

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

SUIT NO. 2004/HCV01741

COR: THE HONOURABLE MR. JUSTICE REID  
THE HONOURABLE MR. JUSTICE MARSH  
THE HONOURABLE MR. JUSTICE D.O. McINTOSH

BETWEEN LOWELL SAMUEL LAWRENCE APPLICANT  
AND FINANCIAL SERVICES COMMISSION RESPONDENT

Gordon Robinson & Miss Minette Palmer instructed by Palmer & Walters for Applicant

Patrick Foster Deputy Solicitor General and Mrs. Simone Mayhew instructed by DSP for the Respondent

Heard: April 11<sup>TH</sup>, 12<sup>TH</sup> & October 28<sup>TH</sup>, 2005

REID, J

- 1 The Applicant contends that the Respondent exceeded its statutory mandate of authority by imposing a fixed penalty from a scheduled tariff, thereby purporting to discharge him from liability to prosecution for breaches of the Insurance Act 2001.
- 2 The orders sought under Judicial Review are:
  - a.) Certiorari, to quash the offer for the Applicant's acceptance by which he would pay a fixed penalty.

b.) Prohibition to prevent a complaint from the Respondent to the Director of Public Prosecutions.

c.) Prohibition to prevent the Respondent suspending revoking or interfering with the Claimant's registration under the Insurance Act.

d.) Damages for interfering with his contract of employment.

3 The Insurance Act of 2001 assigned to the Respondent the regulation of the conduct of insurance in Jamaica. Prior to December 21, 2001 it was exercised by the Superintendent of Insurance. The Applicant since July 2, 2000, had been employed as an intermediary to the MONY Life Insurance Company of the Americas Ltd. (MONY). MONY, never previously registered, in February 2002 submitted an application for registration in Jamaica. In June 2002 MONY transmitted 22 applications by intermediaries (including Claimant) for registration. Insufficient or delayed documentation, as well as "due diligence checks" by the Respondent conducted to delayed processing, extending into the year 2003. The "checks" revealed that up until October 2003 the Applicant as an intermediary of MONY had settled thirty-eight policies of insurance. Dialogue

between the FSC and MONY ensued. They concurred in a course which would redress the breaches and regularize the *impasse*.

- 4 To each intermediary this was the offer: submit if he would, to payment of a penalty in the tariff of the Fourth Schedule of the Financial Services Commission Act. In that event, the FSC would decline to report or recommend prosecution by the Director of Public Prosecutions for breaches past. To that exemption would be offered an added bonus, namely, no regulatory sanction to inhibit registration would be invoked. Although it was not specifically stipulated in the agreement, MONY undertook to provide indemnity for the amount so paid by each intermediary adopting the offer.
- 5 Mr. Bryan Wynter the Executive Director of the FSC by a letter to the Applicant dated April 26<sup>TH</sup>, 2004 outlined the offer in terms. Unmistakable was the repudiation and withal a severe rebuke. Undeterred, the Executive Director renewed the offer, somewhat more persuasively, in a letter dated July 2004; these proceedings were the resulting culmination.

- 6 The issues for determination appear to be:
- a) Did the offer by the Commission require a fair hearing to precede it?
  - b) Does the breach of the Insurance Act as alleged, reflect on the face of the record, an error in law?
  - c) Did the Applicant have a legitimate expectation of conducting business pending registration approval?
  - d) Was the offer of the scheduled penalty payment an exercise usurping a judicial function?
  - e) Has an unjustified breach of the Applicant's right to property, constitutionally protected, occurred?

Ground a – The Fair Hearing Issue

- 7 This is a summary of the submissions:

The Applicant had no opportunity to comment or offer any explanation *qua* breaches alleged and this must derogate from the Commission's forming a plausible reason to believe that he had breached the Act. The Notice of Payment Form accompanying the second letter of July 1, 2004, and alluding, in terms, to a finding of criminal liability, would support a conclusive finding of guilt against the Claimant.

- 8 The submission overlooks the role of the Applicant's employer mediating and offering indemnity.

Comment or explanation from the Applicant could have post-scripted the gratuitous rebuke in retort to Mr. Wynter's first letter. The form of notice of payment is merely provisional, intended to facilitate the deposit of payment of penalty, if and only if the offer were accepted.

- 9 The expression, in the first letter, that the Commission

*"(had) obtained evidence to indicate  
that you had breached"*

is no more than a stronger mode of the formula in the statute:

*"has reason to believe"*

There was no lack of opportunity to explain or comment. None was forthcoming. These proceedings are proof of the election to reject the offer.

Any fair hearing could only arise after the intimation of a breach and before the actual imposition of a penalty. In this instance no penalty was imposed save and except that an offer was made on which the payment of a penalty depended, with the option of acceptance or rejection.

Grounds     b – Error on the face of the record  
                 c – Legitimate expectation

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10     Submissions on these grounds were made together.

Impugned is the first letter addressed to the Applicant conveying  
that the Respondent

*“..... had obtained evidence to indicate that (he had)  
breached Section 70 (1) of the Insurance Act by  
engaging in the sale of insurance policies .....  
without being registered”*

As was previously mentioned, the Act only requires the Commission  
to

*“have reason to believe”*

The letter as worded, it was submitted, points to a conclusion of  
guilt and *ipso facto*, a finding of criminal liability.

Further, the intimation therein that

*“The Commission will commence proceedings for  
suspension and/or revocation of your registration  
.....”*

only served to import confusion by asserting that the Applicant is in  
fact registered.

11 The legitimate expectation of the continued conduct of business in the interim would arise in this way. The company had conducted business from a location outside of Jamaica and hence had not been registered prior to the Insurance Act of 2001. The Applicant as an agent was not aware of any requirement for registration and hence had felt entitled to continue to conduct business unimpeded.

12 Both submissions are misconceived. The tenor of each letter sufficiently informed the Applicant of the perception by the Commission of the breaches. The Applicant cannot honestly assert any legitimate expectation. He is a Chartered Life Underwriter who had been successively registered to conduct insurance under the previous Act, even prior to doing business for MONY. He has not cited any express promise or the existence of any convention to ground his expectation.

Grounds      d – Usurpation of Judicial Function  
                 e – Unjustified breach of the Claimant's right to property

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13 The submissions under these two heads taken together begin thus:  
The Affidavit by the Respondent's Officer Miss Janice Holness that the Claimant's application "*was not in order and therefore there was a delay in processing it*" – is an insufficient response

No reason had been offered for the two-year delay. The Respondent had only dealt with the Claimant's employer and had

*"contemptuously ..... neglected or refused to explain why it (the Commission) so acted..... or expected the Claimant to know (what) was wrong"*

- 14 The short answer is that the Claimant has not shown that he had directed any inquiry to his employer who had submitted his application for registration. It is inconceivable that an employer who had gone to the extent of offering an indemnity as indicated, for the Applicant, could have had such conflict of interest as would have precluded the supplying of information on request by the latter. The allegation of legislative usurpation of the judicial function requires a look at the Financial Services Commission Act.
- 15 Section 21 (1) (2) and (3) read as follows:
- (1) *This section shall apply to an offence under any relevant Act, being an offence specified in the Fourth Schedule.*
  - (2) *The Commission may give to any person referred to in subsection (1) who it has reason to believe has committed an offence which this section applies, a notice in writing in the prescribed form offering that person the opportunity to discharge any liability to conviction of that offence by payment of a fixed penalty under this section.*
  - (3) *No person shall be liable to be convicted of the offence if the fixed penalty is paid in accordance with this section and the requirement in respect of which the offence was committed is complied with before the expiration of the fifteen days*



*following the date of the notice referred to in subsection (2) or such longer period (if any) as may be specified in that notice or before the date on which proceedings are begun, whichever event last occurs.*

The Claimant contends that it is unconstitutional in that it vests the Commission with authority to impose a mandatory penalty.

- 16 The decision in the Ontario High Court of Justice provides a useful reference. In Re McCutcheon and City of Toronto reported at 147 D.L.R. 193 (Vol. 147) before Mr. Justice Linden, a municipal by-law providing for voluntary payments for motor vehicle parking offences to avoid prosecution was challenged as contravening the Canadian Charter of Rights and Freedoms Section II (1).

The Court held that such a payment if made was a part of a settlement process and "could be viewed as a kind of voluntary consensual self-imposed penalty to avoid potential punishment of a more serious nature which may be imposed by a Court at a later time."

It was a scheme creating an incentive to make voluntary payments, the transgressors retaining the option to decline to pay, and await a summons to attend and offer a defence at trial. Moreover the

voluntary payment did not constitute a 'punishment' in the context of Section II (1) of the Charter.

17 In my view the impeccable reasoning in that decision admits of no deviation in its application to the instant case and demonstrates legislation offering a convenient alternative which avoids the consequences of a finding of guilt and conviction.

18 The Claim for damages purportedly based on interference with the contract of employment, seeks to invoke Sections 13 and 18 of the Constitution under Fundamental Rights and Freedoms.

Section 18 *ibid*, protects against compulsory acquisitions of property without compensation.

According to the Applicant he had been conducting business in an unregulated Insurance Industry. Unconstitutional he contends is the Act in its failure to make provision for service providers, previously unregistered, continuing operation pending fresh registration. The purported mandate to the FSC to regulate, even to the extent of canceling registration amounts to a compulsory acquisition of Applicant's contract of employment.

- 19 The averment of a previously unregulated industry is a misuse of language. All the Applicant's previous applications for registration had been submitted to the Superintendent of Insurance, the predecessor of the Respondent Commission. Moreover, the transitional provisions of the new Insurance Act which allow the continued conduct of business by registered entities and agents pending the completion of re-registration apply only where registration was in existence on the eve of the new Act.
- 20 I have seen the judgments in draft of each of my brothers who have reached the same conclusion.

No relief under any of the stated grounds can be sustained and the application must be dismissed with costs to the Respondent.

Marsh J.

The Applicant Lowell Samuel Lawrence sought, by way of Judicial Review, the following orders:-

- i. Certiorari to quash the decision of the Financial Services Commission, the Respondent's, that he has breached the Insurance Act and the said Respondents 'invitation' to him to pay a fixed penalty to discharge any liability or to face prosecution.
- ii. An order of Prohibition to prevent the Respondent from laying a complaint against him to the Director of Public Prosecution.
- iii. An order preventing the Respondent from suspending, revoking or otherwise interfering with the Applicant's registration under the Insurance Act.
- iv. An order that the grant of leave operates as a stay of the proceedings.
- v. Damages for interfering with a contract of employment.

The Applicant was employed to MONY Life Insurance Co. Ltd. (MONY) as an insurance sales representative.

MONY submitted, in the year 2002, an application to respondent to conduct business in Jamaica. This application was never approved – it was not in order.

Respondent is a statutory body established under the Financial Services Commission Act (FSC Act) to regulate prescribed financial institutions, including Insurance Companies. Some four months after submitting its own application for registration, MONY submitted applications for 22 sales representatives employed by it. Applicant was one of them. No certificate of registration was ever issued by respondent for claimant or any of its representatives to settle insurance policies on MONY's behalf.

In 2003, while due diligence checks were being made of MONY, pursuant to its application for registration, respondent learnt that MONY, was conducting insurance business in Jamaica, selling insurance policies and had and employed sales

representatives including Applicant, though unregistered under the Insurance Act 2001.

In 2004, (April 26,) respondent wrote to the applicant advising that it was in possession of evidence that he had breached section 70 of the Insurance Act and that pursuant to Section 21 of the FSC Act, he would be offered an opportunity to discharge his liability by payment of a fixed penalty under the said Act, instead of prosecution by the Director of Public Prosecution. On July 1, 2004, a fixed penalty notice was sent to Applicant. Applicant did not exercise an election and this application issued from him, instead. Applicant relies on several grounds which may conveniently be said to raise issues as follows:-

- (a) Was a fair hearing of Applicant a condition precedent to Respondent deciding to offer a fixed penalty or if Applicant did not so elect, cause prosecution to be begin by the Director of Public Prosecutions?

- (b) Was there an Error on the Record relating to the breach of Section 70 of the Insurance Act?
- (c) Did the Applicant have a legitimate expectation that he would be permitted to continue his activities as insurance sales representatives despite fact that he not his employer was unregistered under the Insurance Act of 2001.
- (d) Whether the legislation giving applicant the option to pay a fixed penalty (under the Financial Services Commission Act) is unconstitutional as being a usurpation of the functions of the judiciary, and
- (e) Whether there has been a breach of Applicant's right of property under the Constitution.

The following legislative provisions are relevant to this application: - Section 70 of the Insurance Act -

- (1) No person shall, in relation to insurance business of any class, specified in section 3(1) carry on or purport to carry on, business as, or act in the

capacity of an insurance intermediary, unless he is registered under this Part to do so.

- (2) Any person who contravenes this section shall be guilty of an offence and liable to summary conviction before a Resident Magistrate to a fine not exceeding Three Million dollars or to imprisonment to a term a not exceeding three years or to both such fine and imprisonment.

An "insurance intermediary" is defined in Section 2 as follows:

"An agent (including a managing general agent), broker (including facilitative placement broker or reinsurance broker), sales representative, adjuster, insurance consultant, or such other person carrying on any business connected with insurance as may be prescribed.

Section 21(1) (2) (3) of the Financial Services Commission Act provide as follows: – Section 21



- (1) This section shall apply to an offence under any relevant Act, being an offence specified in the Fourth Schedule.
- (2) The Commission may give to any person, referred to in subsection (1) who, it has reason to believe has committed an offence to which this section applies, a notice in writing on the prescribed form offering that person the opportunity to discharge any liability to conviction of that offence by payment of a fixed penalty under this Section.
- (3) No person shall be liable to be convicted of the offence if the fixed penalty is paid in accordance with this section and the requirement in respect of which the offence was committed with before the expiration of the fifteen days following the date of the notice referred to in subsection (2) or such longer

period (if any) as may be specified in that notice or before the date on which proceedings all begun, which ever event, last occurs.

FAIR HEARING:-

Applicant's submission is that he must be given a fair hearing before any such offer can be made to him by respondent, and this fair hearing must be before an impartial tribunal so that any or all allegations made against him may be responded to.

Respondent offer of a fixed penalty is in lieu of 'prosecution' and must be taken as an offer which can only be made by Respondent to Applicant only if it has 'reasonable cause to believe' that the Applicant has committed one of the scheduled offences. This offer is one which Applicant could accept or refuse. It was an option open to Applicant. If he exercised this option by refusing to accept the stated offer,

then he would, if prosecuted have an opportunity to respond to the allegations which are made against him.

The fixed 'penalty scheme' as contemplated in Section 21 of the FSC Act does not require a hearing, hence the phrase "has reason to believe." The Respondent is empowered to make this offer, rather than proceed directly to cause prosecutions to be initiated, if "it has reason to believe" that the person to whom the offer is made has committed a scheduled offence. Applicant's right to a fair hearing therefore is in fact, if he elects to put Respondent to proof and chose not to accept Respondent's offer. There is therefore no breach of the rules of natural justice and therefore this ground fails.

#### ERROR ON THE FACE OF THE RECORD LEGITIMATE EXPECTATIONS

The Applicant contends that the Respondent's letter of the 26th April 2004, which contains the decision, discloses an error of law on the face of the record, as this is based upon the "alleged breach by the Applicant of Section 70 (1) of the

Insurance Act 2001, that he was "engaging in the sale of insurance policies as a Sales Representative ... without being registered to do so." This letter also contains a threat to commence proceedings to suspend/or revoke Applicant's registration. This contention has no merit as Section 70 of the Insurance Act makes it obligatory that the Applicant, an insurance intermediary, must be registered in order to carry on insurance business in Jamaica.

The FSC, (Respondent) the competent authority under the Insurance Act, to have registered Applicant as a sales representative, had not registered him; the application submitted on his behalf by MONY was never approved as he deponed. He had, as he himself stated "continued in the course of my employment" believing that his application for registration had not been rejected.

The evidence is that the Applicant was acting as an insurance intermediary on behalf of MONY (an unregistered

company) settling insurance policies while he himself was unregistered.

There is therefore no basis on which applicant's contention can be grounded and this ground fails.

Applicant was of the view that he had a legitimate expectation that he would have been allowed to continue his activities as sales representative while not registered under the Insurance At 2001.

In *Council of Civil Service Unions v. Minister for the Civil Service* (1983) AC 374, Lord Fraser stated that a legitimate expectation may arise:-

*'either from an expressed promise given on behalf of a public body or authority or from the existence of a regular practice which the claimant can reasonably expect to continue.'*

Lord Diplock also laid down the conditions under which such an expectation may arise.

On the evidence provided, before this Court, Applicant has failed to show that any legitimate expectations arise in his favour and of which this Court can be cognizant.

Applicant was registered under the former Insurance Act, and was expected to be registered under the new Act. Applicant was not so registered. He had settled insurance business unregistered on behalf of an unregistered insurance entity and cannot therefore reasonably claim an entitlement to any legitimate expectation. This ground therefore fails.

#### BREACH SEPARATION OF POWERS PRINCIPLE

The Applicant strongly submitted that, in the instant case Respondent usurped the role of the Judiciary in requesting the payment of a fixed penalty and by taking away applicant's right to be tried by a court of competent jurisdiction.

In this case, Respondent's offer to Applicant of a fixed penalty payment, under Section 21 of the FSC Act did not breach the principle of separation of powers. What Applicant was offered was optional; his right to a judicial determination of

his guilt or innocence remained intact. His was the choice to accept or reject the offer.

The fixed penalty is designed to provide an executive device to reduce the volume of cases coming to a Court while encouraging persons in breach of particular statutory provisions to avoid the time and possible expense involved in a trial.

The Road Traffic Act is such an example. The recipient of a "ticket" may either pay a stated sum at the Collectorate or if otherwise minded, appear in Court to be heard at a trial.

In *Re McCutcheon and the City of Toronto* 147 DR (3<sup>rd</sup>) 1993 a decision of the Ontario High Court of Justice, at page 205 Linden J stated the following:-

*"In my view there is no charge in existence against the Applicant at the time of the issuance of the parking ticket, nor at the time of the issuance of the notice of summons. Contrary to the impression that may be imparted by those two documents, they are only preliminary administrative steps that*

*may lead to a charge, but they are not charges themselves."*

This, in my view, may well be applied to Respondent's powers under Section 21 of the FSC Act.

Applicant continued that S. 21 of the FSC Act was unconstitutional as it fixes a mandatory penalty. Reliance was made on the decisions in *Hinds v The Queen* and *Lambert Watson v. The Queen*. These cases dealt with liability after a Criminal trial. For the reasons earlier stated, the fixed penalty is an offer to be accepted or refused, it does not ... come as a fine after a trial and a finding of guilt, is not a sentence and is therefore not unconstitutional.

#### INTERFERENCE WITH CONTRACT OF EMPLOYMENT

Applicant seeks damages for interference with his contract of work. His claim is based on the provisions of Section 18(1) Constitution which protect property and which prevent compulsory acquisition of property without compensation.



Applicant's contention is founded on flawed and inaccurate premises, that prior to the Insurance Act of 2001, the Insurance industry was unregulated; so when the Act of 2001 came into force, it was unconstitutional, not having made any "provisions for the continued operation of businesses which commenced operation before December 21, 2001."

The Insurance Act made no provisions for unregulated service providers to continue their operations pending registration, or at all.

The Insurance industry, prior to the coming into effect of the Insurance Act 2001, was not unregulated. There was a requirement for registration by the Superintendent of Insurance. Applicant's affidavit stated quite clearly that prior to his employment with MONY, he recognized that there was need to, and did register with the Superintendent of Insurance, during the period of his employment as sales representative with other insurance concerns.

Janice Holness averment at paragraph 11 of her Affidavit stands unchallenged.

“As a result of this requirement for re-registration under this new Act, a transitional period of 60 days was allowed for registration to take place .....

As long as an applicant was duly registered under the former Act and was working for a registered entity then the registration would continue during the transitional period.....”

Even if applicant had been employed to a registered entity prior to the new act coming into force, it is clear that he was settling policies of insurance for MONY an unregistered company. His claim for damages must therefore fail.

These applications are therefore dismissed with costs to the Respondent.

**D. McIntosh, J.**

The Claimant seeks judicial review against the Financial Services Commission which had offered him a fixed penalty under the Financial Services Commission Act. He wants the decision to make him that offer set aside, to prevent the Financial Services Commission laying any complaint against him to the Department of Public Prosecutions, or interfering in any way with his registration under the Insurance Act; and to be awarded consequential damages.

Claimant bases his application primarily on the fact that he was not afforded a hearing before the "offer" was made by the Financial Services Commission to him; that the right to be heard is fundamental to natural justice and this was denied him and that the Defendant exercised its statutory authority with regard to the Claimant in a manner that was manifestly unfair and a misuse of its powers.

That sections 21 of the Financial Services Commission Act and sections 70 of the Insurance Act creates criminal offences. It is a provision which allows the Financial Services Commission to offer offenders the opportunity to discharge their liability for an offence is in breach of Section 20 of the constitution which provides "that any person charged

with a criminal offence shall be afforded a fair hearing within a reasonable time by an impartial court established by law". The Defendant is not an impartial court established by law and in any event it did not accord to the Claimant any hearing.

That in imposing a penalty on the Claimant, the Financial Services Commission is in transgression of the constitutional presumption or principle of separation of powers. Based on this principle, it is solely a judicial function to decide criminal liability and that function cannot be placed within the purview of an 'administrative tribunal regulating financial institutions.'

The power to impose a fixed penalty is also unconstitutional as it usurps the functions of the judiciary by imposing a mandatory penalty.

The evidence before the court indicates that at all material times, the Claimant was and is a Chartered Life Underwriter. As such, he should know the laws governing the Insurance Industry.

It is the Claimant's evidence that Mony Life Insurance Company of the Americas Limited (MLICA) had been carrying on business in Jamaica from about 1988.

That in about February 2002 MLICA applied to the Defendant for registration as an insurer on its own behalf and on behalf of the Claimant as one of its 'Sales Agent' or Insurance Sales Representative. This is contained in paragraphs 2, 3 and 4 of Claimant's affidavit as well as in the employment letter from MLICA to Lowell Lawrence dated 20<sup>th</sup> of January 2003, which has been duly attested to by the Claimant.

It is clear that MLICA acted as Agent for the Claimant in seeking to bring him within the ambit of the Insurance Act. That this was done with the full knowledge and consent of the Claimant.

As agent of the Claimant; (MLICA) had a "HEARING" with the Financial Services Commission before the latter made any contact with the Claimant himself.

The offer by the Financial Services Commission came out of these hearings which resulted in a settlement brokered by MLICA on behalf of itself and the Claimant. It would seem that the Claimant was kept abreast of these hearings and the resulting agreement.

If it is felt that MLICA was not acting as agent for the Claimant or that he is not bound by the doctrine of Agency, then the contention that he was not afforded a hearing is correct.

In making the 'offer' to the Claimant, the law stipulates that the Defendant must first have reasons to believe that the Claimant was in breach of the Insurance Act. In their letter to the Claimant dated the 1<sup>st</sup> of July 2004 (Claimants exhibit LSL 3), they set out facts which are not in dispute giving rise to their having "reasons to believe".

In these circumstances, the Financial Services Commission was acting well within the powers given to them by the Act. If the Financial Services Commission was acting within the powers given to them by a law which is unconstitutional, those powers when exercised would also be unconstitutional.

An offer cannot be regarded as a finality or conclusion to any issue. An offer gives options to accept, refuse vary or compromise.

There has been a trend in recent legislation to pass laws with what can be termed a "Plea Bargaining Element," that is, to allow any offender the

opportunity to mitigate the possible consequences of an offence which he agrees that he has committed and to save judicial time and related expenses.

The best-known example of this is the Road Traffic Act. Under this Act, perhaps universal in application, a police officer or traffic warden or authorised person is empowered to issue traffic tickets. These traffic tickets allow for fixed penalties and are issued when an individual is deemed to have committed certain breaches of the Road Traffic Act.

If the person deemed to have committed the act desires a hearing, then he can elect to go to court and be heard; that is an option of which he may avail himself. In such a case, there would be a prosecution for the offence allegedly committed.

In the instant matter, what has been transmitted to the Claimant is an "offer" which he could have and has apparently refused.

The right to refuse could bring into play prosecution under the act or other action by the Financial Services Commission. Any such action would accord to the Claimant a "hearing". In fact, it seems that all he had to do was to indicate his refusal of the offer, if he was of the view that the

offer was unacceptable, notwithstanding the fact the employer (MLICA) had undertaken to pay the penalty which was agreed during negotiations.

In my view, there is nothing unconstitutional about the section 21 of the Financial Services Commission Act. This application is misconceived in all the circumstances and should be dismissed with costs to the Defendant to be taxed if not agreed.