercise its powers of sale as

mortgagee and sought an injunction restraining CIBC from doing so. STD claimed that:

> (1) CIBC, in pursuant to the mortgage endorsement clause had a duty to request payment, as soon as possible from the insurers.
>
> (2) At its request in October 1993 and again in March 1994 CIBC agreed "... to seek repayment of [STD's] said debts from the said Insurer under the said Mortgage Endorsement Clause, rather than proceeding against the plaintiff by suit or under the powers of sale of a mortgagee" and
>
> (3) that STD paid to CIBC the sum of $200,000.00 as a condition for the costs of the arbitration proceedings in lieu of the exercise of CIBC's power of sale.

An interlocutory injunction was granted on 15th April 1996 with a condition attached. STD appealed against the condition. The Court of Appeal dismissed the appeal and set aside the injunction order. On 11th July 2001, on the application of CIBC, this suit was struck out on the ground of a failure to disclose a reasonable cause of action. No appeal was filed in challenge to this striking out.

On 3rd November 1999 STD and S&T filed against CIBC and Royal, Suit C.L. 1999/S222, claiming damages, in an amended statement of claim, for negligence and breach of contract against both, and in addition, seeking the taking of an account against CIBC.

On 11th July 2002 Suit CL 1999/S222 was struck out.

On 19th November 2004 Royal applied for court orders to set aside the striking out of Suit C.L. 1999/S222 on the ground that the relevant application had not been served on the appellants. However, application considered by Sykes, J was struck out on the ground that it disclosed no reasonable cause of action. On an application by CIBC, the claim in contract by STD against CIBC was struck out as an abuse of process and the claim of S&T in contract was also struck out as disclosing no reasonable cause of action.

This appeal arose as a consequence.

The grounds of appeal were:

> "(i) That the Learned Judge in Chambers erred in striking out the Claimant's Claim against the 2nd Defendant.
>
> (ii) That the Learned Trial Judge erred in that he failed to appreciate that the Negligence alleged against the 2nd Defendant encompassed allegations a) that the 2nd Defendant failed to pay in a timely manner and further that b) the 2nd Defendant wrongfully prevented the arbitration between itself and the 1st Defendant.
>
> (iii) The Learned Trial Judge erred in that the issue of whether the 2nd Defendant was negligent was an issue of fact to be determined at trial.
>
> (iv) That the Learned Judge in Chambers erred in striking out the 1st Claimant's claim in contract against the 1st Defendant.
>
> (v) That the Learned Judge erred in finding that there was no evidence that the Claimant did not know of either the Application to Strike out or the date on which it would be heard.
>
> (vi) That the Learned Judge in Chambers erred in striking out the 1st Claimant's claim in contract

against the 1st Defendant, as same was not an abuse of process.

(vii) That the Learned Judge in Chambers erred in finding that the 2nd Appellant's claim against the Respondent for breach of contract did not disclose a reasonable cause of action.

(viii) That the Learned Judge in Chambers erred, in that his Order was ambiguous. The Appellant's claim in contract covered breach of the loan contract in that the Respondent charged excessive interest, but it was never contended by the Respondents that this aspect of the Claim be struck out."

Grounds (i), (ii) and (iii) may be considered together.

The complaint was that the learned trial judge was in error to strike out the claim of STD and S&T in negligence which was a matter of fact to be determined at the trial.

The tort of negligence in modern times is based on the neighbourhood concept propounded in ***Donoghue v Stevenson*** [1932] A.C. 562. Lord Atkin therein expressed the foreseeability test of taking care to refrain from doing harm to one's neighbour, that is a person who is so closely or directly affected by one's act that such person should be in the wrong doer's contemplation, as likely to suffer physical harm or damage.

Lord Wright in ***Lochgelly Iron and Coal Company Limited v M'Mullan*** [1934] A.C. 1 at page 25 said:

> "In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission: it properly connotes the complex concept of duty, breach, and damage thereby suffered by the person to whom the duty was owing: ..."

It was clearly pointed out that the categories of negligence are never closed ***(Donoghue v Stevenson,*** (supra).)

The range of the tort of negligence is therefore capable of expansion but with restraint and within the duty / foreseeability concept.

In ***Anns v Merton London Borough Council*** [1977] 2 All ER 492, Lord Wilberforce proposed a two-tier test to determine the existence of the duty of care, expanding somewhat, the concept of the tort of negligence. He proposed that one should ascertain whether there was a sufficient relationship of proximity or neighbourhood which, in the reasonable contemplation of the parties would cause harm giving rise to a duty and if so whether there were any circumstances which would restrict that duty.

The ***Anns*** two-tier test of Lord Wilberforce, effectively created an expansion of the scope of negligence, for some time, into the area of contractual liability (in some cases), by superimposing thereon the duty of care. See ***Junior Books v Veitchi*** [1983] 1 A.C. 520 where a sub-contractor who had installed a merely defective floor – not dangerous, was held liable to the owner of the building. This was in effect mere economic loss.

The House of Lords in ***Murphy v Brentwood District Council*** [1990] 3 WLR 414, sought to return the law of negligence to a state of certainty.

The main question in ***Murphy*** was whether the appellant council owed the respondent a duty to take reasonable care to protect him from the particular damage he ultimately suffered which was neither injury to health. nor damage to

anything except the defective house. This was again merely economic loss itself. The House of Lords declined to hold that any such duty existed.

Of course, an exception arises in the case of negligent misstatements causing mere economic loss, without any physical harm or damage. In ***Hedley, Byrne & Co v Heller & Partners*** [1964] A.C. 465, it was held that a duty of care did lie in refraining from making negligent misstatements, when there was a known reliance on the statement and a special relationship existed between the parties.

The ***Anns*** two-tier test relied on by Sykes, J., was overruled and departed from in ***Murphy v Brentwood*** (supra). Lord Keith of Kinkel in ***Murphy*** at page 422 -23 said:

> "In ***Council of Shire of Sutherland v Heyman*** (1985) 157 C.L.R. 424, where the High Court of Australia declined to follow ***Anns,*** Brennan J. expressed his disagreement with Lord Wilberforce's approach, saying, at p. 481:
>
> > 'It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable 'considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed.'
>
> In the Privy Council case of ***Yuen Kun Yeu v Attorney-General of Hong Kong*** [1988] AC. 175, 191, that passage was quoted with approval and it was said at p. 194:
>
> > 'In view of the direction in which the law has since been developing, <u>their Lordships consider that for the future it should be recognized that the two-stage test ... is not to be regarded as in</u>

> all circumstances a suitable guide to the existence of a duty of care.' ...
>
> As regards the ingredients necessary to establish such a duty in novel situations, I consider that an incremental approach on the lines indicated by Brennan J. in the ***Shire of Sutherland*** case is to be preferred to the two-stage test." (Emphasis added)

See also ***Caparo Industries plc v Dickman*** [1990] 2 WLR 358.

Although the law is dynamic and changes with time, certainty of the law is of cardinal importance. Economic loss is more readily seen as arising in breach of contractual relationships. The tort of negligence generally envisages a breach of a duty owed causing personal or physical damage to the person to whom that duty is owed.

In the instant case, the loss suffered by the appellants was pure economic loss. There was no circumstance existing to bring the case within the **Hedley Bryne** principle. No duty of care was owned by Royal to the appellants. It was merely an economic loss. Furthermore, the parties were in a contractual relationship which governed their respective liabilities. Although liability in tort may arise in some circumstances where parties are already in contractual relationship, the recourse to tort is discouraged. In ***Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and others*** [1986] AC 80 at page 107, a case primarily concerned with banker/customer relationship and responsibilities, it was said:

> "...there is... [no] advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. Though it is possible ... to conduct an analysis of the rights and duties inherent in some contractual relationships including

> that of banker and customer either as a matter of contract ... or as a matter of tort ... it [is] ... correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis: ..."

Royal was in contractual relationship with the appellants based on the insurance contract. Royal had a right to satisfy itself that the insurance claim was a bona fide one. Royal did make two interim payments under the contract, and defended the suit. That was Royal's right, the weakness of its case notwithstanding. Royal's defence was not struck out, it was litigated upon. Arbitration proceedings having been commenced on 30th June 1994 "to determine the sum due under the insurance policy," Royal was obliged, consistent with its stance of challenge that the insurance claim was invalid, to obtain the injunction to stop proceedings (Suit CLW 1994/W321). I agree with counsel for the second respondent that it owed no duty, in the circumstances, to the appellants.

It is significant to record that in the consolidated suits C.L. 1994/S206 and CL 1994/W318, decided in 1998 in favour of the appellants, Langrin J., as he then was, rejected a claim in negligence, based on the delay and lack of promptness in recommending settlement of the appellants' claim, by the agent of the 2nd respondent, the loss adjusters and advisors.

Any claim in contract for a breach by Royal was effectively dealt with, when the appellants' claim in the said consolidated suits against Royal (then West Indies Alliance Ins. Co,) for payment of the monies under the insurance contract was decided in the appellant's favour.

Sykes, J., was correct, albeit in my view not on the ***Anns*** principle, to find that no claim in negligence arose against the 2nd respondent and to strike out the claim in negligence. There is no merit in grounds i, ii and iii. They therefore fail.

Grounds iv and vi complained that the learned trial judge erred in striking out the first appellant's claim in contract against the first respondent as an abuse of process.

It was argued by CIBC, that STD's claim against it in contract in suit C.L. 1999/S222 should be struck out on the basis that the claim is the same in substance as Suit No. C.L. 1996/S023 which had been struck out previously on 11th July 2001. Sykes, J., in striking out the claim in contract, at page 162 of the record said:

> "I have examined the pleadings in Suit No. 023 of 1996 and the pleadings in this case. I am more than satisfied that this present case is merely a repetition of Suit No. 023 of 1996. The only difference is that in the previous suit the remedy sought was an injunction and a declaration that CIBC was not entitled to sell the property whereas in this suit the claim is for damages."

I agree with Sykes, J. when he said that the difference between the two suits was in respect of the remedies sought in each. However, there was a further difference. Suit No. C.L. 1996/S023 was for a declaration filed in anticipation of a threatened sale. Suit No. 1999/S222 claimed for a breach arising from the sale, as well as excessive interest.

Suit C.L. 1996/S023 filed by STD against CIBC was heard by Chester Orr, J., on 15th April 1996. In considering the grant of the injunction sought, he said of the claim:

> "The Plaintiff seeks this injunction on the ground that the defendant is estopped from exercising its powers of sale of the mortgaged premises because of an agreement between the parties that the remedy against the Insurer should be pursued before resort is had to the sale of the premises."

In Suit No. C.L. 1999/S222 the plaintiffs claimed in their statement of claim, inter alia:

> "13 By letter dated the 30th of May 1994 the first Defendant agreed with the Plaintiffs to go to Arbitration with the second Defendant in respect of the claim. An implied condition of this letter was that the first Defendant would not foreclose on the Plaintiff's loan with them until said Arbitration was complete.
>
> 14. Subsequent to this letter, an agreement was signed with the first Defendant in which it agreed to go to arbitration before any steps were taken to foreclose on the loan agreement. The Plaintiffs duly paid to the first Defendant the amended sum of Two Hundred Thousand dollars ($200,000.00) as per the agreement.
>
> 15. On the 30th of June 1994 the first Defendant commenced Arbitration proceedings against the second Defendant for quantification of the said Mortgagee Endorsement Clause."

The particulars of breach of contract in paragraph 18 inter alia reads:

> "(A) Failure to demand and take steps to obtain payment from the second Defendant to the extent of the amounts noted in the endorsement on the policy by the said Insurance company in it's favour.
>
> (B) Failure to settle the Plaintiffs and the second Defendant's liabilities to it in accordance with the agreement with Plaintiffs not to foreclose before arbitration and also as per the terms of the policy endorsed in it's favour."

In each of the two suits therefore, the substance of the claim was the agreement between the parties that CIBC would not exercise its power of sale until after completion of the arbitration proceedings. However, suit CL 1996/S023 was a claim for a declaration and injunction, whereas suit CL1999/S222 was a claim for breach of contract and excessive interest.

Miss Davis for the appellants submitted that the appellants' claim, and in particular S&T's claim in contract should not have been struck out, because S&T was not a party to suit C.L. 1996/S023. She further submitted that the appellants claim to have made a verbal agreement with the agent of CIBC, one Payne. Such agreement which was also written was that the power of sale would not be exercised until arbitration proceedings were complete. The cause of action, she said was "properly constituted."

After the Court of Appeal's decision on 9th July 1996 in suit C.L. 1996/S023 dismissing the appeal and setting aside the injunction, all parties were aware that, the substantive claim in the suit was pending. There was no basis therefore, even after the sale of STD's property by CIBC, in 1996, for the issuance of a new suit, namely, C.L. 1999/S222, in particular, as far as STD was concerned; except for a breach of contract now committed due to the sale and excessive interest. Suit CL 1996/S023 was still pending to the knowledge of STD. S&T was not a party to suit CL 1996/SO23.

CIBC filed a summons in 1996 to strike out STD's claim in C.L. 1996/S023. That summons was served on and acknowledged by STD's then attorney-at-law. The said summons was re-listed and heard on 14th July 2001,

when the said suit was struck out "for failing to disclose a reasonable cause of action." The affidavit of Carol Davis dated 2nd September 2004, with reference to the order striking out the suit, reads at paragraph 9:

> "... I am informed by Mr. Simmons that the 1st Claimant is unaware of the order referred to, since it did not receive the re-listed summons referred to."

Nor was STD aware of the costs taxed in the matter on 29th November 2001.

At no time, on hearing of the striking out of suit C.L. 1996/S023, did STD attempt to set aside the said striking out of the suit.

The claim in contract by STD in suit C.L. 1999/S222 against CIBC was incorrectly struck out by Sykes, J. It was not an abuse of process. What existed in suit C.L. 1996/S023 was a claim for a declaration, suit CL 1999/S222 was a claim for the breach of contract consequent on the sale of the premises.

There is merit in grounds iv and vi.

Ground v is a complaint that there was no evidence that the appellants knew of the application to strike out or the date of hearing in respect of suit No. 1996/S023.

I had earlier referred to the affidavit of Miss Davis, and her reference to the fact that she was told that the appellants did not receive the re-listed summons in suit 1996/S023. This affidavit was exhibited before Sykes, J. He said, at page 163 of the record:

> "For well onto two years the claimants did nothing about the striking out. There is no evidence that they did not know of either the application to strike out or the date on which it would be heard."

One can only assume that the learned judge was unconvinced that the appellants were unaware of the re-listed summons, and was in effect rejecting the evidence of lack of knowledge of the said summons. However, in addition, in view of the reasons expressed above, in respect of grounds iv and vi, of the failure to set aside the striking out of suit CL 1996/S023, this complaint in ground v cannot avail the appellants.

Ground vii complains that the learned judge erred in finding that S&T's claim for breach of contract did not disclose a reasonable cause of action. Sykes, J. at page 163 said:

> "Miss Davis seeks to sustain S & T Limited's claim in contract against CIBC by saying that S & T Limited was not a party to Suit No. 023 of 1996 and to that extent is not affected by the decision in that matter. I agree. What is the basis of its claim against CIBC? The claimant says that there was an oral contract between S & T Limited and CIBC in these terms: CIBC would not exercise its power of sale under the mortgage unless the proceeds recovered from the arbitration were insufficient to cover the claimants' indebtedness. The claimant says further that this contract had an implied term. The implied term is this: CIBC would take all necessary steps to proceed to arbitration. ...
>
> Miss Davis was explicit: S & T Limited's claim is not based upon any interest in the property but in the opportunity to earn profit."

The learned judge found that no such term should be implied and struck out the claim of S&T on the ground that "... it discloses no reasonable cause of action."

It is unquestionable that S&T was not a party to the suit 1996/S023, therefore the stated objection to STD repeating its claim against CIBC in the current suit cannot and does not apply to S&T.

I agree with Sykes, J., that it is a matter of law whether or not a term is implied in a contract.

However, in addition to the reliance on the implied term, S&T in its pleadings is relying on an agreement both verbal and written. Both STD and S&T relied therein on –

(1) a letter dated 30th May 1994 evidencing an agreement between S&T and CIBC (paragraph 13 of the statement of claim)

(2) a verbal agreement 'between the Plaintiffs, through their agent ... Simmons and the First Defendant, through their agent B.E. Payne ..." (paragraph 13) and

(3) a signed agreement "... with the First Defendant in which it agreed to go to arbitration before any steps were taken to foreclose on the loan agreement. The Plaintiffs duly paid to the first Defendant the amended sum of Two Hundred Thousand dollars ($200,000) as per the agreement."

The exercise of the power of sale by the mortgagee given by section 106 of the Registration of Titles Act may by agreement be postponed in view of the decision of the Judicial Committee of the Privy Council in the recent unreported case of ***Jobson v Capital and Credit Merchant Bank et al*** Privy Council Appeal No. 52/06 dated 14th February 2007.

The existence and substance of these agreements and their meaning and interpretation is a question of fact for a trial court and cannot be resolved by a judge in chambers on affidavit evidence, simpliciter.

Furthermore, it is difficult to visualize that STD and S&T, companies known to CIBC as being engaged in manufacturing, functioning on a loan from

the bank and insured on a policy against loss of profits, could be seen as not governed by an implied term that it is pursuing the earning of profits. Such an implication is evident in the contract of insurance. It therefore may well satisfy the test of necessity.

The striking out of S&T's cause of action by Sykes, J., irrespective of the nature of the proposed evidence, was incorrect.

The claim by S&T in contract should be resolved at trial, whether or not the evidence in support is viewed as not strong. Ground vii therefore succeeds.

Ground viii complains that the order of the learned judge was ambiguous, in that there was no contention by CIBC that the claim for excessive interest should be struck out.

Although Sykes, J., ordered that:

> "ii. S & T Ltd's claim in contract against CIBC Jamaica Ltd struck out on basis that it discloses no reasonable cause of action."

he did go on to order that:

> "iii. CIBC granted permission to amend defence to the rest of claim."

The "rest of the claim" is, on the amended statement of claim, presumably, the claim for refund of excessive interest, the complaint that $200,000.00 was paid as the costs of arbitration which was not held, and the taking of an account.

The order of Sykes, J., was not necessarily ambiguous. It merely omitted to deal with certain aspects of the appellants claims.

In my view the order of Sykes, J. in so far as it –

(a) struck out the claim against Royal for breach of contract and negligence and

(b) struck out STD's claim in contract against CIBC

should be affirmed, with half costs to the respondent Royal to be agreed or taxed.

The appeal by STD and S&T against the striking out of their claim in contract against CIBC should be allowed, with costs to the appellants to be agreed or taxed.

The consequential orders should stand.

HARRIS, J.A:

This is an appeal from an order of Sykes, J. made on November 19, 2004 in which he struck out a claim in contract brought by the appellants against the first respondent as well as a claim in negligence and contract by the appellants against the second respondent.

The appellants are companies with registered offices stated as 56 Brentford Road in the parish of Saint Andrew. Sometime in 1982, the first appellant, which was a customer of the first respondent, a bank, obtained a loan from them by way of overdraft facilities. This loan was anchored by mortgage on the security of two properties, one at 56 Brentford Road, St Andrew, owned by the first appellant, and the other, an apartment at 19C Turtle Towers, Ocho Rios, St Ann, owned by the appellant's managing director, Mr. Anthony Simmons. 56 Brentford Road housed a factory from which the appellants operated business as manufacturers.

It was a condition of the loan that the appellants obtain insurance coverage for the mortgaged properties. In compliance with this condition, they took out two policies of insurance with the second respondent, which was a company engaged in the business of insurance, against loss and damage occasioned by fire and loss of profits. The first respondent subsequently sought

and obtained from the second respondent an assignment of the appellants' interests in the policies of insurance to themselves.

On July 17, 1993 fire partially destroyed the building and its contents at 56 Brentford Road. At the time, the mortgage debt was in arrears. The second respondent made two interim payments to the first respondent under the policy of insurance. Following this, the first appellant requested the first respondent to commence arbitration proceedings with the second respondent for the purpose of quantifying the amount due and owing to the first respondent. This, the first respondent agreed to do, provided the appellants pay the legal costs of the arbitration. The appellants aver that in pursuance of this agreement, they paid $200,000.00 to the first respondent.

By letter dated May 30, 1994 the first respondent agreed to proceed to arbitration under certain conditions. On June 30, 1994 arbitration proceedings commenced. Before these proceedings were completed, the second respondent commenced an action, C L 1994/W321, against the first respondent in which they sought two interim payments made by them to the first respondent.

Sometime in 1994, the appellants instituted proceeding (suit C L 1994/S206) against the second respondent seeking recovery of the proceeds of insurance. During the pendency of suits C L 1994/W321 and C L 1994/S206, the second respondent sought and obtained an injunction against the first respondent staying the arbitration proceedings in C L 1994/W321 until suit C L

1994/S206 was determined. Both suits were consolidated. The hearing of these consolidated actions began February 19, 1996 and was determined on January 16, 1998 in favour of the appellants.

On February 1, 1996 the first appellant commenced an action suit C L 1996/S023 against the first respondent, seeking an injunction to restrain it from exercising its powers of sale. It also sought a declaration that the first respondent was not entitled to sell the properties. On the very day of the filing of the suit, it also issued a summons seeking an injunction to restrain the sale. An injunction was granted on April 16, 1996 for the restraint of the sale of the properties until the determination of the suit (C L 1996/S023), on condition that the first appellant pay into court the sum of $4,253,148.07. An appeal and cross appeal were filed by both parties against the injunctive order. This order was set aside with costs in favour of the first respondent.

On April 22, 1996 the first respondent issued a summons to strike out the first appellant's action. The action was struck out on July 14, 2001 for failing to disclose a reasonable cause of action.

In February 1996, the first respondent sold the properties. The funds realized from the sale were insufficient to liquidate the appellants' indebtedness. The proceeds of the policy of insurance were not paid over to the first respondent until a date subsequent to the delivery of the judgment in the appellant's favour in 1998.

On May 3, 1999 the appellants filed a new suit, C L 1999/S222, claiming damages against the respondents for negligence and breach of contract. A defence was filed by the first respondent on March 6, 2000. No defence was filed by the second respondent. On July 11, 2002 the second respondent successfully applied to strike out the suit as against them. The striking out was irregular for want of service of the summons on the appellants. Following this, other applications were made.

The following applications were before the learned judge:

(a) An application dated April 16, 2004 by the appellants for the order of July 11, 2002 to be set aside, or alternatively for an order that the order of July 11 be struck out as being irregular.

(b) An application dated August 12, 2004 by the first respondent to strike out that part of the appellant's claim in contract against them.

The following orders were made by the learned judge:

> "i. Order of this Honourable Court made on 11th July 2002, in which the claim against the 2nd Defendant herein was struck out be set aside.
>
> ii. Claim struck out as it discloses no reasonable cause of action (as against the second respondent).
>
> iii. Costs to Royal and Sun Alliance to be agreed or taxed.

iv. ...

2. i S & T Distributors Ltd.'s claim in contract against CIBC Jamaica Ltd. struck out.

ii S & T Ltd's claim in contract against CIBC Jamaica Ltd struck out on basis that it discloses no reasonable cause of action.

iii CIBC granted permission to amend defence to the rest of claim.

iv Costs to CIBC be agreed or taxed.

v. Leave granted to CIBC to amend defence."

A preliminary point was raised by Mr. Vassell, Q.C., who submitted that the matter before the court is a procedural appeal which had not come before the court by way of reference by a single judge under Rule 2.4 (5) of the Court of Appeal Rules 2002 and the Notice of Appeal had not been filed within the seven days prescribed by Rule 1.11 (1) (a) of the Rules. Miss Davis argued however, that the order of the learned trial judge was effectually a determination of the substantive issues of the appellants' claim and consequently, the matter before us was a substantive appeal. It was her further submission that, should the court find that it was a procedural appeal she would seek leave to extend the time to file the appeal.

The arguments of Mr. Vassell, Q.C., were adopted by Mr. George.

Rule 1.1 (8) of the Court of Appeal Rules 2002 defines a procedural appeal as follows:

> "In these rules -
>
> "**procedural appeal"** means an appeal from a decision of the court below which does not directly decide the substantive issues in a claim but excludes -
>
> (a) any such decision made during the course of the trial or final hearing of the proceedings;
>
> (b) an order granting any relief made on an application for judicial review (including an application for leave to make the application) or under the Constitution;"

Under Rule 1.11 (1) (a) a procedural appeal must be filled and served within 7 days of the date of the decision against which the appeal is made.

Rule 2.4 (3) mandates that a procedural appeal should be considered on paper by a single judge, however, under 2.4 (5) the judge may direct that the appeal be considered by the court.

The court is empowered to extend time to appeal by virtue of rule 1.7 (2). The rule reads:

> "Except where these Rules provide otherwise, the court may –
>
> (a) consolidate appeals;
>
> (b) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed;"

The appellants filed Notice and Grounds of Appeal on December, 6, 2004, seven days outside the time prescribed for the filing of a procedural appeal. The

striking out did not determine the substantive issues of the claim. The orders made by the learned trial judge, cannot be classified as final, as, they do not determine the issues between the parties on the merits. In addition, the fact that the learned judge in the court below gave leave to appeal, it is clear that all parties recognized that such leave was granted under section 11(1) (f) of the Judicature (Appellate Jurisdiction) Act which reads:

> "11(1) No appeal shall lie -
>
> (a) - (e) ...
>
> (f) without the leave of the Judge or of the Court of Appeal from any interlocutory judgment or any interlocutory order given or made by a Judge.
>
> except ..."

It follows therefore that the notice of appeal relates to a procedural appeal.

It cannot be denied that the appellants failed to adhere to rule 1.11 (1) (a) of the Court of Appeal Rules in not filing the notice within the time limited for so doing. A Case Management Conference was conducted by the single judge who mistakenly treated the matter as an appeal and directed, among other things, that the appeal be heard by the court. The Registrar also treated the matter as an appeal. We were of the view that no undue prejudice would be encountered by the respondents should the hearing proceed as an appeal. We accordingly, granted the appellants leave to extend the time within which to appeal and treated the matter as being properly before us as an appeal.

Eight grounds of appeal were filed by Miss Davis. Consideration will first be given to the grounds (ii) and (iii) simultaneously.

Ground i

> "The Learned Judge in Chambers erred in striking out the Claimant's Claim against the 2nd Defendant."

Ground ii

> "That the Learned Trial Judge erred in that he failed to appreciate that the Negligence (sic) alleged against the 2nd Defendant encompassed allegations a) that the 2nd Defendant failed to pay in a timely manner and further that b) the 2nd Defendant wrongfully prevented the arbitration between itself and the 1st Defendant."

Ground iii

> "The Learned Trial Judge erred in that the issue of whether the 2nd Defendant was negligent was an issue of fact to be determined at the trial."

Under rule 26 of the Civil Procedure Rules 2002 the court may strike out a statement of case or part thereof if it appears to the court that it discloses no reasonable ground for bringing a claim. Rule 26.3 (1) provides:

> "In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court -
>
> (a) ...
> (b) ...
> (c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or
> (d) ..."

The striking out of a claim is a severe measure. The discretionary power to strike out must be exercised with extreme caution. A court when considering an application to strike out, is obliged to take into consideration the probable implications of striking out and balance them carefully against the principles as prescribed by the particular cause of action which is sought to be struck out. Judicial authorities have shown that the striking out of an action should only be done in plain and obvious cases.

In ***Nagle v Feilden & Others*** [1966] 2 Q B 633 Dankwerts L.J. at page 648 said:

> "The summary remedy which has been applied to this action is one which 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 of the court."

In ***Drummond-Jackson v British Medical Association and Others*** [1970] 1 WLR 688 Lord Pearson in delivering a majority judgment, at page 695, observed that:

> "Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases."

In light of the foregoing, it is clear that a claim will only be struck out as disclosing no reasonable cause of action if it is obvious that the claimant has no real prospect of successfully prosecuting the claim. Real prospect of success contemplates the existence of a claim which carries with it realistic prospect of

successfully prosecuting the claim as opposed to a "fanciful" prospect. See ***Swain v Hillman*** [2001] All ER 91.

Although ground 1 makes reference to the "Claimants' " claim, Miss Davis' submissions encompassed both appellants. She argued that the issue as to whether the second respondent was negligent is a question to be resolved at a trial. It was further submitted by her that the learned judge failed to take into consideration the second respondent's failure to pay out the proceeds of insurance timeously as well as the fact that they had wrongfully prevented the arbitration proceedings between the first respondent and themselves (the second respondent).

It was Mr. George's submission that the second respondent was entitled to refuse to pay out the proceeds of the policy of insurance as there was a breach of contract by the first appellant and notwithstanding that the case for the second respondent may have been weak, this could in no way ground a claim in negligence against them. He argued that neither the staying of arbitration proceedings between first and second respondents nor the refusal of the second respondent to make payment under the policy of insurance would amount to negligence.

The learned judge examined the issues arising on the pleadings in suits CL 1996/S023 (the first appellant's suit) and in suit CL 1999/S222 (the first and second appellants' suit). He held that grounds raised by the second respondent

that the suit, CL 1999/S222, should be struck out either on the ground of *res judicata* or issue estoppel were unsustainable. He then went on to consider whether a claim in negligence by the appellants is maintainable against the second respondent. He found that, on the face of it, the trial ought to proceed but held that the appellants' claim disclosed no reasonable cause of action.

The learned judge regarded the appellants' claim in negligence against the second respondent to be a novel one and said:

> "When dealing with novel situations in which it is said that a duty of care exists I am of the view that the two stage test proposed by Lord Wilberforce in ***Anns v London Borough Council*** [1977] 2 All ER 492, 498g-499b is the proper one."

He then carried out a comparative review of a series of negligence cases including ***Donoghue v Stevenson*** [1932] AC 532, ***Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.*** [1963] 2 All ER 575, ***Home Office v Dorset Yacht Co. Ltd.*** [1970] 2 All ER 294, ***Anns v London Borough of Merton*** [1977] 2 All ER 492 ***and Caparo Industries plc v Dickman*** [1990] 2 WLR 358, before finding that the two pronged test propounded by Lord Wilberforce in ***Ann's*** case was applicable. He also found that the appellants and second respondent were neighbours within the ***Donoghue*** principle, as there was a close and direct connection between them on which a duty of care could be founded. Thereafter, he went on to hold that liability should be negated, as proposed in the second limb of ***Ann's*** case.

In ***Ann's*** case Lord Wilberforce rejected the traditional principles giving rise to a duty of care and proposed a two tiered test, when, at page 498 he said:

> "Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise (see the ***Dorset Yacht*** case, per Lord Reid)."

Anns's case placed the law of negligence in a state of confusion. By his approach, Lord Wilberforce advocated a single general principle as being determinative of a duty of care, in that, he treated proximity and forseeability as synonymous. He also advocated the creation of new categories of negligence. His approach has been repeatedly denounced as a suitable guide in establishing a duty of care.

The employment of a single general principle to establish a duty of care had been rejected by the House of Lords and the Privy Council in the following cases: ***Peabody Donation Fund v Sir Lindsay Parkinson & Co. Ltd.*** [1984] 3 All ER 529; ***Yuen Kun-yeu v A-G of Hong Kong*** [1987] 2 All ER 705, ***Rowling v Takaro Properties Ltd.*** [1998] 1 All ER 163; ***Hill v Chief Constable of West Yorkshire*** [1988] 1 All ER 163 and ***Caparo Industries***

plc v Dickman (supra). In ***Caparo Industries plc v Dickman***, Lord Bridges made special reference, with approval, to a dictum of Bernam J in the Australian case of ***Sutherland Shire Council v Heyman*** (1985) 157 CLR in which Bernam J, in alluding to ***Ann's*** case, had this to say:

> "It is preferable in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories rather than by a massive extension of a prima facie duty of care restrained only by indefinable 'considerations which ought to negative or to reduce or limit the scope of the duty or class of persons to whom it is owed'."

In ***Murphy v Brentwood District Council*** [1990] 3 WLR 414 Lord Keith, of Kinkel, with reference to ***Ann's*** case declared:

> "In my opinion it is clear that ***Anns*** did not proceed upon any basis of established principle, but introduced a new species of liability governed by a principle indeterminate in character but having the potentiality of covering a wide range of situations, involving chattels as well as real property, in which it had never hitherto been thought that the law of negligence had any proper place."

In ***Caparo Industries plc v Dickman*** (supra) Lord Bridge sought to return the law of negligence, as it relates to a duty of care, to a state of certainty. He enunciated the test in establishing a duty of care to be: (a) proximity of relationship (b) foreseeability and (c) reasonableness. Each of these requirements, which underpins a duty of care, must be treated as a practical means of assessing whether a duty of care should be imposed in any given case.

The events, situations and circumstances giving rise to a duty of care are manifold. A court, however, must ascertain and first be satisfied, that, in a particular case the law recognizes the existence of a duty of care and then decide whether such duty should be imposed on a wrongdoer. It follows therefore, that in considering a claim, the court should not only make inquiry into the nature of the relationship between the parties but also address the question of foreseeability and thereafter decide whether it is just and reasonable to impose a duty of care on a defendant. Liability, if imposed, must directly or by analogy fall within the scope of one of the established categories of negligence.

I will now turn to the instant case and will deal with the appellants' claim. It is necessary, at this stage, to outline the acts of negligence of the second respondent as alleged. Paragraph 19 of the amended statement of claim reads:

> "19. Further and/or in the alternative, Plaintiffs have suffered loss and damage as a result of the Injunction obtained by the Second Defendant against the First Defendant in Suit No. C.L.W. 321 of 1994 which loss was reasonably foreseeable by the Second Defendant. The Second Defendant having filed the suit and obtained the injunction did not proceed to trial on the Suit filed by it.
> 19 (a) Further and in the alternative the 2nd Defendant had a duty to the Plaintiffs as the assignors of the insurance policy to pay amounts due pursuant to the policy in a timely manner.
> 19 (b) Further and in the alternative the 2nd Defendant had a duty to the Plaintiffs not to prevent the arbitration which was to determine the amount to be paid to the 1st Defendant under the policy of insurance.

> 23. The sale of the factory premises forced a closure of the Plaintiffs (sic) trading operations. Having been awarded the sum of $12,000,000.00 under its Consequential Loss Policy as loss of profit for one year against the 2nd Defendant, the Plaintiffs claim against the First and/or the 2nd Defendants for loss of profits from 1994 at the rate of $12,000,000.00 per year and continuing.
>
> Particulars of Special Damage
> Loss of profits for 10 years @ $12,000,000.00 per year (and continuing)."

There is no dispute that a contract is in existence between the appellants and the second respondent. This would lend support to their proximity of relationship as the learned judge correctly found. His finding that the second respondent owed a duty of care to the appellants, but that liability should be negated was based on the following reasons:

> "First, Royal was within its rights to refuse to pay out under the contract if there was a breach of contract. The fact that Royal's case turned out to be weak cannot make a case of negligence. This would have the effect of establishing a principle that persons with weak cases are susceptible to being sued in negligence. This would not be a desirable development in the law. It would be wrong in principle, to allow an action to be generated because one litigant thought that another was being unreasonable in resisting his claim. Take this very suit: suppose it were to go to trial and the claimants lost, could Royal then sue and say that the case was not only hopeless but the claimant was motivated by feelings of malice and vindictiveness and so had a duty of care to Royal? I think not. I therefore conclude that on Lord Wilberforce's two-stage test the claimants' case against Royal should be struck out as disclosing no reasonable cause of action."

I feel constrained to disagree with the reasoning of the learned judge, as to the second limb of his findings. The issue is not whether the second respondent owed a duty of care to the appellants and whether that liability should be negated for the reason that they had a right to withhold payment of the proceeds of the policy based on a breach by the appellant of the contract. Nor is the issue whether the second respondent's case being weak that it could not ground an action in negligence.

The central issues in this case are whether there was a proximity of relationship between the parties and whether it was foreseeable that the appellants would have sustained loss as a result of the acts and omissions of the second respondent and whether it is fair and reasonable to impose liability for such loss on the second respondent.

It is undeniable that the second respondent was entitled to refuse to pay out the proceeds of the policy. Their refusal was based on their allegations of fraud and arson on the part of the appellants' managing director. These allegations proved to be baseless. It was a finding of Langrin, J who heard the consolidated suits, that the second respondent failed to make reasonable investigations into the circumstances of the fire. The inescapable inference is that the allegations of fraud and arson had not been proved.

The burden of Miss Davis' submission was that the second respondent had unreasonably withheld payment by not carrying out investigations within a

reasonable time after the fire. Had they done so, she argued, the proceeds of the policy would have been disbursed to the first respondent thus obviating sale of the property.

It cannot be ignored that arbitration proceedings were instituted to determine the sum due and owing to the first respondent approximately one year subsequent to the fire. The inference to be drawn is, that, up to then, there was a dispute between the first respondent and the appellants as to the sum due and owing. The arbitration proceedings were stayed by the injunctive order granted to the second respondent. There is no evidence as to the basis on which that order was made. Miss Davis' submission that the order was made for the reason that damages were not an adequate remedy, remains unsubstantiated. The real question however, is whether, on the face of it, the second respondent could be said to be owing a duty of care to the appellants of which there has been a breach.

The appellants seek to impose liability on the second respondent for economic loss. Over the years, in imposing a duty of care on a defendant, different approaches have been adopted in determining different kinds of damages. The concept of such duty embraces the avoidance of injury to person or property and in the case of ***Hedley Byrne v Heller & Partners*** [1963] 2 All ER 576, the duty also extends to economic loss.

There are, however, restrictions as to the extent to which a claimant may recover damages for financial loss. The court is obliged to place restraint on liability for economic loss arising from a defendant's negligence. In ***Candlewood Navigation Corporation Ltd. v Mitsui OSK Lines Ltd, The Mineral Transporter, The Ibaraki Maru*** [1985] 2 All ER 935, Lord Fraser in delivering the judgment of the Privy Council at page 945 said:

> "Their Lordships consider that some limit or control mechanism has to be imposed on the liability of a wrongdoer towards those who have suffered economic damage in consequence of his negligence. The need for such a limit has been repeatedly asserted in the cases, from ***Cattle's*** case to Caltex, (see ***Caltex Oil (Australia) Pty Ltd. v Dredge Willenstad*** (1976) 136 CLR 529) and their Lordships are not aware that a view to the contrary has ever been judicially expressed."

The authorities show that liability for economic loss is restricted to loss suffered by a claimant, through negligent misstatement or advice, who relies on the accuracy of information, and advice, from a party who is in position to give such advice or information as shown in cases such as Hedley ***Byrne v Heller & Partners*** (supra), and ***Smith v Eric & Bush*** (a firm) ***& Harris v Wyre Forest DC*** [1989] 2 All ER 514. In those cases, the defendants were fully cognizant of the nature of the transactions contemplated by the plaintiffs. They were also aware that advice or information given by them would be transmitted to the plaintiffs. It was also within their knowledge, that there was a distinct possibility that the plaintiffs, in determining whether they should participate in the

only be said to be owing a duty of care to the appellants if such duty is shown by the claim to fall within the ambit of the ***Hedley Byrne v Heller & Partner*** (supra) principle. The statement of case does not reveal that the appellants had relied upon any statements, information or advice given by the second respondent on which they acted to their detriment, causing them to suffer financial loss. It follows therefore, that the particulars of claim, on the face of it, does not disclose a reasonable cause of action in negligence against the second respondent. Consequently, the claim in negligence against the second respondent cannot stand.

The learned trial judge's order striking out the appellants' claim against the second respondent would be not only with reference to their claim in negligence but also to their claim in contract. He found that there was a contract between the parties but held that the claim disclosed no reasonable cause of action. As earlier indicated, the appellants seek to recover damages for loss arising from the second respondent's failure to pay over the proceeds, of the policies of insurance to the first respondent within a reasonable time. They allege that there is in existence, an express, oral and written agreement for the 1st respondent to complete arbitration proceedings before the sale of the property and the second respondent derailed the arbitration process. It is their further claim, in the alternative, that such an agreement was implied.

respondent to complete arbitration proceedings before the sale of the property and the second respondent derailed the arbitration process. It is their further claim, in the alternative, that such an agreement was implied.

A contractual relationship between the parties is grounded in the policies of insurance issued by the second respondent to the appellants. The first appellant is the owner of the Brentford Road property and claimed loss by reason of the sale of the property as well as loss of profits. The claim is grounded in the second respondent's delay in paying over the insurance funds. The first respondent, with reference to the existence of an arbitration clause, in paragraph 12 of its defence states:

> "... the First Defendant and Trafalgar were not entitled to appoint an arbitrator or otherwise proceed on any reference to arbitration since the mortgage endorsement clause was not such as to give the First Defendant and Trafalgar the right to invoke the provisions of the arbitration clause in the Plaintiff's insurance policy with the Second Defendant, and an injunction to restrain the First Defendant and Trafalgar from submitting the dispute to arbitration."

Trafalgar to which mention is made in the foregoing paragraph of the defence is the predecessor of the first respondent.

It appears to me that the primary consideration as to whether an agreement as alleged does in fact exist, ought to be directed to the arbitration clause in the policy of insurance. It would be for the court in construing the relevant clause to determine whether the second respondent is in breach

thereof, when they sought and obtained the injunctive order, preventing the arbitration.

Further, with respect to the alternative claim, the relationship between the parties is inherently a commercial one. The question arising would be whether, depending on the intention of the parties, taking into account all the surrounding circumstances, a term as contended for by the 1st appellant could be imported into the contract of insurance to show the true intention of the parties. A term may be implied if necessary to give efficacy to the contract. See ***Reigate v Union Manufacturing Co. (Ramsbottom)*** [1981] 1 KB592 page 605; ***Shirlaw v Southern Founderies (1926) Ltd.*** [1939] 2KB page 206; ***Liverpool, City Council v Irwin*** (1977) AC 239 ***National Commercial Bank v Guyana Refrigerators*** (1998) 53 WIR 22.

If as alleged, arbitration proceedings ought to have been pursued and completed prior to the sale of the property, it would be for a trial court to determine whether the second respondent ought to have paid over the funds to the first respondent within a reasonable time so as not to expose the first appellant to any loss.

The second appellant is not the owner of the property. However, the appellants were parties to the insurance policies, thus giving rise to contractual relations between the second respondent and themselves. The appellants have claimed loss of profits by reason of the second respondent's failure to pay over

the funds to the first appellant within a reasonable time. The question arising out of the insurance contract would be, whether there was a breach of contract as a consequence of the direct connection between the contract and the second appellant's loss. The appellants have an arguable claim in contract against the second respondent and this claim should proceed.

Ground v

> "That the Learned Judge erred in finding that there was no evidence that the Claimant did not know of either the Application to Strike out or the date on which it would be heard."

The learned judge stated that for approximately two years the appellants did nothing about the striking out. He went on to state that no evidence exists to show that they were unaware of the application or the hearing date.

In paragraph 14 of an affidavit sworn on August 12, 2004 by Miss Sheena Stubbs on behalf of the first respondent, she stated that:

> "On the date of the filing of S & T Distributors Limited's Appeal, a Summons to Strike out (sic) Writ of Summons and Statement of Claim was filed on behalf of CIBC Jamaica Limited. This has to be re-listed having regard to the Appeal (sic) and was re-listed on the 19th of July 1996 and again on the 22nd of January 2001."

There was nothing in the affidavit to indicate the initial hearing date of the summons. It was obligatory on the part of the first respondent to have served the summons for the first appellant's attendance in chambers on the return date.

There is no evidence that this was done. It is also remarkable that no evidence exists as to where, or, upon whom the summons was served.

Miss Davis, in an affidavit sworn on September 2, 2004, at paragraphs 8 and 9 stated:

> "8. I am informed by Mr. Anthony Simmons aforesaid that the Claimant did not receive the relisted Summons attached as "SPS7". By that time the Suit herein was filed, and the 1st Defendant was aware that 1 Rougemont Way was not the Plaintiff's address. Certainly the 1st Defendant was aware the 56 Brentford Road (which is the address given on the Summons) was not the Claimant's address, as by this date they had themselves sold the premises. Further I am informed by Mr. Simmons and verily believe that as far as he was aware he did have an Attorney-at-law representing the Plaintiff in Suit 023 of 1996.
>
> 9. With regard to paragraph 15 of the said affidavit, I am informed by Mr. Simmons that the 1st Claimant is unaware of the order referred to, since it did not receive the re-listed summons referred to."

A re-listed summons filed January 22, 2001 was addressed to the first appellant as follows:

> "AND TO: The Plaintiff
1 Rougemount Way
Kingston 8
>
> AND 56 Brentford Road
Kingston 5."

Although 56 Brentford Road was the first appellant's registered address at the date of the filing of the summons, the property at Brentford Road was

already sold by then. There is no evidence that 1 Rougemount Way was the first appellant's registered address. It is also of significance that the summons was neither addressed to, nor served on Mesdames DaCosta & Cummings, the then attorneys-at-law for the first appellant on whom it ought to have been served.

It is clear from the foregoing that it could not be accepted that the first appellant had been aware of the application or of its date of hearing. The learned judge had been clearly wrong in his conclusion.

Grounds iv and vi

> "iv. That the Learned Judge in Chambers erred in striking out the 1st Claimant's claim in contract against the 1st Defendant.
>
> vi. That the Learned Judge in Chambers erred in striking out the 1st Claimant's claim in contract against the 1st Defendant, as same was not an abuse of process."

Miss Davis argued that the learned judge was wrong in striking out the first appellant's claim in contract against the first respondent. There was an agreement, she argued, between the parties from which it can be inferred that the first respondent would not sell the properties. She contended that, the question as to the forbearance is evidenced by a letter of May 30, 1994 as well as by an oral agreement between the first appellant's managing director and Mr. Basil Payne, the first respondent's agent.

Mr. Vassell, Q.C., submitted that the learned judge was correct in finding that there was no reasonable cause of action in the appellant's claim in contract

against the first respondent. At the material time, he argued, the first appellant was indebted to the first respondent. The fire occurred. The insurers (the second respondent) imputed arson on the part of the first appellant and consequently denied liability. He further argued that in the circumstances, it would be unreasonable for the first respondent to have deferred the sale as they were entitled to sell.

The claim was struck out by the learned judge (a) as an abuse of process and (b) for the reason that it does not disclose a reasonable cause of action. At paragraphs 57 and 58 of his judgment, he said:

> "57. The basis of the application to strike out STD's claim against CIBC is that the same matter was pleaded in Suit No. 023 of 1996. I have examined the pleadings in Suit No. 023 of 1996 and the pleadings in this case. I am more than satisfied that this present case is merely a repetition of Suit No. 023 of 1996. The only difference is that in the previous suit the remedy sought was an injunction and a declaration that CIBC was not entitled to sell the property whereas in this suit the claim is for damages.
>
> 58. At the time when the 1996 suit was filed, the property had not yet been sold and so the claimant could not seek damages. It will be recalled that this 1996 suit was filed to prevent the sale of the property. Miss Davis submitted that Suit No. 023 of 1996 was not properly pleaded as a *contract* between the parties. This submission does not rest on firm foundations. Although the noun contract and the verb *breach* were not used, there can be no doubt that the pleader was stating that there was a contract and CIBC was in breach of the contract. I therefore conclude that the part of the statement of case of STD that is based upon contract should be struck out

> on the basis that it is a misuse of process. The misuse being to plead a case against CIBC that was already struck out from which there was no appeal or application to set aside that striking out. Miss Davis tried to resist this conclusion by saying that the previous suit was not decided on the merits. She relied on the decision of **Johnson.** The broad approach suggested by the House of Lords which I adopted earlier cannot avail Miss Davis. The broad approach cannot embrace a situation such as this where this court has struck out a matter for failing to disclose a reasonable cause of action and the claimant simply repeats the same facts, introduces the words *contract, breach and damages* and then say it is a new claim."

As a general rule, the court's process should be engaged only once in pursuit of a particular subject matter or cause. The well known case of ***Henderson v Henderson*** [1843] 3 Hare 100, which prohibits re-litigation of matters which were or ought to have been previously litigated on their merits was considered by the learned judge. In keeping with ***Henderson v Henderson*** (supra) a court will strike out a second action as an abuse of process where the circumstances so warrant.

There may be situations, however, in which the court will refrain from striking out an action which had been previously brought, if the interest of justice so dictates. The case of ***Johnson v Gore Wood & Co.*** [2001] 1 All ER 481, eminently lends support to this proposition. In that case, a claim was brought by a claimant company WWH against the defendants for professional negligence. The defendants were solicitors. That claim was pursued and settled. Mr. Johnson was the managing director and majority shareholder of WWH. He

subsequently stated that he had a personal claim against the defendants. The particulars of his claim arose from the same matters as those in the claim by WWH. He could have, but did not initiate proceedings against the defendants when WWH commenced its action. Mr. Johnson commenced his action. The defendants unsuccessfully applied to strike it out as an abuse of process. At page 14 Lord Bingham said:

> "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. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have

> been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interest of justice."

Lord Bingham's dictum has much to commend it, notwithstanding that the learned judge found that the broad approaches advocated by him would not inure to the benefit of the first appellant. Where a party seeks to pursue a claim already brought in a previous suit which clearly seeks to unjustly expose the defendant to litigation, then, the court must view the later proceedings as abusive. There are however, circumstances in which a second suit may be regarded as something other than an obvious endeavour by a claimant to revive an earlier action. There, are also situations in which a matter which ought to be raised in an earlier suit was not raised, or, a claim made in an earlier suit, is advanced in later proceedings which the court may not regard as an unfair persecution of a defendant. In such cases, as proposed in ***Johnson v Gore Wood & Co.*** (supra), the court ought to adopt a broad based approach by engaging itself in a balancing exercise and conducting an "enquiry into all the circumstances with due weight given to each circumstance and with a judgment being formed at the end of the exercise as what justice requires overall."

The claim by the first appellant in suit C L 1996/S023 was for an injunction to prevent the sale by the first respondent and for a declaration that they were not entitled to sell the properties. In suit C L 1999/S222, the relevant particulars of the claim are contained in paragraphs 13 and 14 of the statement of claim which read:

> "13. By letter dated the 30th of May, 1994 the First Defendant agreed with the Plaintiffs to go to Arbitration with the Second Defendant in respect of the claim. It was verbally agreed between the Plaintiffs, through their agent Anthony Simons and the First Defendant, through its agent B.E. Payne, that the First Defendant would not exercise its powers of sale with respect their mortgages on the Plaintiff's said land, unless the proceeds recovered from the arbitration were sufficient to cover the Plaintiffs' indebtedness. It was further agreed that the First Defendant would take all necessary steps to proceed to arbitration and in addition would not seek to exercise its powers of sale under the mortgages of the Plaintiff's land aforesaid until the arbitration between the 1st and 2nd Defendants was completed. In the alternative, The (sic) Plaintiffs say that it was an express and/or implied term of the agreement between the Plaintiffs and the 1st Defendant that the 1st Defendant would take all necessary steps to proceed to arbitration and in addition would not seek to exercise its powers of sale under the mortgages of the Plaintiff's land aforesaid until the arbitration between the 1st and 2nd Defendants was completed. At the Trial of this action, the Plaintiff will rely on letter dated May 30, 1994 for its terms and effect.
>
> 14. Subsequent to this letter, an agreement was signed with the First Defendant in which inter alia it was agreed that the 1st Defendant would take all necessary steps to go to arbitration and in addition would not seek to exercise its powers of sale under the mortgages of the Plaintiff's land until the arbitration between the 1st and 2nd Defendants was

> complete. The Plaintiffs gave consideration and duly paid to the First Defendant the amended sum of Two Hundred Thousand Dollars ($200,000.00), being the estimated cost of the arbitration, as per the agreement."

The claims in suit C L 1996/S023 and in paragraphs 13 and 14 of suit CL 1999/S222 speak to allegations of breach of contract. Paragraphs 13 and 14 of the statement of claim in C L 1999/S222 make mention of an express written and oral agreement between the parties that the first respondent would not sell the mortgaged property, unless the sum recovered after arbitration was insufficient to liquidate the first appellant's indebtedness. There is also an averment of an agreement for the first and second respondents to proceed to arbitration for a decision on the amount due to the first respondent. The learned judge omitted to give consideration to these matters within the context of the allegations embodied in an express averment of an agreement between the parties.

The express agreement as pleaded, refers to the passing of consideration of $200,000.00 from the first appellant to the first respondent with respect to the conduct of arbitration proceedings as well as an allegation of a promise that the first respondent would not sell the property until arbitration proceedings were completed. The averment as to the passing of consideration was denied by the first respondent in paragraphs 8 and 10 of their defence and as a consequence, issue was clearly joined between the parties on this aspect of the claim.

The learned judge also ignored the fact that it was also averred by the first appellant, in paragraphs 31 and 32 of their amended statement of claim, that the first respondent's interest charges were excessive. Although this claim could have been pleaded in the previous suit, it is clearly a separate and an independent claim which is grounded on that aspect of contract relating to the loan it self as distinct from the alleged agreement to defer the sale.

It is also of importance to state that at the time the former suit CL 1996/S023 (the injunction suit) was brought, the property at Brentford Road had not been sold and the first appellant would not have been in a position to have claimed damages for breach of contract for loss of profit.

I am of the view that the first appellant could have a good claim against the first respondent as to whether there was an express written and oral agreement between the parties to restrain the sale pending the determination of arbitration proceedings. In these circumstances, the broad approach adopted in ***Johnson v Gore Wood*** (supra) should be applied to permit the first appellant to proceed with their claim in contract against the first respondent. It is open to the defendant to seek an amendment to their defence to raise the doctrine of frustration in light of the injunctive order obtained by the second respondent, as submitted by Miss Davis. Additionally, the claim with respect to excessive charges of interest is maintainable. The first appellant's claim in contract ought

not to have been struck out as against the first respondent. Their claim should proceed to trial.

Ground vii

> "vii. That the Learned Judge in Chambers erred in finding that the 2nd Appellant's claim against the Respondent for breach of contract did not disclose a reasonable cause of action."

It was submitted by Miss Davis that although an express averment of a contractual term was pleaded, the learned judge incorrectly found that an implied term, pleaded in the alternative, could not be established. Mr. Vassell, Q.C., argued that an implied term could not be grounded in the contract between the parties. It was contended by him that the second appellant, not being the owner of the property destroyed by the fire, would be unable to demonstrate any loss as a consequence of the sale of the property.

In dealing with the second appellant's claim, the learned trial judge at paragraph 59 of his judgment said:

> "**59.** I now turn to S & T Limited's claim against CIBC. Miss Davis seeks to sustain S & T Limited's claim in contract against CIBC by saying that S & T Limited was not a party to Suit No. 023 of 1996 and to that extent is not affected by the decision in that matter. I agree. What is the basis of its claim against CIBC? The claimant says that there was an oral contract between S & T Limited and CIBC in these terms: CIBC would not exercise its power of sale under the mortgage unless the proceeds recovered from the arbitration were insufficient to cover the claimants' indebtedness. The claimant says further that this contract had an implied term. The implied term is this: CIBC would take all necessary

> steps to proceed to arbitration. It will be recalled that, CIBC was funded by the claimants to participate in arbitration proceedings. It will be recalled, further, that these proceedings were halted by Royal through an injunction issued by this court. S & T Limited is saying that CIBC was under an obligation to pursue all necessary litigation so as to be able to continue with the arbitration. Is the argument supported by law?"

At paragraph 64 he declared:

> "64. It is well known that terms are not to be implied into a contract unless it passes the very stringent test of necessity (see ***Liverpool City Council v Irwin*** [1977] A.C. 239). This means that a term should not be implied unless it is necessary to give efficacy to the contract. Another way of emphasizing how strict the test is, is by saying that a term should only be implied "if and only if the court finds that the parties must have intended that term to form part of the contract" (see Lord Pearson ***Trollope & Colls v North West Metropolitan Regional Hospital Board*** [1973] 1 W.L.R. 601, 609C). The Judicial Committee of the Privy Council on appeal from Jamaica reaffirmed that approach in ***National Commercial Bank v Guyana Refrigerators*** (1998) 53 WIR 229. In any event even if there were cases that said other wise this decision is binding on me. In that case Lord Steyn stated that "*it is not enough that such an implied term would be reasonable and sensible*"; the test "*is always strict necessity*" (see page 233d)."

Paragraph 9 of the statement of claim discloses that the first respondent obtained from the second respondent an endorsement of the appellants' interest in relation to the policies of insurance. The policies were underwritten for the benefit of both appellants. Paragraph 13 of the statement of claim reveals an express averment of a written and oral agreement between the first respondent

and the appellants with reference to the postponement of the sale pending the completion of arbitration proceedings between the first and second respondents. This clearly points to the existence of a contract between the first and second appellants and the first respondent.

An error on the part of the learned judge was that having proceeded on the assumption that a contract existed he gave consideration only to the second appellant's alternative pleading of an implied term of the contract.

As a general rule, a mortgagee is entitled to exercise his power of sale where the mortgagor is in default. However, such power of sale may be postponed by an agreement between the mortgagee and the mortgagor.

The second appellant was not the owner of the property at 56 Brentford Road. They nonetheless, could have claimed loss of profit, consequent on the sale of the premises by reason of the first respondent's failure to adhere to terms of a contract as alleged, requiring the first respondent to engage in and complete arbitration proceedings. The important issues therefore, are whether the pleadings show a causal connection between the alleged breach of contract and the second appellant's loss, and whether the loss claimed was within the contemplation of the parties.

The allegation of the second appellant as to the agreement to defer sale subject to arbitration proceedings being finalized must be viewed against the background of an allegation in paragraph 12 of the defence which states:

> "In reply to paragraph 16 of the Statement of Claim the First Defendant states that the Second Defendant on the 14th November, 1994, filed a Writ of Summons in the Supreme Court endorsed with a claim for a declaration that the First Defendant and Trafalgar were not entitled to appoint an arbitration or otherwise proceed on any reference to arbitration since the mortgage endorsement clause was not such as to give the First Defendant and Trafalgar the right to invoke the provisions of the arbitration clause in the Plaintiff's insurance policy with the Second Defendant, and an injunction to restrain the First Defendant and Trafalgar from submitting the dispute to arbitration."

The foregoing averment raises the question as to whether arbitration proceedings ought to have been instituted. If it can be established that, contrary to the allegations in paragraph 12 of the defence, arbitration proceedings ought to have been pursued and completed prior to the sale of the property, then the question as to whether a breach had occurred would arise. If a breach is established, the second appellant would have to go further to show that it was foreseeable that they would have suffered the loss of which they complained and that it would be reasonable to ascribe liability to the first respondent for such loss.

It appears to me that the appellants may be able to establish a breach of contract but may not be able to prove that their loss was a direct cause of the of the first respondent's failure to complete the arbitration process. They may however, be able to prove the claim of excessive interest on the loan based contract and should be allowed to pursue this aspect of the claim.

Ground viii

> "That the Learned Judge in Chambers erred, in that his Order was ambiguous. The Appellant's claim in contract covered breach of the loan contract in that the Respondent charged excessive interest, but it was never contended by the Respondents that this aspect of the Claim be struck out."

The claim for excessive interest is still an outstanding claim, it having its genesis in the loans to the appellants. However, the learned trial judge would have fallen into error by striking out this aspect of the appellants' claim against the first respondent. This claim discloses a reasonable cause of action.

I would allow the appeal in part. The appellants' appeal against the second respondent in respect of their claim in negligence is dismissed but the appellants' appeal in contract is allowed. The appeal by the first appellant against the first respondent is allowed and their claim against the first respondent in contract should proceed. The appellants' claim in contract as to excessive interest charges should proceed.

Costs to the appellants against the first respondent to be agreed or taxed. I would award one-half costs to the second respondent against the appellants to be agreed or taxed.

SMITH, J.A:

I have read in draft the judgments of Harrison P. and Harris, J.A. I agree with their reasons and conclusions and there is nothing further that I wish to add.

HARRISON, P.

ORDER:

1. The order of Sykes, J. striking out the claim against Royal for Breach of Contract and Negligence and striking out STD's claim in contract against CIBC is affirmed with half (½) costs to the Respondent Royal to be agreed or taxed.
2. The Appeal by STD and S & T against the striking out of their claim in contract against CIBC is allowed with costs to the Apellants to be agreed or taxed.
3. The consequential orders stand.