

IN THE CAYMAN ISLANDS COURT OF APPEAL

HOLDEN AT GEORGE TOWN

Grand Cayman

C.I.C.A. Civil Appeal

No. 11/1987

DICK FRAZIER

Appellant

AND

COAST HILL DEVELOPMENT COMPANY LIMITED

Respondent

BEFORE:

The Honourable Mr. Zacca, P.
The Honourable Mr. Georges, J.A.
The Honourable Mr. Kerr, J.A.

Appearances are:

Mr. Pierre Lamontagne, Q.C for the
Appellant, instructed by Hunter
and Hunter.

Mr. Norman W. Hill, Q.C. for the
Respondent, instructed by Truman
Bodden and Company.

Hearing: December 1st - 4th, 1987, April 6th, 1988.

J U D G M E N T

Georges, J.A.:

The respondent (referred to herein as "the Company") engaged the appellant originally in May, 1980, to build a block of six (6) condominium units. This was followed by contracts to build five (5) other blocks of six (6) units each. Disputes arose between the parties under these building agreements which were referred to

arbitration under an agreement dated 11th March, 1983. The arbitrator published his award in Kingston, Jamaica in June, 1987.

Substantially, the appellant succeeded. The arbitrator found that the sum of \$536,868.92 was due to the appellant from the Company

By notice of motion dated 23rd July, 1987, the Company moved that the award be set aside and/or remitted on a large number of grounds therein enumerated. The motion was supported by the affidavit of Mr. Herbert Peintner, a director of the Company which set out in some detail the history of the matter. To this were annexed two substantial bundles containing the documents relevant to the application. The motion did not specify a return day. It was apparently not possible at the date it was filed to have a date of hearing fixed.

On 24th July, 1987, the day after the motion was filed, the appellant issued a summons headed:

"Rule 41 Rules of Court, Grand
Cayman (Civil Procedure Rules)".

In that summons the appellant sought an order:

"that the 'Notice of Motion'
filed herein on the 23rd July,
1987 be struck out on the
following grounds that —

- (a) it discloses no cause
of action, and/or
- (b) it is scandalous, frivolous
and vexatious; and/or
- (c) it is an abuse of the
process of the court".

This summons came up for hearing before Hull, J., on 10th August, 1987. Mr. Hill, for the company, objected that under rule 41, there was no authority to strike out a notice of motion. Mr. Lamontagne agreed with that submission but urged that the Court had an inherent jurisdiction so to do.

Mr. Hill countered that the motion was not before the Court and that properly, Mr. Lamontagne should have taken the objection contained in the summons on the hearing of that motion when it came for hearing.

The trial judge ruled as follows:

"I agree with Mr. Hill that the notice of motion is not before me ... But in any case I do not think it is open to the applicant to take out an interlocutory summons in chambers to strike out a notice of motion, even if it had relied expressly on the ground of inherent jurisdiction. The applicant's objections should be taken in Court, when the motion comes for hearing".

It seems clear from that formulation that the learned judge was of the view that a preliminary objection of the kind taken by Mr. Lamontagne could only be taken at the hearing of the motion. It does not appear that he considered that it was possible otherwise, but that in the exercise of his discretion he considered it appropriate that it should be taken then.

This is not surprising because Mr. Lamontagne had conceded that there was "nothing in Cayman or England in rules or case law dealing with striking out notice of motions". The judge so noted and the note is admittedly accurate.

There are, in fact, cases in which applications have been made to have notices of motion struck out. In R v Secretary of State for the Home Department, ex parte Dew [1987] 2 All E. R. 1049, Dew applied (leave having been granted for that purpose on 29th October, 1985) for judicial review by way of orders of mandamus and/or certiorari, and/or injunctions, and damages against the respondent Secretary of State, the Governor and the Medical Officer of H. M. Prison at Wandsworth. The respondents, by notice of motion dated 21st March, 1986, applied to have the originating motion struck out and the application for judicial review dismissed on the ground that the application disclosed no reasonable claim in public law and was

an abuse of the process of the Court. The applicant, Dew, subsequently sought an order that the proceedings should continue by writ so that he could pursue his claim for damages. Intervening circumstances had made the claim for judicial review unnecessary, as the actions which the applicant had asserted should have been taken had, in fact, been taken.

McNeil, J., stated at p 1052:

"There is an inherent power in the Court to strike out proceedings which are an abuse of process, and the point is only of academic interest here, as I am satisfied that the application here of counsel for the respondents is properly founded under the inherent jurisdiction of the Court".

In Ringroad Investments Limited and Others v Secretary of State for the Environment and Another, 40 P. & C. R. 99, the applicants filed a notice of motion dated 4th April, 1979, challenging an enforcement notice made by the respondent. By notice of motion dated 18th July, 1979, the respondents sought an order that the applicants notice of motion be struck out because it was out of time. The application to strike out succeeded.

While in both these cases the application to strike out was itself made by notice of motion, the fact remains that the objection to the notice of motion sought to be struck out was not taken as a preliminary objection on the hearing of that motion but in a separate proceeding. In the Ringroad case, both notices of motion were heard together. In Ex parte Dew, the notice of motion was heard together with an application to amend the original motion which was sought to be struck out.

Once it becomes clear, as it appears to me abundantly to be, that an application to strike out a motion can be made by proceedings quite distinct from the motion sought to be struck out, the only remaining issue is whether or not it is a fatal procedural error to proceed by way of a summons rather than by way of a notice of motion.

The case of Orri v Elias Grace Shipping Company Limited, Court of Appeal, Civil Division Transcript, dated 10th April, 1986 does indicate that a summons may have been used. An award had been made against the applicant in an arbitration under a charter-party for hire due. The applicant did not appeal on a point of law as he could have, but filed an originating motion ("the 1984 notice of motion") challenging the jurisdiction of the arbitrators. This came before a judge in February, 1985. He allowed the applicant to amend that notice of motion to enable leave to be sought to appeal out of time and he granted that application and extended the time. The applicant did not appeal within the extended time, but in October, 1985, filed a second originating motion seeking leave to appeal and challenging the jurisdiction of the arbitrators. The judge at first instance refused these applications and the appellant appealed unsuccessfully. The Court stated at p 2 of the judgment:

"On 6th December, 1985 the defendants issued a summons to strike out the 1985 application. On 4th February of this year that application to strike out came before Mr. Justice Bingham. According to the order as drawn up Mr. Justice Bingham refused the plaintiff's application for leave to amend to appeal against the award ... In addition Mr. Justice Bingham struck out the 1985 notice of motion in so far as it challenged the jurisdiction of the arbitrators to make their awards".

It does appear, therefore, that the challenge in that case was by way of summons. I see no reason in principle why the application cannot be made by summons. No rule has been cited.

Mr. Lamontagne stated that the overriding consideration was getting an early date and the documents bear this out. When the notice of motion was filed on 23rd July, 1987, the Registrar could not give a date and it was issued with the return date blank. When the summons was filed on 24th July, 1987, a date for hearing as early as 3rd August, 1987 was fixed.

I am satisfied that the Court has an inherent power to strike out a notice of motion which discloses no grounds for the remedy sought. In this case the summons was specifically headed under Rule 14 of the Rules of Court, but this did not, in my view, disentitle the judge from exercising his inherent power on such an application if the circumstances justified it.

Mr. Hill contended that the balance of convenience tilted in favour of having the issues raised as a preliminary objection at the hearing of the motion. He urged that hearing the summons would result in there being two trials of the matters in dispute requiring extensive consideration of the disputed facts.

I find this contention unacceptable. The application to strike out can only be argued on the basis that the contentions set out in the affidavit in support of the notice of motion are assumed to be true. Further, it can succeed only if the clearest of cases is made out. If it does succeed, however, much time will have been saved. The contested merits of the motion will not have to be investigated. If it fails, no more time would have been spent than would, in effect, have been taken up for the disposal of the preliminary objection. On the other hand, should the preliminary objection succeed, then much time would have been wasted in preparing for the hearing of the motion itself, which would, in the event, not have taken place.

For these reasons I concurred in the order allowing the appeal with costs and remitting the summons for determination in the Grand Court.

ZACCA, P.

I have had the opportunity of reading the Judgment of Georges, J.A. and I am in agreement with his reasons and conclusions.

KERR, J.A.:

I have had the benefit of reading the draft judgment of Georges, J.A. in which he reviewed the history of the proceedings and summarised the arguments of counsel on both sides. Accordingly herein I shall do no more than reveal the considerations that moved me to concur in the judgment of the Court and refer only to such of the history of the proceedings and the arguments that I consider necessary to render my reasoning understandable.

The company by an amended notice of motion dated 23rd July, 1987 sought to set aside the award made by the arbitrator in favour of the respondent, Frazier. The respondent countered by a summons to strike out the motion on the ground that on the face of it, no cause of action was disclosed therein. It was expressly stated that the summons was taken out pursuant to Rule 41 of the Grand Court Rules. Rule 41 so far as is relevant reads:

"41 (1) The Court may at any stage of the proceedings, of its own motion or on the application of any party, order to be struck out or amended any pleading or indorsement, on the ground that -

(a) it discloses no cause of action
or defence; or

and may order the case to be dismissed or stayed or judgment to be entered accordingly.

"41 (3) For the purpose of this Rule a pleading includes an originating summons and a petition.

When the summons came before Hull, J., on August 10, 1987 on behalf of the Company, as I understand the argument, it was urged as a preliminary point in limine that Rule 41 did not apply in that it did not confer any jurisdiction on the Court to strike out a notice of motion by such proceedings and as the notice of motion was not there before the Court it was not open to take a preliminary objection. Mr. Lamontagne unhesitatingly conceded that Rule 41 did not apply to the notice of motion but asked the Court, never-

theless, to exercise its inherent jurisdiction and hear the summons on the merits. Hull, J. upheld Mr. Hill's objection but also considered the matter of inherent jurisdiction when he said:

"I agree with Mr. Hill that the notice of motion is not before me in Chambers. Whether or not the relief sought by the respondent must be asked for in an originating summons is in my view open to argument. But in any case, I do not think it is open to the applicant to take out an interlocutory summons in Chambers to strike out a notice of motion even if it had relied, expressly on the ground of inherent jurisdiction."

Now it is no longer in question, indeed it was agreed by all, that a judge of the Grand Court had an inherent jurisdiction to strike out proceedings that disclose no cause of action. The cases of R. v Secretary of State for the Home Department ex parte Dew (1987) 2 ALL E.R. and Ringroad Investments Ltd. et al vs. Secretary of State for the Environment et al 40 P. and C.R. 99 are illustrative of this power. These cases, however, were not concerned with the question whether or not a summons to strike out could be entertained in Chambers and on a date antecedent to a date fixed for the hearing of the notice of motion to which the summons related.

Rule 41 is silent as to the form of procedure to invoke the jurisdiction of the Court to strike out proceedings in which the pleading or endorsement discloses no cause of action. It, however, expressly recognized the power of the judge to do so on his own volition. Secondly, in the definition of pleadings, applying accepted canons of construction, I am of the view that the word "includes" in the definition extends the ordinary meaning of "pleadings" rather than as Mr. Hill would have it and, as Mr. Lamontagne conceded, restricts the meaning to originating summons and petition. Accordingly I do not interpret Rule 41 as excluding the jurisdiction to strike out proceedings on an application by way of a summons.

Indeed Rule 58(1) provides:-

1. " Where by any law or rule of Court any application is authorised to be made to the Court and no other procedure is prescribed for so doing, such application shall be made by motion in Court, or by summons to the Judge in Chambers."

Assuming there was merit in the submission that Rule 41 was in-applicable the mere fact that the summons purported to be made pursuant to that Rule would not be a bar to hearing the summons on the merits. For the purist a simple amendment would suffice. It would be no more than a triumph of substance over form.

Although it was not pursued, I note with interest, Mr. Lamontagne's observation that by Rule 3, the approved procedure to set aside the award of an arbitrator is by an originating summons. Had this procedure been followed, no question would arise as to the summons to strike out being an appropriate remedy.

Be that as it may, neither in law nor good sense is there any in-escapable obligation on a judge to waste judicial time by embarking on the hearing of proceedings which disclose no cause of action. Indeed if it so appears to him, it would be perfectly proper on his own volition to exercise the jurisdiction to strike out those proceedings. I am not attracted by the argument that as the motion was not yet before the Court the summons was not properly before the Judge. In my view the summons to strike out by its terms and references brings into consideration the proceedings to which it relates. Mr. Hill's highly technical objection did not merit the termination of the proceedings which challenge the efficacy of the notice of motion. The appellant was obviously seeking expeditious treatment of a matter manifestly calling for prompt determination.

For these reasons I concurred in the decision that the appeal be allowed, the order of Hull, J., set aside and the summons remitted for hearing in the Grand Court.