IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C. L. S 222 OF 1999

BETWEEN	S & T DISTRIBUTORS LIMITED	FIRST CLAIMANT
AND	S & T LIMITED	SECOND CLAIMANT
AND	CIBC JAMAICA LIMITED	FIRST DEFENDANT
AND	ROYAL AND SUN ALLIANCE (Formerly known as West Indies Insurance Company)	SECOND DEFENDANT

IN CHAMBERS

Miss Carol Davis for the claimants
Mr. John Vassel QC and Miss Shena Stubbs instructed by DunnCox for the first defendant
Mr. Conrad George instructed by Hart, Muirhead and Fatta for the second defendant

September 24, November 12 and 19, 2004

Sykes J (Ag)

RES JUDICATA, ISSUE ESTOPPEL, ABUSE OF PROCESS AND IMPLIED TERM

1. The issues raised in these applications are not intelligible unless one has recourse to the history of litigation that came in the wake of a fire at the

premises of the claimants located at 56 Brentford Road, Cross Roads, Kingston. The fire occurred on July 17, 1993. This is at least the fifth suit in these courts concerning various claims and counterclaims arising from the fire.

2. The first application is by the claimants who are seeking to have Suit No. 222/1999 restored. This claim was struck out against Royal and Sun Alliance (formerly known as West Indies Insurance Company and hereafter called Royal) on July 11, 2002. The claimants are relying on the fact that the striking out was irregular because they were not served with notice of the hearing. The second application is made by CIBC Jamaica Limited (CIBC) to have claimants' case in contract struck out. CIBC are seeking relief on the grounds that

a) the case of the claimants amounts to an abuse of process; or
b) it is likely to obstruct the disposal of the proceeding; or
c) there is no reasonable cause of action; or
d) the claimants have no real prospect of success

The history

3. In reading this history, it is important to bear in mind that these were happening simultaneously or in close proximity to each other.

i. ***Suit No. C.L. S. 206/94 (the insurance claim) and Suit No. C.L. W 318/94 (the recovery suit)***

4. The two claimants, S & T Distributors Limited (STD) and S & T Limited (S & T), are companies registered under the Companies Act in Jamaica. The driving force and moving spirit behind the companies is Mr. Anthony Simmons. He describes himself as the managing director of both claimants.

5. The claimants, for business purposes, obtained loans from CIBC. CIBC demanded and received amour-plated security. CIBC had a mortgage that included a power of sale. CIBC also required the claimants to have adequate insurance and then endorse on the policies CIBC's interest. The effect of these arrangements was that CIBC had a power of sale over 56 Brentford Road as well as a right to the proceeds of the insurance policies in the event that the risks insured against occurred.

6. We now know that there was a fire in July 1993. The mortgage was still outstanding at the time of the fire. The claimants asked Royal to honour the claim. Royal not only resisted the claim but also laid a most grievous accusation at the feet of Mr. Simmons. Royal alleged that Mr. Simmons burnt down the premises and was trying to line his pockets from, what would be, even on the most delicate interpretation, a criminal act.

7. Royal, at some point, made two interim payments to CIBC. The claimants were stung by these accusations and filed suit against Royal and Graham Miller & Company Jamaica Ltd. This was Suit No. C.L. S 206/94. Graham Miller is not important to these applications. Nothing further will be said about this company.

8. In Suit No. C.L. S 206/94 (the insurance suit) the claimants were seeking to get the monies due under the insurance policies. Royal filed Suit No. C.L. W 318/94 (the recovery suit) against the claimants in which it sought to recover the interim payments that it had made to CIBC.

9. Both actions were consolidated. The trial began in February 1996. Judgment was delivered in January 1998. Langrin J (as he was at the time) found for the claimants. They recovered the money under the policies of insurance. The money recovered under the policies went straight into the

coffers of CIBC, the mortgagees. By the time Langrin J delivered judgment, the insurance proceeds did not cover the outstanding mortgage payments.

10. The judge found that there was no fraud committed by Mr. Simmons. He found that Royal's case came down to this: Mr. Simmons was on the premises at the time of the fire, there was no evidence of any person entering or leaving the premises, therefore he must have set the fire. This is a textbook case of the because-this-therefore-that fallacy. Royal's suit against the claimants was dismissed.

ii. *The arbitration and Suit No. W. 321/1994*

11. The claimants say that after the fire, given that CIBC's interest was endorsed on policies they (the claimants) could not act independently to prosecute the settlement of the insurance claims. They needed the cooperation of CIBC. In an effort to settle the claim as quickly as possible, CIBC was prompted by the claimants to enter into arbitration. It is not clear who were the parties to this arbitration. CIBC, the claimants allege, was a reluctant participant in this exercise and only agreed to do so when the claimants agreed to pay what was, in the context of a burnt out business that was not earning revenue, the princely sum of $350,000. Only $200,000 was in fact paid.

12. The arbitration began in July 1994, one year after the fire, and ended abruptly in 1994. The reason for this unexpected end of the arbitration was that Royal filed Suit No. C.L. W 321/1994 which formed the basis for it to be granted an injunction stopping the arbitration proceedings. The claimants allege, in the suit before me, that since that time CIBC's conduct has been one of studious and meticulous inactivity. The claimants say that CIBC failed to appeal against the injunction. Suit No. C.L W321/1994 never emerged from

the barn door. It is still in deep slumber. It was never pursued by Royal. This aspect of the case will be dealt with in more detail when I come to consider CIBC's application at paragraphs 56 – 66.

iii. *Suit No. 23 of 1996 and the injunction*

13. Apparently, by late 1995 or early 1996 CIBC indicated its intention to sell the property. On February 1, 1996, STD filed Suit No. C.L. S. 23 of 1996 against CIBC to prevent it from selling the mortgaged property. This was eighteen days before the trial insurance and recovery suits began. The injunction was granted on April 15, 1996. By this time, the trial of the consolidated suits began. The injunction was discharged by the Court of Appeal.

14. CIBC applied to strike out the cause action for failing to disclose a reasonable cause of action. The action was struck out on July 11, 2001. No complaint is made about this striking out by STD. S & T was not a party to the suit.

iv. *the current suit*

15. What the claimants did was file another suit. This is Suit No. C.L.S. 222 of 1999 in which STD and S & T are the claimants and CIBC and Royal are the defendants. It is this suit that Royal struck out. Both claimants wish to have it restored. CIBC is now applying for a striking out of those parts of the claim that rest upon contract.

The claimants' case against Royal

16. Miss Davis makes the case against Royal in this way. Royal wrongfully denied liability on the insurance policies. It accused Mr. Simmons, the

managing director of both companies, of arson and fraud. This was not established. The lack of a proper and reasonable basis for the allegation of fraud and arson was known to Royal from the outset. Had it not engaged in this delaying tactic; had it not interrupted the arbitration in 1994, in all probability the insurance claims would have been resolved earlier. The settlement would have occurred at a time when the insurance policies would have covered the outstanding mortgage. Royal's behaviour increased the risk of the claimants losing the property because the mortgage charges were accumulating. Because the insurance money had to be extracted from Royal by judicial pronouncement, the claimants, by then, were exposed to at least three years of additional mortgage payments which would have been avoided had the arbitration been allowed to run its course. The claimants say that this amounted to the tort of negligence which became actionable when the property was sold.

The claimants' application to set aside order made on July 11, 2002

17. STD says that because it was not served with the notice of proceedings of July 11, 2002, the striking out was irregular and so as a matter of right their action ought to be restored. Royal resists this on three grounds. It says that

a) the STD has delayed unduly and any attempt to resurrect the matter would amount to an abuse of process and in any event Royal could now apply to have the matter struck out for want of prosecution, if it had been not been struck out before,;

b) res judicata applies;

c) the cause of action is now statute barred; and

d) the claim does not disclose any reasonable cause of action.

18. There is no dispute that STD was not properly served. What happened was this: STD, in June 2002, had terminated the retainer of the firm of Clough, Long and Company. It had retained Nunes, Scholefield, Deleon and Company. Nunes had filed a notice of change of attorney on June 7, 2002. There is no evidence that this change of attorney was served on Royal's lawyers. Mr. Ruel Gibson, who was a legal clerk employed to Hart, Muirhead and Fatta and the process server, on July 10, 2002, (a mere one day before the summons was heard) attended upon the chambers of Clough, Long and Company to serve Royal's summons to strike out the matter. Clough, Long and Company declined to accept service and the process server left. He did not serve the notice of the hearing of the summons. STD was not served. Nunes were never served. I would think that on this basis the striking out should be set aside and I so decide.

19. Since the action was not properly struck out in 2002 then I do not see how the issue of the matter being statute barred can arise. The fact that Royal could have applied to have the matter struck out in 2004 if it had not been struck out in 2002 is irrelevant to the issue.

Res judicata

20. I will deal with the issue of res judicata first. Mr. George submitted that the issue was decided between the STD, S & T and Royal in the insurance and recovery suits. Res judicata, as I understand it, is what is sometimes called cause of action estoppel. As I will attempt to demonstrate, the doctrine of res judicata cannot bar this action since this is grounded in negligence and not contract. Issue estoppel does not apply here either.

21. In ***Henderson v Henderson*** [1843-60] All ER Rep 378 Wigram VC used the expression res judicata to describe the situation in the case before him. I

do not use res judicata in the way that it was used by the Vice Chancellor because the case before him was not one of res judicata but rather one of abuse of process. When I come to the issue of abuse of process, I will show that the concept of abuse of process as described by the Vice Chancellor does not apply to this case.

22. Dixon J (as he was at the time) in the case of ***Blair v Curran*** [1939-40] 62 CLR 464 set with great clarity the law relating to res judicata and issue estoppel. Any attempt on my part to summarise his analysis would do him an injustice. I will let his clarity speak for itself. He said at pages 531-533:

> *A judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion, whether that conclusion is that a money sum be recovered or that the doing of an act be commanded or be restrained or that rights be declared. The distinction between* res judicata *and issue estoppel is that in the first the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order.*
>
> *Nothing but what is legally indispensable to the conclusion is thus finally closed or precluded. In matters of fact the issue estoppel is confined to those ultimate facts which form the ingredients in the cause of action, that is, the title to the right established. Where the conclusion is against the existence of a right or claim which in point of law depends upon a number of ingredients or ultimate facts the absence of any one of which would be enough to defeat the claim, the estoppel covers only the actual ground upon which the existence of the right was negatived. But in neither case is the estoppel confined to the final legal conclusion expressed in the judgment, decree or order. In the phraseology of* Coleridge *J. in* R. v. Inhabitants of the Township of Hartington Middle Quarter*, the judicial determination concludes, not*

merely as to the point actually decided, but as to a matter which it was necessary to decide and which was actually decided as the groundwork of the decision itself, though not then directly the point at issue. Matters cardinal to the latter claim or contention cannot be raised if to raise them is necessarily to assert that the former decision was erroneous.

In the phraseology of Lord Shaw, *"a fact fundamental to the decision arrived at" in the former proceedings and "the legal quality of the fact" must be taken as finally and conclusively established (*Hoystead v. Commissioner of Taxation*). But matters of law or fact which are subsidiary or collateral are not covered by the estoppel. Findings, however deliberate and formal, which concern only evidentiary facts and not ultimate facts forming the very title to rights give rise to no preclusion. Decisions upon matters of law which amount to no more than steps in a process of reasoning tending to establish or support the proposition upon which the rights depend do not estop the parties if the same matters of law arise in subsequent litigation.*

The difficulty in the actual application of these conceptions is to distinguish the matters fundamental or cardinal to the prior decision or judgment, decree or order or necessarily involved in it as its legal justification or foundation from matters which even though actually raised and decided as being in the circumstances of the case the determining considerations, yet are not in point of law the essential foundation or groundwork of the judgment, decree or order.

23. The first point to note is that Dixon J restricts the term res judicata to its proper technical meaning, namely that the same cause of action involving the same parties or their privies had been litigated already. The second point is that issue estoppel arises only in respect of those issues which were necessary for the decision reached in the matter.

24. I will now state the Vice Chancellor's passage in ***Henderson*** and then demonstrate why it is not a true example of res judicata. I will rely on the analysis and conclusion of Brennan J in the ***Port of Melbourne Authority v Anshun Proprietary Limited*** (1980-1981) 147 CLR 589. Wigram VC said these now oft repeated and celebrated words at pages 381-382:

In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

25. A comparison between Dixon J's analysis and Wigram VC's dictum will show that the Vice Chancellor was not referring to res judicata as explained by Dixon J. It is obvious that Dixon J did not contemplate the circumstances outlined by the Vice Chancellor as falling with the doctrine of res judicata or issue estoppel. Despite this, there is a link between the two doctrines. This link is shown in paragraph 27.

26. Brennan J in the ***Port of Melbourne Authority*** case has shown that the case before the learned Vice Chancellor had certain procedural peculiarities. In the days of the Vice Chancellor, it was necessary to obtain leave of the court to present a bill of review of a decree. One of the grounds upon which a review could be granted was that some new material had been discovered. This new material, the argument usually went, if it was available, would have been evidence in the suit in which the decree was pronounced. The person applying for the review had to show that a different decision would have been made had the evidence been presented at the original hearing. Thus, when the passage of the learned Vice Chancellor is put in its proper historical and

procedural context it is not surprising that he spoke in the terms that he did. What the Vice Chancellor was saying was that a party should bring all his case forward in one action where possible and should not hold back parts of his case in the hope of litigating it further. To do this, would amount to abuse of process. It is clear therefore that what the Vice Chancellor was describing could not properly be described as res judicata or issue estoppel. He was describing what modern lawyers call abuse of process, which, for reasons that will become apparent, I will call misuse of process.

27. Lord Millett in ***Johnson v Gore Wood and Co*** [2001] 1 All ER 481 has convincingly demonstrated that the link between res judicata, issue estoppel and Wigram VC's formulation is the idea that a superior court of record must "*protect the process of the court from abuse and the defendant from oppression*" (see ***Johnson*** at page 525a-j). For clarity's sake I will use the expression misuse of process to describe what is commonly referred to as abuse of process. I will use abuse of process to include, res judicata, issue estoppel and misuse of process.

28. My understanding of the law in this area based upon ***Johnson*** and ***Port of Melbourne***, that whenever the expression abuse of process is used, the first question to ask is whether reference is being made to res judicata/issue estoppel on the one hand or misuse of process on the other hand. The difference between them is important. As Brennan J in ***Port of Melbourne Authority*** stated, once res judicata and issue estoppel are established the second action is barred as a matter of law. If one is dealing with misuse of process then in deciding whether the second action should continue, there are various factors to be weighted. This mental process is more suggestive of judicial discretion than a hard-boiled rule of law, as in the case of res judicata/issue estoppel, which does not admit of any weighing of factors. Res

judicata, issue estoppel and misuse of process rest upon the salutary principle that there must be "*finality to litigation and avoid the oppression of subjecting a defendant unnecessarily to successive actions*" (see Lord Millett in ***Johnson*** at page 525e). The decision in ***Johnson*** was not directed at the narrow doctrines of res judicata and issue estoppel. It was dealing with misuse of process.

29. The law that I will apply can be summarised in this way:

a. there is a concept of abuse of process that underlies res judicata, issue estoppel and misuse of process;
b. whenever there is an issue of res judicata and issue estoppel, once the court decides that they apply then as a matter of law the second action must be stopped. There is no weighing of factors to decide whether it should be allowed to proceed;
c. if there is an allegation of misuse of process then the court can weigh a number of factors in deciding whether there was a misuse of process amounting to abuse of process. It is in this situation that there appears to be an element of discretion.

30. Mr. George says that res judicata applies because Langrin J had decided the tort issue in the insurance claim and recovery action. Mr. George points to page 5 of the written judgment where it reads:

> *A declaration that [Royal] has been guilty of unreasonable delay in accepting/denying liability under the said policies in making interim payments to the mortgagees under the said policies and/or in settling and/for paying the claim.*

31. This was one of the reliefs sought by the current claimants in Suit No. C.L. S 206/94 (the insurance suit). On this basis Mr. George submits, the claimants cannot now seek to relitigate this issue by dressing it up a negligence claim.

32. I have examined the judgment of Langrin J very carefully and at page 4 His Lordship clearly states the following:

> *A writ was issued on the 28th of June 1994. The pleadings have been amended and in summary the plaintiffs claim an indemnity under the Policies of Insurance it had with the First (sic) defendant [Royal] and for the following:..*

33. After this passage appears the declaration referred to in paragraph 30. Langrin J was not adjudicating upon a negligence claim against Royal. The only time Langrin J addressed the issue of negligence was in respect of the claimants' action against the second defendant in the suit.

34. Using res judicata as defined by Dixon J, this second action does not fall within the definition. The claim in the first action was a claim in contract. Therefore, res judicata has no application here.

Issue estoppel

35. I am also of the view that issue estoppel does not apply either because a finding of negligence was not "legally indispensable" to the conclusion that the monies under the insurance contracts were payable. The written judgment of Langrin J does not show that there was any judicial determination of the question of whether Royal had a duty of care in the law of tort and neither was such a determination necessary to decide whether the insured should collect the money due under the contracts.

Abuse of process

36. I now have to consider whether it would be an abuse of process for the claimants to raise the issue of negligence now. I heed Lord Millett's warning in ***Johnson*** . The Law Lord said at page 525h

> *It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon.*

Equally, Lord Bingham in the same case said at page 490g

> *Litigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court.*

These passages show that a court should exercise great caution when it is being asked to shut out a litigant based on misuse of process.

37. In deciding whether there was misuse of process one has to look at the matter broadly. (see Lord Bingham in ***Johnson*** (see page 499 – 500)). What are the factors here that I have to examine? First, the insurance and recovery suits were slated to be begin in February 1996. Pleadings would have already been closed. CIBC did not indicate that it would sell the property until either late 1995 or early 1996. It would have been very difficult for the claimants to seek to tack on any negligence claim to the insurance and recovery trial at that point. In addition, when the insurance and recovery suits began, the property had not yet been sold. This meant that no damage had occurred that

would make any alleged negligence actionable. For these reasons I find that this current suit is not a misuse of process. On the face it then, the claimants' case ought to go forward. In light of this Mr. George made his final assault on the fortress of the claimants. He says that it is not sustainable in law. It discloses no reasonable cause of action. I now consider this point.

Is the claim sustainable in law?

38. This claim appears to be a novel one. I have not unearthed any reported case in the region in which any superior court has had to consider what the proper approach ought to be when novel situations in the tort of negligence are being considered. How then should I approach this question?

39. Mr. George submits that one approach is to look to see if previous cases have decided that a duty arose in either same or similar circumstances. That approach has some judicial support but it is an imperfect way of looking at the matter. This is not to say the previous case law has no value. 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.

40. I will now deal with a possible preliminary objection at his point. In the case before me the parties had a contractual relationship. It is now well settled that that fact does not prevent a duty of care arising in tort. In the tort of negligence the question is what is the relationship between the parties and not how the relationship arose (per Oliver J (as he was at the time) in ***Midland Bank v Hett, Stubbs & Kemp*** [1979] 1 Ch 384, 413). Indeed there can be concurrent liability in both contract and tort (see ***Henderson v Merret Syndicates Ltd*** [1995] 2 A.C. 145).

41. In accepting Lord Wilberforce's approach, I have say why I have decided to use it despite the attacks that have been leveled at it. I am aware of the cases such as ***Governors of the Peabody Donation Fund v Sir Lindsay Parkinson &b Co. Ltd*** [1985] A.C. 210, ***Yuen Kun Yeu v Attorney General of Hong Kong*** [1987] 3 W.L.R. 776, and others, in which Lord Wilberforce's test has been criticised. The core of the criticism seems to be that the test equates proximity with foreseeability.

42. I think that this is a mischaracterization of Lord Wilberforce's dictum particularly when is recalled that he made express reference to ***Donoghue v Stephenson*** [1932] A.C. 562, ***Hedley Byrne & Co Ltd v Heller*** [1964] AC 465 and ***Home Office v Dorset Yacht Co. Ltd*** [1970] 2 All ER 294. It is my view that in ***Anns*** when Lord Wilberforce, in establishing the first stage of his test, spoke of "*sufficient relationship of proximity*" between the wrong doer and the injured party, he could not have simply meant that any one who was injured by the act of the tortfeasor, without more, could recover from the tortfeasor. What he must have meant was that the person entitled to recover had to be someone "*closely and directly affected*" by the act or omission of the wrongdoer. What he was doing, as Lord Atkin did in ***Donoghue***, was laying down a broad conceptual approach. Therefore whenever a novel claim is made, what the courts are looking for are such facts in the new situation that would enable the court to conclude that there is a "sufficient proximity of relationship" or if one prefers Lord Atkin, a close and direct relationship between the wrong doer and the injured party such that prima facie, liability should be imposed. Once proximity is established, the second stage of the test requires the court to consider whether there are any considerations that negate or restrict liability. This second stage must be addressed because there must be a limitation of liability otherwise the tortfeasor would be exposed to

unlimited liability. Where the line is drawn is ultimately a policy question. I believe this approach is conceptually sound. Greater precision is not possible given that one is dealing with many factual situations. Lord Diplock's analysis of the facts in ***Dorset*** is a supreme demonstration of Lord Wilberforce's conceptual approach albeit it was decided before ***Anns***. In ***Dorset*** one sees Lord Diplock closely analysing the facts and trying to decide how liability may be restricted since he recognised the possibility of open-ended liability on the part of the defendants.

43. In ***Donoghue*** Lord Atkin, after stating his famous neighbourhood principle, stated that the principle was, in effect, (with an appropriate adjustment that will be indicated in the next sentence), a summary of the effect of the dictum of Brett MR (later Lord Esher MR) in ***Heaven v Pender*** 11 Q.B.D. 503, 509 after it was leavened with passages from Brett MR and A.L. Smith LJ from ***Le Lievre v Gould*** [1893] 1 Q.B. 491, 497, 504. Lord Atkin was of the view that the effect of the passages he cited from these two cases, was that (here is the adjustment) if "proximity" as used in them, is not confined to "mere physical proximity" but extends "to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act" then one would get an accurate statement of principle (see Lord Atkin at 581). Lord Atkin by this statement was saying that physical proximity was not a necessary condition before liability would arise. Once this limitation was removed he had to find a way of limiting liability. His limitation device was foreseeability **and** the close and direct relation to the effect of the act done or not done. The limitation device has an inherent vagueness. It is imprecise. One of the reason why it is imprecise and vague is that as expressed it does not reveal that restriction of liability is a policy matter. The law in this area is

necessarily imprecise because the factual situations that may generate novel claims do not come from a closed universe where one is dealing with only so many known or soon-to-be-known possibilities. It is sufficiently flexible to take account of novel claims. In my view, Lord Wilberforce was making explicit what was implicit in Lord Atkin's formulation.

44. There may be many persons who may be affected by the act of the wrongdoer. However, for Lord Atkin, not all such persons would be neighbours for the purposes of his proposition. Only those that bore the stamp of closeness and directness could recover. How then do we know those who are directly and closely affected, once physical proximity is removed? No clear answer is to be found in Lord Atkin's statement. It is not there. The answer is to be found in the exercise of prudent judgment on the part of the court.

45. Lord Atkin recognised, at page 582, that there may be cases in which "it will be difficult to determine whether the contemplated relationship is so close that the duty arises". There is nothing in Lord Wilberforce's judgment in ***Anns*** that even remotely suggests that he did not have this in mind. Lord Wilberforce recognised that even if the duty is held to exist, there may be considerations that reduce or limit to the class of persons to whom the duty is owed.

46. The critics of Lord Wilberforce have often been overlooked that in ***Donoghue***, Lord Atkin was critical of a number of judgments which in his view sought to "*confine the law to rigid and exclusive categories, and by not giving sufficient attention to the general principle which governs the whole law of negligence in the duty owed to those who will be immediately injured by lack of care*" (see page 594-595). Just this passage shows why unqualified acceptance of Mr. George's approach is impossible and why Brennan J's dictum in ***The Council of the Shire of Sutherland v Heyman*** [1984] 157

C.L.R. 424, 476 – 481 has to be viewed with caution. This is the judicial support for Mr. George to which I had earlier referred. Lord Wilberforce in ***Anns***, before stating his two-stage test said that it was not necessary in order to establish the duty of care in any particular case to demonstrate that it was within some existing category. This is, my view, is consistent with what Lord Atkin was saying. Both were warning of the dangers of being too wedded to preexisting categories.

47. I will make another point here. If one looks at the three cases referred to by Lord Wilberforce in ***Anns*** , it will be seen that these three, up until ***Anns***, were what could be called the big three in terms of the imposition of liability in negligence in novel situations (see ***Donoghue***, ***Hedley Byrne*** and ***Dorset Yacht Co. Ltd***). ***Donoghue*** established for the first time that a manufacturer of a product that was liable to the ultimate consumer although the product was not dangerous in itself and where the defect in the product was not known to the manufacturer. If one reads the dissenting judgment of Lord Buckmaster the radical nature of ***Donoghue's*** case is brought into focus. ***Hedley Byrne*** decided that negligent misstatement can provide a basis for tortious liability. The ***Dorset*** case was by any measure a case of great significance. ***Dorset*** imposed liability on the supervisors of prisoners who escaped and damaged property at the nearby yacht club. Until then the conventional wisdom was that liability would not be imposed in such a situation. If there are any lingering doubts on the effect of these decision and that they were in fact deciding questions of policy it would be good to read the judgment of Lord Diplock in ***Dorset.***

48. On any reading of these three cases, it is clear that unless some qualifying or limiting principle was placed on them the potential liability would be open-ended. Lord Atkin sought his limitation by saying that the person

affected must be closely and directly affected. I have already dealt with the inherent vagueness of the proposition. In ***Headley Byrne*** the limiting factor was that there had to be reliance on the information provided in circumstances which made it obvious that the seeker of the information was relying on the skill of the information provider and it was clear to the provider that the seeker would or might rely on the advice or information. ***Headley Byrne*** could hardly be a better case of the application of Lord Wilberforce's second stage, namely, "whether there are any consideration which ought to negative, ***or reduce or limit the scope of the duty or the class of person to whom it is owed or the damage to which a breach of it may give rise***"(my emphasis). Finally, in ***Dorset*** the limiting factor was that only persons actually within the geographical location of where the borstal boys escaped could recover (see Lord Diplock at page 334g).

49. Brennan J in the ***Southerland Shire Council*** case (already cited) sought his recognition of "novel categories of negligence" by "analogy with established categories" (see page 481). This approach has its virtues but if pressed to far it would be antithetical to the spirit, if not the letter of Lord Atkins and Lord MacMillan's judgments in ***Donoghue*** (see paragraph 46 for the quotation from Lord Atkin). I am now able to state the difficulty with category approach. The weakness of the category approach is that there was a time when each of the so-called existing categories did not exist. Thus if a case arises for which there is no suitable analogy, what do we do? Of course this is not to say that categories have no value, as Gibbs CJ in ***Southerland Shire Council*** stated, if there is an established category then the judge does not have to decide whether a duty of care exists; he simply applies it (see page 441). The only qualification I would make to the Chief Justice's proposition is that it is logically possible for a court to say that the category

may be held to have been wrongly created. That this must be so is demonstrated by the case of ***Candler v Crane, Christmas & Co*** [1951] 2 K.B. 164 where a new category was rejected by the majority but ***Hedley Byrne*** later overruled the majority. Logic and common sense demand that if a category can be created, then it can also be abolished.

50. I now turn to an example of what is said by the critics of Lord Wilberforce to be the "correct" approach. The passage I am about to cite be read carefully. The reader should keep in mind this question: does this formulation achieve any greater precision than Lord Wilberforce's does?

51. Lord Bridge, one of the leading critics of Lord Wilberforce, said in ***Caparo Plc v Dickman*** [1990] 2 W.L.R. 358, 364H-365E:

> *What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by law as one of "proximity" or "neighbourhood" and the situation should be one in which the court considers if* ***fair, just*** *and* ***reasonable*** *that the law should impose a duty of a given scope upon the party for the benefit of the other.* ***But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients [read fair, just and reasonable] are not susceptible of any precise definition*** *[read indefinable] as would be necessary to give them utility as practical tests, but amount in effect to little, more than convenient labels to attach the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope.* (my emphasis)

52. Any clearer? Any more precise?

53. Who decides what the law is? Who decides whether "*on a detailed examination of all the circumstances, the law [in any given case] recognises pragmatically as giving rise to a duty of care*" ought to arise? What is it that actually guides the intellectual processes that lead to the conclusion that the law should recognise pragmatically that a duty of care has arisen? The answer to the first two questions is the same: judges. The answer to the third is policy. Is there a difference between Lord Wilberforce's test that asks at stage one whether as between the alleged wrongdoer and the person who suffered damage there is a sufficient relationship of proximity such that it was within the reasonable contemplation of the wrongdoer that damage would be caused to the latter and at stage two "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 damage to which a breach of it may give rise" **and** Lord Bridge's statement? What is it that makes the phrase "*fair, just and reasonable*" (per Lord Bridge) more acceptable as a test of whether a duty of care should exist in any given situation than "*considerations which ought to negative, or to reduce or limit the scope of the duty*" (per Lord Wilberforce)?

54. In the same vane as Lord Bridge is Lord Keith in ***Peabody's*** who said "*[a] relationship of proximity in Lord Atkin's sense must exist before any duty of care can arise,* ***but the scope of the duty must depend on all the circumstances of the case***" (my emphasis) (see page 240G). What is "*proximity in Lord Atkin's sense*"? Lord Keith after citing a passage from ***Dorset*** said "*[s]o in determining whether or not a duty of care of particular scope was incumbent upon a defendant it is material to take into account whether it is just and reasonable that it should be so*" (see page 241). Again, is this any different from the two-stage analysis proposed by Lord Wilberforce?

What is clear from both Lord Keith's and Lord Bridge's analyses is that establishment of proximity in the Lord Atkin sense is necessary but not sufficient for liability. This is no different from Lord Wilberforce's first stage. Both Lord Keith and Lord Bridge then go on to ask whether it is just and reasonable that the duty should be imposed. This is the same question only with different words as Lord Wilberforce's query as to whether they are considerations that negate or limit the duty to the persons ***to whom the duty is owed*** (which would be already established if the first stage enquiry yields a positive answer)? As a footnote I would add that the Canadian Supreme Court has not had difficulty with the Wilberforce test (see ***City of Kamloops v Nielsen*** 10 D.L.R. (4^{th}) 641; ***Rothfield v Manolakos*** 63 D.L.R. (4^{th}) 449).

55. Applying all this to the claimants' case, I conclude that they are neighbours within the ***Donoghue*** principle. There was a contract between the claimants and Royal. This would establish that close and direct connection between the parties. I now go on to stage two of the Wilberforce test. I have concluded that liability should be negated for the reasons which follow. 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.

CIBC's application

56. Of the six orders applied for by CIBC the ones that are being pursued can be stated as follows:

(a) striking out of claimants' case in so far as it is based upon contract because:

i. STD's claim is a misuse of process

ii. S & T's claim does not disclose a reasonable cause of action or alternatively it is too remote

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. The defendant should feel that the contract case against him is at an end. 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. It would be quite remarkable if after a striking of which one has notice you could simply file the same claim rearrange a few words and then say it is a different suit.

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?

60. 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. Mr. Vassel said that this claim is too remote and that there was no such implied term. However before the question of remoteness arises, it has be decided whether there was an implied term of the kind contended for by Miss Davis.

61. However, for the purposes of this application I will assume that there was a contract between S & T Limited and CIBC in the terms stated by Miss Davis. I now seek to determine whether term as claimed by Miss Davis should be implied in the contract. This can be determined at this stage because whether a term should be implied into a contract is a matter of law.

62. Miss Davis submits that I should not decide on this matter of the implied term and it should be left for trial. I do not agree. If a claim is not sustainable in law then part of managing the case effectively requires that such claims be struck out at the earliest possible time.

63. I have grave doubts about whether a term of the kind contended for by Miss Davis should be implied. Miss Davis' implied term seems to be the product of 20/20-after-the-event vision. Because of the danger of this happening, the courts have developed quite a stringent test that must be met before a term is implied into a contract.

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).

65. What this means is that we cannot look back at what has happened and then say a term should be implied to cover the eventuality. It seems to me that this is what Miss Davis is doing. This would mean that if Royal prevailed in the Supreme Court, then CIBC should go to the Court of Appeal and in the event of a loss, proceed to the Judicial Committee of the Privy Council. Alternatively, if CIBC prevailed and Royal appealed then CIBC should litigate right to the final appellate court. CIBC could only cease litigating before the final adjudication in the Privy Council only if Royal agreed to arbitration.

66. CIBC was not taking any issue with the tort aspect of the claim made against it.

Conclusion

67. Royal succeeds in its application to strike out the claim in tort brought against it by both claimants.

68. CIBC succeeds in its application to have that part of the statement of case brought against them in contract by both claimants.

Orders

In respect of notice of application for court orders dated April 16, 2004 the orders are:

i. order granted in terms of paragraph one.
ii. Claim struck out as it discloses no reasonable cause of action.
iii. Costs to Royal and Sun Alliance to be agreed or taxed.
iv. Leave to appeal granted.

In respect of notice of application for court orders filed August 13, 2004 the orders are:

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 to be agreed or taxed.
v. Leave granted to CIBC to amend defence.
vi. Leave to appeal granted to S & T Distributors and S & T Limited.
vii. Case management conference adjourned to November 24, 2004 at 9:30am