JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL 113/2000

BEFORE: **THE HON. MR. JUSTICE DOWNER, J.A.**
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE SMITH, J.A.

BETWEEN: **SELECT HOLDINGS LTD.** **PLAINTIFF\APPELLANT**

AND **PETROLEUM COMPANY OF JAMAICA LIMITED** **DEFENDANT/RESPONDENT**

Donald Scharschmidt, Q.C. and Ms. Georgette Scott instructed by John Graham & Co., for the appellant

Sandra Minott-Phillips instructed by Myers Fletcher and Gordon for the respondent

June 7, 8, 22, July 20, 2001 and November 7, 2002

DOWNER, J.A.

The issue to be decided in this important interlocutory appeal is whether Reckord J. was correct in striking out the appellant's Statement of Claim on the ground that it was an abuse of the process of the Court. The gist of the decision in the Court below is contained in the following passage in the judgment at page 62 of the Record:

> "I have no doubt in my mind that the action brought by the plaintiff in this 2nd suit i.e. suit against Petcom is based on the facts relied upon in the previous action against P.C.J. I agree with counsel for the defendant that this is an abuse of the process of the court.
>
> As far as the plaintiff's case that this is a continuing nuisance is concerned that is rejected out of hand.
>
> Accordingly, this action suit No. 2000/S 060 is an abuse of process of the court and is struck out.

> The plaintiff's application for paragraphs of the defence to be struck out is refused and the summons is dismissed. The defendant will have its costs on both summonses. Leave to appeal granted to the plaintiff."

These reasons were embodied in a Formal Order which states in part at page 56 of the Record:

> "...**IT IS HEREBY ORDERED THAT:**
>
> 1. This action be dismissed and struck out as an abuse of process of the court.
> 2. The plaintiff's summons dated the 4th day of May,2000 is dismissed.
> 3. The plaintiff pay the costs of both summonses and of the action generally.
> 4. Leave to appeal granted to the plaintiff."

It is to be noted that the appellant brought a summons to strike out the defence. The summons was worded thus:

> "1. The paragraphs 6,8,13,14,17,18,19,20 and 21 of the Defence filed herein be struck out on the ground that they are irrelevant, frivolous and vexatious and is likely to delay the fair trial of the action."(Emphasis supplied)

It will be demonstrated that if the appellant succeeds on appeal it will only be necessary to strike out paragraph 8 of the respondent's defence which pleaded abuse of process. Both summonses were heard together in the Court below and on appeal.

It is clear that the learned judge rejected the appellant's submissions on continuing torts which were averred in the Statement of Claim. Had he accepted those submissions he would have found for the appellant. So there must be an enquiry as to what are continuing torts.

Did the Statement of Claim aver continuing torts?

The appellant, who was the plaintiff, in the court below based its claim on **Rylands v Fletcher**, negligence and nuisance. Here is how the tort of **Rylands v Fletcher** was averred:

> "4. The Defendant during the period 1992 to the date hereof caused the storage tanks aforesaid to be filled continually with a considerable quantity of petrol and diesel oil from persons/companies who supplied the aforesaid products to them.
>
> 5. During the period 1992 to 1999 large quantities of petrol escaped from the storage tanks and seeped through the subsoil and settled on the Plaintiff's land depositing thereon hazardous hydrocarbons which has contaminated the Plaintiff's land.
>
> 6. The Plaintiff will contend that the petrol and diesel oil are dangerous things and the Defendant is liable to the Plaintiff for the damage caused by the escape of the petrol and diesel oil aforesaid.
>
> 7. Further or in the alternative the escape of the petrol and diesel oil was caused by the Defendant, its servants or agents.
>
> 8. Further or in the alternative the Defendant failed to properly construct or maintain the storage tanks or the pipe and mains leading to and from the tanks or the faucets and other devices attached to the tanks and pipes so as to prevent petrol and diesel oil to escape therefrom as a result of which petrol and diesel oil which have escaped in dangerous quantities has caused damage to the Plaintiff."

Maybe the pleader could have inserted the standard phrase "the continuing..." damage in paragraph 6 but the nature of the plea is clear as it stands.

Here is how the particulars were set out:

"PARTICULARS OF NEGLIGENCE/NUISANCE

(a) The Defendant failed to construct its storage tanks, pipes, mains, pumps and faucets in a manner which would ensure that the petrol, diesel and other hazardous contaminants would not escape therefrom.

(b) The Defendant failed to have a system of inspection which would detect or discover leaks in the storage tanks, pipes, mains or faucets and in particular the leaks complained of.

(c) The Plaintiff will also rely on the doctrine of res ipsa loquitur."

It is clear from the Statement of Claim and the Defence, which will be considered, that the case will be decided on expert evidence and documents.

The response to the allegation of the continuing torts was pleaded thus on the respondent's Defence:

"9. Save that it is admitted that petrol and diesel oil are dangerous things, paragraph 6 of the Statement of Claim is denied."

Then as regards the appellant's claims for negligence/ nuisance, the respondent's Defence stated thus at page 15 of the Record:

"10. In as much as they relate to an incident which occurred before April 27, 1992, paragraphs 7 and 8 of the Statement of Claim are not admitted. Save as aforesaid, paragraphs 7 and 8 are denied."

Paragraph 9 of the Statement of Claim refers to a contract entered into by Select Holdings for the sale of Lot 6 in Portmore. There is a probability that that contract will not be performed because of the continuity of the contamination on the land. The remaining paragraphs 10-18 deal with a claim for damages and an injunction. The damages claimed are substantial. They are as follows:

"17. By reason of the matters aforesaid the Plaintiff has suffered loss as follows:

PARTICULARS OF SPECIAL DAMAGES

(a) Cost of removing contaminants – US$250,000.00

(b) Interest on the balance purchase price of $6,818,798.15 at the rate of 50% from 1st January, 2000 to the date of judgment/abatement of the said nuisance/removal of the contamination.

18. **AND THE PLAINTIFF CLAIMS:**

(a) The sum of US$250,000.00.,

(b) Interest on the balance purchase price of $6,818,798.15 at the rate of 50% from 1st January, 2000, to the date of judgment/ abatement of the said nuisance/removal of the contamination."

The defence to those averments is contained in paragraphs 11 to 24. They involve substantial questions of fact and law.

It is pertinent to ascertain the common law on continuing torts, and its relation to the issue of abuse of process. A clear definition is contained in the **Limitation Periods** second edition by Andrew McGee. At page 64 it reads:

> "(2) **Continuing torts** Perhaps the most common example of this is a continuing nuisance. In these cases the right of action accrues afresh every day, but damages can be recovered only for that part of the loss which arose within the relevant period before the commencement of proceedings."

The appellant's writ was dated 22nd March, 2000, and there was an entry of appearance on 7th April, 2000.

Another useful discussion on the issue of continuing torts is contained in **Laws of Torts** by Sir Arthur Underhill, M.A. LL.D. fifteenth edition by Ralph Sutton, MA. At page 380 the following passage appears:

" ART. 135. –**Continuing Torts**

(1) Where a tort is continuing or is repeated or recurs, a fresh cause of action arises from day to day during its continuance and on each occasion on which it is repeated or recurs."

Then as illustrated the learned author cites the following at page 382:

"Illustrations (2) The defendants were trustees of a turnpike road and built buttresses to support it on the land of the plaintiff. The plaintiff accordingly brought an action for trespass, but accepted money paid into court in satisfaction. Subsequently he called upon the defendants to remove the buttresses, and on their failing to do so brought another action for trespass for keeping the buttresses on his land. It was held that he was entitled to do so, for the keeping of the buttresses on his land was a fresh trespass and the first action was, therefore, no bar to the second (i)**Holmes Wilson** (1829)9 B.C 603"

This case above cited is a significant pointer to the solution in the instant case. The appellant first adverted to the contamination in correspondence of March 25, 1992, but withdrew its claim. Subsequently, in February 21, 2000 in correspondence with the report of an expert attached the appellant adverted to the same contamination. The other illustration is equally relevant. It reads:

"(3) The defendants were builders and, while demolishing a chimney stack on certain premises, with the leave and licence of the occupier of an adjoining house deposited rubbish on the roof of the latter, but failed to remove it on completion of the work, as they had agreed to do. Subsequently the plaintiff became the tenant of this house, and after that, owing to the gutters being choked by the rubbish, a heavy storm of rain flooded the basement. It was held that though the plaintiff could not sue the builders for

> negligence in failing to remove the rubbish, as at the time when they ought to have done so he was not a tenant of the premises, yet the rubbish remaining on the roof constituted a continuing trespass and the builders were consequently liable for the damage caused to the plaintiff (k).**Konskie v. B. Goodman** [1928] 1 K.B. 421."

These illustrations are sufficient to demonstrate that the learned judge's statement, "As far as the plaintiff's case that this is a continuing nuisance is concerned that is rejected out of hand," cannot be supported. The appellant is entitled to litigate these issues at a trial. So in answer to the problem posed, the appellant has pleaded continuing torts.

Is the appellant Select Holdings Ltd. debarred from instituting proceedings against the respondent because it withdrew or abandoned a previous action against Petroleum Corporation of Jamaica Ltd. a different entity in the eyes of the law?

As for the status of the parties here is how it was pleaded in the Statement of Claim at page 7 of the Record:

> "(1) The Plaintiff was at all material times the owners and occupiers of all that parcel of land known as Lot 6, Portmore in the parish of St. Catherine registered at Volume 1203 Folio 185 of the Register Book of Titles. The said land is located in the prime commercial area in Portmore which is one of the most populous and fastest growing residential and commercial areas in Jamaica.
>
> 2. The Defendant was at all material times the owners and occupiers of premises situate at Lot 1, Portmore in the parish of Saint Catherine registered at Volume 1203 Folio 180 of the Register Book of Titles which is separated from the Plaintiff's land by a ten (10) foot road."

The response in the Defence to these averments reads at page 13 of the Record:

"1. Save that it is admitted that the Plaintiff is the owner of all that parcel of land known as Lot 6 Portmore in the Parish of St. Catherine being the land entered at Volume 1203 Folio 185 of the Register Book of Titles, paragraph 1 of the Statement of Claim is not admitted.

2. Save that the width of the road separating the Defendant's land from the Plaintiff's land is not admitted, paragraph 2 of the Statement of Claim is admitted."

Then the Statement of Claim continues at pp 7-8 of the Record thus:

"3. At a date that the Plaintiff cannot specify until after discovery herein save that it was before the month of March, 1992 the Defendant caused to be constructed on its land a petrol filling station which consisted of petrol storage tanks, pipes, mains, pumps, faucets and other mechanical and electronic devices to facilitate the business of dispensing petrol, diesel oil and other potentially hazardous chemicals to members of the public for reward.

4. The Defendant during the period 1992 to the date hereof caused the storage tanks aforesaid to be filled continually with a considerable quantity of petrol and diesel oil from persons/companies who supplied the aforesaid products to them.

5. During the period 1992 to 1999 large quantities of petrol escaped from the storage tanks and seeped through the subsoils and settled on the plaintiff's land depositing thereon hazardous hydrocarbons which contaminated the Plaintiff's land."

Further paragraphs of the Defence read:

"3. Save that it is not admitted that the Defendant's construction on its premises facilitates the business of dispensing other potentially hazardous chemicals to members of the public for reward, paragraph 3 of the Statement of Claim is admitted.

4. Save that it is not admitted that the storage tanks are continually filled, paragraph 4 of the Statement of Claim is admitted.

5. Paragraph 5 of the Statement of Claim is denied."

It is envisaged that both parties will rely on experts with respect to the foregoing pleas.

Then comes the following important paragraphs of the Defence:

"6. The Defendant states that prior to the end of March 1992, the Plaintiff made an allegation of contamination of the land referred to in paragraph 1 of the Statement of Claim in respect of which the Plaintiff sued Petroleum Corporation of Jamaica Limited in Suit No. CL 1992/S- 124.

7. The claim subject of this action is brought in contravention of the Statute of Limitations and is statute barred.

8. This action is an abuse of the process of the court.

Particulars

a. The Defendant is a wholly owned subsidiary of Petroleum Corporation of Jamaica Limited

b. Suit No. CL 1992/S-124 was commenced by Writ of Summons dated April 27, 1992 and an appearance entered on behalf of Petroleum Corporation of Jamaica Ltd on May 20, 1992 and served on the Plaintiff attorneys on May 22, 1992;

c. The plaintiff never filed a Statement of Claim in that action in spite of a request by the Defendant's attorneys that their Statement of Claim be served on them.

d. Almost 8 years after its commencement, Suit No. CL 1992/S-124 was, on March 20,2000, discontinued by the Plaintiff after its attorneys in the said action, Messrs. Patterson, Phillipson & Graham, were served with Petroleum Corporation Limited's application for dismissal

of the action for want of prosecution set for hearing on March 23, 2000.

e. This action was commenced by Writ of Summons filed on March 22, 2000.

f. The contamination subject of Suit No. CL 1992/S-124 was neither continuous nor recurrent and is the very same contamination which is the subject of the plaintiff's claim in this action."

Is paragraph 8 (f) of the Defence an admission on the pleadings pursuant to Section 3 of the Judicature (Civil procedure Code) law?

The first point which is admitted by the appellant is that it instituted proceedings against Petroleum Corporation of Jamaica Ltd. by a writ dated 27th April, 1992 and that an appearance was entered on 20th May 1992. There was a Notice of Intention to Proceed dated 18th March 1996 and a change of Attorneys dated 18th March, 1996.

Up to this point there was never a Statement of Claim by the appellant against Petroleum Corporation of Jamaica Ltd. There was a Writ of Summons and Endorsement which reads at page 29 of the Record:

"**ENDORSEMENT**

The Plaintiff, the owner and occupier of all that parcel of land registered at Volume 1203 Folio 185 and situate at Portmore in the parish of Saint Catherine, claims against the Defendant to recover damages for negligence and/or nuisance for that the Defendant caused and/or permitted gasoline and/or other flammable petroleum products which were at all material times stored on the Defendant's premises to escape therefrom and enter onto the Plaintiff's adjoining land, permeate the soil and as a consequence thereof has caused the Plaintiff to suffer loss, damage and considerable expense.

DATED the 27th day of April 1992."

There was a summons dated 3rd December 1999 by the respondent Petroleum Corporation of Jamaica Ltd. to dismiss the original action. It reads in so far as material:

> "1. This action be dismissed for want of prosecution.
>
> 2. The costs of and occasioned by this application and of the action generally be the Defendant's."

Here it should be pointed out that it seems before this summons was heard there was a Notice of Discontinuance dated 20th March 2000,which reads:

> "**TAKE NOTICE** that the Plaintiff herein, **SELECT HOLDINGS LIMITED,** will proceed no further in this action against the Defendant, **PETROLEUEM CORPORATION OF JAMAICA,** and against the Third Party, **JAMAICA GENERAL INSURANCE COMPANY LIMITED** and hereby wholly discontinues the same."

There is a statement by Alwyn Brown at page 36 of the Record which reads:

> "I, **ALWYN BROWN** being duly sworn make oath and say as follows:
>
> 1. I reside and have my true place of abode and postal address at 47 Border Avenue, Kingston 19 in the parish of St. Andrew. I am the acting General Manager of Petroleum Company of Jamaica Limited, a subsidiary of the Defendant, and am duly authorized to make this affidavit on behalf of the Defendant."

This original action was against the parent company Petroleum Corporation of Jamaica Ltd. and the relevant question must be - what effect did this action have in relation to the claim in issue against its subsidiary Petroleum Company of Jamaica? The answer will be found in cases on Company Law cited by Mr. Scharschmidt, Q.C. The respondent seems to be contending that it falls within the exceptional situation where it is permissible to lift the veil of incorporation.

At this stage it is helpful to set out the correspondence between John Graham, the Attorney-at-Law for the appellant, and, the initial defendant Petroleum Corporation of Jamaica Ltd. It purports to explain why the initial letter dated March 25, 1992 was written before the commencement of the abandoned action.

"March 25, 1992 **BY HAND**

Petroleum Corporation of Jamaica
36 Trafalgar Road
Kingston 10

Attention: The Managing Director

Dear Sirs:

Re: Petcom Service Station, Portmore

We act on behalf of Select Holdings Ltd., the owner of all that parcel of land registered at Volume 1203 Folio 185 which adjoins the Petcom Service Station.

Our client recently commenced excavation work on the abovementioned parcel of land for the purpose of constructing a commercial building. Whilst undertaking the excavation work, our client discovered that certain petroleum based substances had permeated the soil and there was a particularly strong smell of gasoline in the soil. Because of the obvious dangers which are inherent in such a highly flammable substance, our client was obliged to discontinue its construction work. A soil test was carried out on a sample taken from the area and a copy of the result is enclosed for your information.

Our investigations reveal that the leakage of gasoline from a storage tank has resulted in this situation.

This is to alert you that this state of affairs has caused and is causing our client to suffer loss and damage as a result of its inability to pursue construction work at this time. We have been asked to request that you do the following:-

(i) Immediately undertake the remedial work necessary to make our client's premises safe and advise us of this promptly along with an appropriate written certificate from an expert.

(ii) Indicate to us your willingness to settle our client's claim for the loss it has suffered and which it will continue to suffer until such time as this unfortunate matter has been remedied.

Please let us hear from you within seven (7) days.

Yours faithfully
BRODERICK & GRAHAM

Per: JOHN G. GRAHAM

Enclosure

c.c: Select Holdings Ltd. –
Attention: Mr. Adrian Genus"

This was the reply on March 27, 1992:

"March 27, 1992

Mr. John Graham
Broderick & Graham
Attorneys-at-law
The Towers, 9th Floor
25 Dominica Drive
KINGSTON 5

Dear Mr. Graham:

Re: PETCOM SERVICE STATION,PORTMORE
We refer to your correspondence of March 25, 1992, in respect of the parcel of land registered at Volume 1203, Folio 185 adjoining the PETCOM Service Station.

In this regard, we are enclosing a copy of a letter sent today to the Natural Resources Conservation Authority (NRCA) on this subject.

Your sincerely
PETROLEUM CORPORTION OF JAMAICA

Raymond M. Wright
GROUP TECHNICAL DIRECTOR."

Then here is the important letter to show that the responsible public authorities were involved in protecting the environment. This is understandable as the shares in the holding company and its subsidiary are probably owned by the Accountant-General.

"March 27, 1992

Mr. Franklyn McDonald
Executive Director
Natural Resources and Conservation Authority (NRCA)

53 ½ Molynes Road

KINGSTON 10

Dear Franklyn:

Re: PETCOM PORTMORE SERVICE STATION

I refer to the gasoline product which was found in the vicinity of the PETCOM Portmore Service Station on the afternoon of March 10, 1992.

Without prejudice to whether or not it can be shown that the cause of the gasoline contamination is attributable to leaks emanating from part of the PETCOM gasoline storage or delivery system PETCOM is conducting a clean-up of the gasoline from the ground water in the immediate vicinity of the gasoline station.

It is the intention to work closely with the NRCA team, Underground Water Authority, Office of Disaster Preparedness, Bureau of Standards and any other relevant agency in protecting the environment, both in the short and long term.

Yours sincerely,
PETROLEUM CORPORATION OF JAMAICA

Raymond M. Wright
GROUP TECHNICAL DIRECTOR

c.c..: Mr. Michael Steel, General manager – PETCOM."

This correspondence may have an important bearing on the issue of Limitation and concealed fraud. Certainly there ought to be records of these events. The important feature to note is that, both the holding company and its subsidiary, the respondent PETCOM were aware of the contamination, before the appellant raised the issue in its letter of March 25, 1992. The assurance that PETCOM was conducting a clean-up and that it was working closely with public authorities concerned to protect the environment, would tend to persuade the appellant, that its concerns were being remedied. These facts could amount to willful conduct. Such conduct could have amounted to concealed fraud. This issue will be addressed later.

What do the authorities say about the status of the respondent?

The appellant relies on the principal case in this branch of the law **Salomon v Salomon & Co. Ltd.** [1897] A.C. 22. Lord Halsbury L.C. at page 31 of **Cases and Materials in Company Law** Third edition by L.S. Sealy said:

> "I can only find the true intent and meaning of the Act from the Act itself; and the Act appears to me to give a company a legal existence with, as I have said, rights and liabilities of its own, whatever may have been the ideas or schemes of those who brought it into existence."

The appellant Select Holdings Ltd. relies on this case to emphasise that the present proceedings is against Petroleum Corporation of Jamaica Ltd. The appellant has contended that although proceedings were instituted against Petroleum Corporation of Jamaica Ltd. they were discontinued and so has little bearing on the instant case. However, the appellant, Select Holdings Ltd., has given an explanation for discontinuing the original proceedings. Here is how the explanation emerged, in a relevant part of a letter at page 51 of the Record from the then Attorneys-at-Law, to Petroleum Corporation of Jamaica Ltd. dated February 21, 2000:

> "On the 27th day of April, 1992 we filed Writ of Summons against Petroleum Corporation of Jamaica in respect of contamination of the ground water in the sub-oil below the land by petroleum hydro carbons, gas and grease.
>
> The suit has been in abeyance because we had been given the impression by Petroleum Corporation of Jamaica Limited that the contamination had been removed.
>
> An assessment was recently done to the sub-soil and it was discovered that the contamination still exists. We are enclosing copy of the report which was done for your information.
>
> Our client has entered into a contract to sell the property to MCD Properties Inc. (McDonald's in the United States of America) and the contamination is causing a serious problem which could result in the sale being aborted."

This is the vital evidence that the appellant relies on to establish that the contamination still exists. Regrettably the assessment was not exhibited at this stage.

Then there was this extract from a letter dated March 23, 2000, to Myers Fletcher and Gordon at page 54 of the Record:

> "We would like to RESTATE that our client did not proceed with the suit because they had received communication emanating from your client in a letter dated March 27, 1992 stating that:
>
> > 'PETCOM is conducting a clean-up of the gasoline from the ground water in the immediate vicinity of the gasoline station'."

On the other hand there is some evidence from the present respondent that it is a subsidiary of Petroleum Corporation of Jamaica Ltd. To reiterate this is how the evidence emerged at page 20 of the Record:

> "**I ALWYN BROWN** being duly sworn make oath and say as follows:
>
> 1. I reside and have by true place of abode and postal address at 47 Border Avenue, Kingston 19 in the parish of St. Andrew. I am the General Manager of the

> Defendant Company (PETCOM) and am duly authorized to swear to this affidavit on its behalf.
>
> 2. The Defendant is a wholly owned subsidiary of Petroleum Corporation of Jamaica Limited (PCJ). PCJ was, by action commenced on April 27th, 1992, sued by the Plaintiff for damages in respect of the incident which is also the subject of this action now directed at PCJ's subsidiary, PETCOM. I am also authorized to depone on behalf of PCJ in relation to the incident subject of this action."

As previously stated it is also averred in the particulars of the Defence that the contamination was not continuous, thus:

> "f. The contamination subject of Suit No CL 1992/S-124 was neither continuous nor current and is the very same contamination which is the subject of the plaintiff's claim in this action."

However, as previously stated there is a report prepared by expert for the appellant forwarded to Myers Fletcher & Gordon, the Attorneys-at-Law, for the respondent stating that the contamination still exists.

It is true that there are instances where the courts have lifted the veil but in the circumstances of this case this would have to be done at a full scale trial . The veil was not lifted in **Turnbull v Steigman** [1942] 2 QB 593 or [1962] 2 All E R 417 at page 47 of **Cases and Materials.** On the other hand the note on page 51 of **Cases & Materials** reads:

> "One instance of this is perhaps **Smith, Stone and Knight Ltd v Birmingham Corpn** [1939] 4 All ER 116, where Atkinson J, on facts very similar to those of **DHN Food Distributors Ltd v Tower Hamlets London Borough Council** [1976] 1 WLR 852, [1976] 3 All ER 462 (Court of Appeal), allowed a holding company to claim compensation as if it were an owner-occupier, on the ground that its subsidiary (which occupied the land in question) was merely its agent for the purpose of carrying on its business. This decision of Atkinson J, which is in marked contrast to **Gramophone and Typewriter Ltd v**

> **Stanley** Sections 229-230 and Sch 4, Pt IV has been the subject of some criticism, e g by Pickering, (1968) 31 MLR 481, 494."

The veil was also lifted in **DHN Food Distributors Ltd v Tower Hamlets London Borough Council** [1976] 1 W.L.R. 852, [1976] 3 All E.R. 462 (Court of Appeal). This was a case where there was a claim for compensation before the Lands Tribunal. At page 56 **Cases and Materials**, Shaw LJ said:

> "[There] is the further argument [An alternative ground for the decision of the court was that DHN did have a sufficient interest in the land, on the basis of either an irrevocable licence or a resulting trust, to claim compensation for disturbance in its own right], advanced on behalf of the claimants that there was so complete an identity of the different companies comprised in the so-called group that they ought to be regarded for this purpose as a single entity. The completeness of that identity manifested itself in various ways. The directors of DHN were the same as the directors of Bronze; the shareholders, of Bronze were the same as in DHN, the parent company, and they had a common interest in maintaining on the property concerned the business of the group.
>
> If each member of the group is regarded as a company in isolation nobody at all could have claimed compensation in a case which plainly calls for it. Bronze would have had the land but no business to disturb; DHN would have had the business but no interest in the land."

That the facts are to be elicited at a trial is demonstrated by the concluding words of Shaw LJ at page 57 which read thus:

> "The President of the Lands Tribunal took a strict legalistic view of the respective positions of the companies concerned. It appears to me that it was too strict in its application to the facts of this case, which are, as I have said, of a very special character, for it ignored the realities of the respective roles which the companies filled. I would allow the appeal."

Another instance where the veil was lifted was **Hone v. Canadian Imperial Bank of Commerce** 1987-1988 Law Reports of the Bahamas p. 223. **Gower's Principles of Modern Company Law** Fifth Edition Chapter 6 addresses this issue and two citations are appropriate. The first at page 126 reads:

> "...each company in a group of companies ... is a separate legal entity possessed of separate rights and liabilities., page 532, quoting Roskill L.J. in **The Albazero** [1977] A.C. 744, C.A. and H.L. at 807."

The other citation is at page 134 and reads at footnote 62:

> "note also the dictum of Browne-Wilkinson V.C. in **Tate Access Inc. v. Boswell** [1991] Ch. 512 'If people choose to conduct their affairs through the medium of corporation, they are taking advantage of the fact that in law those corporations are separate legal entities... In my judgment controlling shareholders cannot for all purposes beneficial to them insist on the separate identity of such corporations and then be heard to say the contrary' [when it is disadvantageous]; at p 131H."

The principle may apply even to a company incorporated by virtue of the Crown Property (Vesting) Act where the Accountant-General is the sole shareholder. If it were not so then a subsidiary company could escape liability for a tort by saying sue the holding company.

The important issue to be determined in these interlocutory proceedings may be formulated thus. **In the instant case where Select Holdings Ltd. abandoned its claim for continuing torts of Rylands and Fletcher and nuisance against the holding company Petroleum Corporation of Jamaica Ltd., is it entitled to institute proceedings with respect to the same continuing torts against the subsidiary Petroleum Company of Jamaica in the circumstances of this case?** My answer is in the affirmative. As to the institution of fresh proceedings see **Birket v James** [1977] 2 All E.R. 801 at 806, 813, 816 and 817.

It is now appropriate to turn to the grounds of appeal.

Ground 1 reads:

> "1. The learned judge erred in law in failing to grant the Orders sought on the Plaintiff's Summons dated the 4th day of May, 2000 and that he failed to give due regard or any regard to whether the paragraphs in question were necessary for a fair determination of the issues joined between the parties."

With respect to the appellant's summons, to reiterate the learned judge ruled:

> "The plaintiff's application for paragraphs of the defence to be struck out is refused and the summons is dismissed. The defendant will have its costs on both summonses. Leave to appeal granted to the plaintiff."

The order reads:

> "2. The Plaintiff's summons dated the 4th day of May, 2000 is dismissed."

To my mind Paragraph 8 of the Defence ought to be struck out. It averred that the appellant's Statement of Claim was an abuse of process. If the finding at this interlocutory stage is that the Statement of Claim should not be struck out, then logically paragraph 8 of the Defence must go, and I so order. Thus ground one therefore is successful.

Grounds 2, 3, and 4 read:

> "2. The learned judge erred in law in making an order that the action be struck out as an abuse of the process of the Court and that in so doing the learned judge failed to apply the correct principles of law which required him to consider whether the action brought in the suit was an independent and subsisting cause of action.
>
> 3. The learned judge failed to consider that nuisance, trespass and breach of the rule in **Rylands v. Fletcher** are continuing torts.

4. Further the learned judge failed to give any regard or sufficient regard to the fact that at all material times the defendant/respondent was an independent legal person against whom the plaintiff/appellant's causes of action should have to be independently evaluated."

The averments of **Rylands v Fletcher** and nuisance were pleaded as continuing torts. These proper pleas ought not to be struck out on the basis of abuse of process.

As for ground 4 the averment in the Statement of Claim simply states that the appellant is the owner of a parcel of land which is admitted. There is no averment in the Defence as to the status of the respondent. There is no evidence save in the affidavit of Alwyn Brown that the Defendant is a subsidiary of Petroleum Corporation of Jamaica Ltd. The documentary evidence to demonstrate this was not adduced.

As for grounds 5 and 6 they read as follows:

"5.The learned judge sought to make findings of fact on disputed questions raised in affidavit evidence.

6. The learned judge erred in law in finding that the defendant/respondent was a wholly owned subsidiary of the Petroleum Company (sic) of Jamaica Limited in the absence of any or any sufficient evidence as is required to satisfy the provisions of the Companies Act."

Grounds 5 and 6 criticise the learned judge for making findings of fact adverse to the appellant by relying on affidavit evidence. The passage to which the criticism is directed is as follows at p. 62 of the Record:

"I have no doubt in my mind that the action brought by the plaintiff in this 2nd suit i.e. suit against Petcom is based on the facts relied upon in the previous action against P.C.J. I agree with counsel for the defendant that this is an abuse of the process of the court."

All that was before the Court with respect to the initial action against Petroleum Corporation of Jamaica Ltd. was a Writ of Summons. With respect to the instant case there was a Statement of Claim.

Here is the Summons which succeeded before Reckord J:

> "1. This action be dismissed and/or struck out as statute-barred by the Limitation of Actions Act and/or as an abuse of process of the court
>
> 2. The Plaintiff pay the costs of and occasioned by this application and of the action generally."

With respect to the plea of the Limitation of Actions Act, the Statement of Claim cannot be struck out on that ground in view of the following plea:

> "5. During the period 1992 to 1999 large quantities of petrol escaped from the storage tanks and seeped through the subsoil and settled on the Plaintiff's land depositing thereon hazardous hydrocarbons which has contaminated the Plaintiff's land."

Firstly as explained nuisance and **Ryland v Fletcher** are continuing torts. "So a right of action accrues afresh every day". Secondly, it is arguable that properly pleaded the appellant may rely on concealed fraud in connection with the limitation period.

There is a passage in **Clerk and Lindsell on Torts** Twelfth edition at page 276 which reads:

> "Fraud" is used here in the sense of any willful wrongdoing; there need be no active suppression of facts. In **Rolfe v. Gregory** (1865) 4 De G.J. & S. 576 at p. 579 Lord Westbury L.C. said, "The right of the party defrauded is not affected by lapse of time . . . so long as he remains without any fault of his own in ignorance of the fraud which has been committed."
>
> The doctrine of "concealed fraud" is that where a defendant has fraudulently infringed the plaintiff's right, the Statute of Limitations does not run against the plaintiff

> until his discovery of the infringement, provided that he has not been guilty of the laches. See per Kindersley V.C. in **Petre v Petre**(1853) 1 Drew. 371 at p. 397. As to laches, see **Lindsay Petroleum Co. v. Hurd** (1874) L.R. 5 P.C. 221 at p. 239, per Lord Selborne L.C; **Betjemann v. Betjemann** (1895) 2 Ch. 474."

There is also another useful passage on page 633 under the caption **Fraud and Mistake.** The purpose of this analysis is to demonstrate that if the issue of concealed fraud was pleaded and proved then the tort of negligence could have been properly pleaded. As it was not pleaded the tort of negligence must be struck out as it is not a continuing tort. It is difficult to say how pleadings good on its face as the pleas of **Rylands v. Fletcher** and nuisance could be struck out as an abuse of process.

Perhaps it is useful to advert to the definition cited on "Abuse of process of the Court" at page 322 of the 1997, **The Supreme Court Practice** 18/19/15:

> "Para. (1) (d) confers upon the Court in express terms powers which the Court hitherto exercised under its inherent jurisdiction where there appeared to be "an abuse of the process of the Court." This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation (see **Castro v. Murray** (1875) 10 Ex. 213: **Dawkins V. Prince Edward of Saxe Weimar, Willis v. Earl Beauchamp** (1886) 11 P. 59 per Bowen L.J. p.63)."

In **Buckland v. Palmer** [1984] 3 All E.R. 564 the claim for abuse of process succeeded, where in **Hardy v. Elphick** [1973] 2 All ER 914 it did not. Despite the very able response by Mrs. Minott-Phillips I do not agree with her that the action instituted is an abuse of process. This is a case similar to **Department of Transport v. Chris Smaller Ltd.** [1989] 1 All E.R. 897 at 904 (c & d) which will be determined by expert and documentary evidence.

Conclusion

This is a very important and substantial claim. As the correspondence reveals this case is of "general public importance" as it involves the environment generally, quite apart from the allegations that there has been an infringement of the property rights of the appellant. To my mind, the appellant has succeeded in establishing a valid Statement of Claim and the issues to be determined at a trial are that the respondent company has polluted his property. So the orders of Reckord J. must be set aside. The appellant's Statement of Claim is restored except for the claim for negligence. Paragraph 8 of the Defence averring that the Statement of Claim is an abuse of process is struck out. There should be an expedited hearing in the Supreme Court. The respondent must pay the appellant's costs both here and below.

Conclusion

This is a very important and substantial claim. As the correspondence reveals this case is of "general public importance" as it involves the environment generally, quite apart from the allegations that there has been an infringement of the property rights of the appellant. To my mind, the appellant has succeeded in establishing a valid Statement of Claim and the issues to be determined at a trial are that the respondent company has polluted his property. So the orders of Reckord J. must be set aside. The appellant's Statement of Claim is restored except for the claim for negligence. Paragraph 8 of the Defence averring that the Statement of Claim is an abuse of process is struck out. There should be an expedited hearing in the Supreme Court. The respondent must pay the appellant's costs both here and below.

defendant/respondent was an independent legal person against whom the plaintiff/appellant's causes of action should have to be independently evaluated.

(5) The learned judge sought to make findings of fact on disputed questions raised in affidavit evidence.

(6) The learned judge erred in law in finding that the defendant/respondent was a wholly owned subsidiary of the Petroleum Company (sic) of Jamaica Ltd. in the absence of any or any sufficient evidence as is required to satisfy the provisions of the Companies Act.

It seems to me that the critical issues in this appeal are:

(1) Whether or not the appellant has pleaded continuing torts.

(2) Whether in the circumstances of this case the withdrawal of the Writ of Summons filed against the parent company and the filing of a fresh Writ against the subsidiary company in respect of the same cause of action constitutes an abuse of process of the court.

1. **Continuing Torts**

If "A" wrongfully placed something on "B's" land and leaves it there, that is not simply a single act of trespass, but is a continuing trespass giving rise to a fresh cause of action **de die in diem** - see **Winfield and Jolowicz** on **Tort** 15th Edition p. 741. This must be distinguished from a single act of trespass such as the digging of a hole on the plaintiff's land, where it is only the consequence of the trespass not the trespass itself which continues – **ibidem** (Footnote No. 15). Professor Andrew McGee in his work "Limitation Periods" 2nd Edition at p. 64 in addressing continuing torts states:

> "Perhaps the most common example of this is a continuing nuisance. In these cases the right of action accrues afresh everyday, but damages can be recovered only for that part of the loss which arose within the relevant period before the commencement of proceedings".

Halsburys Laws of England 4th Edition Vol. 28 at paragraph 623 reads in part:

> "Where there has been a continuance of the damage, a fresh cause of action arises from time to time, as often as damage is caused."

On this subject Ralph Sutton M.A. in his 5th Edition of " A Summary of the Law of Torts by Sir Arthur Underhill" has this to say at p.380:

> "1. Where a tort is continuing or is repeated or recurs a fresh cause of action arises from day to day during its continuance and on each occasion on which it is repeated or recurs.
>
> 2. When an action is brought in respect of such a tort damages may be awarded down to the date on which they are assessed, but no damages may be awarded for the prospective continuance, repetition or recurrence of the tort thereafter".

It should be noted that The Supreme Court Practice 1967 Order 37/6 provides that in respect of a continuing tort damages shall be assessed down to the time of the assessment. The learned author went on to explain (2) (supra) in light of the common law principle that the court has no power to adjudicate upon a cause of action which is not included in the writ and that no cause of action which had not accrued at the date of the issue of the writ can, even by amendment, be included in it.

As stated before the appellant's claim against the respondent is to recover damages for negligence, nuisance, trespass and breach of the rule in ***Rylands v Fletcher***. A perusal of the appellant's Statement of Claim will reveal that the trespass, nuisance and breach of the rule in ***Rylands v Fletcher*** averred therein are continuing torts. Paragraphs 3 and 4 aver that during 1992 the respondent caused storage tanks constructed on its lands to be filled with petrol and diesel oil. Para 5 claims that during 1992 to 1995 large quantities of petrol escaped from the storage tanks and seeped through the subsoil and settled on the appellant's land depositing thereon hazardous hydrocarbons which have contaminated the appellant's land. One of the particulars of special damages is the cost for removing contaminants. The other refers to the abatement of the nuisance or removal of this contamination. To my mind there can be no serious debate as to whether or not the torts of nuisance, trespass and ***Rylands and Fletcher*** averred in the Statement of Claim are continuing torts. However, the same cannot be said of the tort of negligence as averred.

What then is the legal implication when the tort averred is a continuing tort? As said before a fresh cause of action arises from day to day during its continuance ***Holmes v Wilson*** [1839] 10 A& E 50. It is therefore no answer to the plaintiff's action when he sues for the repetition of a tort, to say that he had already sued and recovered for its

SMITH, J.A.

This is an appeal from an order of Reckord J., made on the 18th October, 2000 whereby he dismissed and struck out, as an abuse of the process of the court, an action brought by the appellant. The action was brought against the respondent to recover damages for negligence, nuisance, trespass and breach of the rule in **Rylands v Fletcher**.

The appellant was at all material times the owner and occupier of lands known as Lot 6, Portmore in the parish of St. Catherine registered at Volume 1203 Folio 185 of the Register Book of Titles.

The respondent was at all material times the owner and occupier of premises situate at Lot 1, Portmore in the parish of St. Catherine registered at Volume 1203 Folio 180 of the Register Book of Titles. A road separates the appellant's land from the respondent's premises. Prior to March, 1992, the respondent constructed on its land a petrol station which consisted of petrol storage tanks, pipes, mains, pumps, faucets and other mechanical and other electronic devices to facilitate the business of dispensing petrol and diesel oil to members of the public for reward. This is the Petcom Service station operated by the respondent which is a wholly owned subsidiary of the Petroleum Corporation of Jamaica Ltd.

It is the contention of the appellant that large quantities of petrol escaped from the storage tanks, seeped through the subsoil and contaminated its land. On the 25th March, 1992, the appellant's

attorneys wrote the Petroleum Corporation of Jamaica Ltd. (PCJ) pointing out that there has been a leakage of gasoline from the storage tanks on to the appellant's land which adjoins the Petcom Service Station. In this letter the appellant's attorney claimed that the contamination of the appellant's land had caused and was causing the appellant to suffer loss and damage as a result of its inability to pursue construction work. The appellant requested immediate remedial action and an indication of the willingness of PCJ to compensate the appellant for the loss suffered.

PCJ replied by letter dated 27th March, 1992 and enclosed a copy of the letter sent to the Natural Resources Conservation Authority ("NRCA"). The gist of this letter to NRCA was that Petcom was conducting a clean-up of the gasoline from the ground water in the immediate vicinity of the Portmore service station.

On the 27th April, 1992 the appellant filed a Writ of Summons against PCJ to recover damages for negligence and/or nuisance in suit no. CL 1992/S-124. An appearance was entered on behalf of PCJ on the 20th May 1992. Despite requests by the attorney acting on behalf of PCJ for a statement of claim none was forthcoming. On the 18th March, 1996 the appellant filed a Notice of Intention to Proceed and a Notice of Change of Attorney. Over three years later on the 17th November, 1999, the appellant filed another Notice of Intention to Proceed.

On the 3rd December, 1999 a Summons to Dismiss the Action for Want of Prosecution was filed on behalf of PCJ. On the 14th March, 2000 the appellant filed a summons for leave to file Statement of Claim out of time. Both summonses were set for hearing on the 23rd March, 2000. However, the hearing of these summonses was obviated by the filing of a Notice of Discontinuance by the appellant's attorney on the 20th March, 2000. After more than eight (8) years with a suit pending, any relief that PCJ had was short lived; because on the 22nd March 2000 a writ was filed against its wholly owned subsidiary Petroleum Company of Jamaica Ltd. ("PETCOM"), the respondent.

By this writ the appellant seeks to recover from the respondent damages for negligence, nuisance, trespass and breach of the rule in **Rylands v Fletcher**. It is alleged that the respondent caused/or permitted hazardous contaminants stored on its premises to escape therefrom and enter on the appellant's adjoining land and permeate the soil and as a consequence has caused the appellant to suffer loss and damage.

In its Statement of Claim the appellant alleges the escape of petrol during the period 1992 to 1999. The Defence to this action was filed on the 20th April, 2000. On the 4th May, 2000 the appellant by summons applied to have certain paragraphs of the Defence struck out on the ground that they were irrelevant, frivolous and vexatious and likely to

original perpetration. And it follows that damages cannot be awarded to him for the prospective repetition or recurrence or continuance of the tort, however, likely it may be - see Sir Arthur Underhill's a Summary of the Law of Torts (supra) at p.381.

The redress for such prospective continuance would be an injunction – see ***Alan Maberley v. Henry W. Peabody & Co. Ltd. and others*** [1946] 2 All E.R. 192. It is also important to note that damages can be recovered only for the loss which arose within the relevant limitation period.

The learned trial judge "rejecfed out of hand" the appellant's contention that the nuisance averred was a continuing tort. In my view the learned judge erred in so holding.

2. **Abuse of Process**

Mrs. Sandra Minott-Phillips in her usual competent manner forcefully argued that the second suit filed by the appellant was merely a device to circumvent the difficulty the appellant anticipated at the hearing of the respondent's summons to dismiss the appellant's first suit for want of prosecution. It is her contention that the second action is the same as the first which is statute-barred. The allegation by the appellant in the second suit that the tortious activities complained of occurred between 1992 and 1999 was not honest and bona fide and is therefore a sham and an abuse of process, she urged.

Mrs. Minott-Phillips also submitted that in the circumstances the learned trial judge could not be faulted for finding that the new action against PCJ's subsidiary was, on the evidence, an abuse of process of the court and was done for the sole purpose of trying to preserve the appellant's (by then) statute barred cause of action. She further contended that the appellant was using the fact that the "defendant" in the previous action and the "defendant" in the fresh action are two distinct corporate entities to support the sham of the fresh action being different from the previous one. When in truth and in fact, she continued, it was in substance the same action as the one previously brought in 1992. She referred the court to several authorities including ***West Indies Sugar v Minnell*** [1993] 30 J.L.R 452; ***Vashti Wood v H.A Liquors Ltd. et al*** [1995] 48 W.I.R. 240; ***Biss v Lambeth*** et al [1978] 2 All E.R 125 (abuse of process); ***Hone v. Canadian Imperial Bank of Commerce*** [1987-88] 1 LRB 223 (lifting the veil) and ***Barakat Ltd. v Epiette Ltd.*** [1997] 1 BCLC 303 (abuse of process and privity of interest).

Mr. Scharschmidt, Q.C., on the other hand, submitted that discontinuance cannot be an abuse of the process of the Court. He relied on section 240 of the Civil Procedure Code, ***Hardy v Elphick*** [1973] 2 All E.R 914 and ***Buckland v Palmer*** [1984] 3 All E.R 554.

It seems to me that in so far as the continuing torts are concerned the discontinuance of the previous suit and the institution of a fresh suit in

the circumstances of this case cannot without more constitute an abuse of the process of the court. This is so because the right of action accrues afresh every day. This principle was applied in ***Holmes v Wilson*** (supra). In that case the defendants were trustees of a turnpike road and built buttresses to support it on the land of the plaintiff. The plaintiff accordingly brought an action for trespass, but accepted money paid into court in satisfaction. Subsequently, he called upon the defendant to remove the buttresses, and on their failing to do so brought another action for trespass for keeping the buttresses on his land. It was held that he was entitled to do so for the keeping of the buttresses on his land was a fresh trespass and the first action was, therefore, no bar to the second.

Most of the cases cited by counsel for the respondent were not the subject matter of continuing torts. Further, it should be noted that by virtue of section 240 of the Civil Procedure Code a discontinuance or withdrawal by a plaintiff of an action at any time before the receipt of the Defence shall not be a defence to any subsequent action. (The subsequent action must of course, be filed within the limitation period). Thus, the revival of the matter cannot be an abuse of the process of the court merely because it had previously been withdrawn or discontinued.

As regards the lifting of the corporate veil, counsel for the appellant submitted that the mere fact that a company is a wholly owned subsidiary of another is not enough to warrant the lifting of the veil. There

is no evidence before the court to support the argument of counsel for the respondent, he further submitted. In this regard he referred the court to several cases in "**Cases and Materials in Company Law**" 3rd Edition by L.S. Sealy.

I must confess some difficulty in understanding the relevance of the lifting of the corporate veil to the question of abuse of the process of the court. How will it benefit the respondent if the fact of separate corporate existence of the parent company and itself the subsidiary, be ignored? If I understand Mrs. Minott-Phillips well the separate corporate existence of the respondent should be ignored for the purposes of enabling the court to hold that the defendant in the previous suit, that is, the parent company is the same as the respondent (the subsidiary). In such a case it would mean that the defendant in the suit which was discontinued is the same as the respondent in the fresh suit. Therefore, argued counsel for the respondent, the fresh action was a sham, it was not different from the previous one and "in truth and in fact, it was in substance, the same action as the one previously brought in 1992." The action, subject of this appeal, was nothing more than a blatant attempt by the appellant to avoid the consequences of its inaction in the 1992 proceedings and as such was an abuse of process, she urged. But as I have endeavoured to show where the tort alleged is continuous the right of action accrues afresh **de die in diem** until the tort is abated. The fact that the original

continuing tort is alleged to have arisen over eight years ago will not bar the filing of a fresh suit alleging the same continuing tort. Thus, even if there was sufficient evidence to found the respondent's plea that the veil should be lifted, and I am not saying there was, such a course would avail nothing. Having discontinued the previous suit, the exercise by the appellant of its right to file a fresh suit against the subsidiary company within the limitation period cannot without more constitute an abuse of the process of the Court – see ***Birkett v James*** [1977] 2 All E.R 801.

Conclusion

In my view the torts of trespass, nuisance and ***Rylands v Fletcher***, alleged by the appellant in its action against the respondent, are prima facie continuing torts. Accordingly, the appellant's claim in respect of those causes of action are not statute barred. It is also my view that the appellant having abandoned its claim against PCJ in respect of the continuing torts is entitled to proceed against PCJ's subsidiary (the respondent) in respect of the same continuing torts. However, in my opinion the appellant's claim against the respondent in negligence, which, on the pleadings arose in 1992, is statute barred.

I would therefore allow the appeal in part and make the following orders:

(i) That the orders in the court below be set aside.

(ii) That the appellant's claim in negligence, be struck out as being statute –barred.

(iii) That paragraph 8 of the Defence averring abuse of process be struck out.

(iv) Costs in this court and the court below to the appellant to be taxed if not agreed.

BINGHAM, J.A. (Dissenting)

This is an appeal in which the appellant sought to challenge an order made by Reckord, J. in Chambers that:

> "1. This action be dismissed and struck out as an abuse of the process of the Court.
>
> 2. The plaintiff's summons dated 4th May 2000, be dismissed.
>
> 3. The plaintiff pay the costs of both summons and of the action generally.
>
> 4. Leave to appeal granted to the plaintiff."

The abovementioned orders were made consequent on a summons taken out by the attorneys-at-law for the defendant company in the suit on 12th September 2000, which sought the following reliefs viz:

> 1. This action be dismissed and/or struck out as statute – barred by the Limitation of Actions Act and/or as an abuse of the process of the Court.
>
> 2. The plaintiff pay the costs of and occasioned by this application and of the action generally.

This summons was in response to an earlier summons filed on 4th August 2000, in which the plaintiff had applied to strike out several paragraphs in the defence filed on the ground that:

> "They are irrelevant, frivolous and vexatious and is likely to delay the fair trial of the action."

At the hearing on 9th and 13th October 2000, both summonses were heard together following which in a written judgment delivered on 18th

October 2000, the learned trial judge made the order striking out the action and dismissing the plaintiff's summons. The grounds of appeal raised the following areas of complaint viz:

> **"(1)** The learned judge erred in law in failing to grant the orders sought on the plaintiff's summons dated the 4th day of May 2000, and that he failed to give due regard or any regard to whether the paragraphs in question were necessary for a fair determination of the issues joined between the parties.
>
> **(2)** The learned judge erred in law in making an order that the action be struck out as an abuse of the process of the court and that in so doing the learned judge failed to apply the correct principles of law which required him to consider whether the action brought in the suit was an independent and subsisting cause of action.
>
> **(3)** The learned judge failed to consider that nuisance, trespass and breach of the rules in **Rylands** v **Fletcher** are continuing torts.
>
> **(4)** Further the learned judge failed to give any regard or sufficient regard to the fact that at all material times the defendant/respondent was an independent legal person against whom the plaintiff/appellant's causes of action should have to be independently evaluated.
>
> **(5)** The learned judge sought to make findings of fact on disputed questions raised in affidavit evidence.
>
> **(6)** The learned judge erred in law in finding that the defendant/respondent was a wholly owned subsidiary of the Petroleum (sic) Company of Jamaica Limited in the absence of

> any or any sufficient evidence as is required to satisfy the provisions of the Companies Act."

It may be convenient at this stage to set out the factual background giving rise to the matter.

THE FACTS

The present Writ of Summons in Suit C.L 2000/S-060, filed on 22nd March 2000, founded on a claim for damages for negligence, nuisance, trespass and breach of the rule in **Rylands** v **Fletcher** was not the first action for damages alleging a similar cause of action filed by the plaintiff. Although the cause of action in both suits are the same following a lapse of some eight years the attorney-at-law for the plaintiff, for reasons best known, to themselves, withdrew the original claim which was filed as far back as 27th April 1992. That action had named the defendant as "The Petroleum Corporation of Jamaica." This action followed a claim by the appellant that sometime in early 1992, workmen on the land which adjoins the Petcom Service Station in Portmore, St Catherine, in excavation work discovered that certain petroleum based substances had penetrated the sub-soil and this resulted in a strong smell of gasoline in the soil.

On the 25th March 1992, the appellant's attorneys-at-law wrote to the Petroleum Corporation of Jamaica complaining that this state of affairs had caused the appellant to suffer loss and damage. They requested that the Corporation immediately undertake remedial work to

make the appellant's premises safe. There was a reply to this letter on 27th March 1992, by the Group Technical Director of the Corporation.

The appellant and their attorneys-at-law were apparently not satisfied with the steps taken to remedy the problem and so on 27th April 1992, the appellant's attorneys-at-law filed the writ of summons claiming damages against the Petroleum Corporation of Jamaica. An appearance to the writ was entered by the attorneys-at-law for the Petroleum Corporation of Jamaica on 20th May 1992 and served on the attorneys-at-law for the appellants on 22nd May 1992.

On 10th August 1992, the attorneys-at-law for the Corporation gave their consent to statement of claim being filed within fourteen days of that date. There was no response to this by the attorneys-at-law for the appellants.

The matter then seemed to have come to a rest as the next move by the attorneys-at-law for the appellant was taken several years later when on 18th March 1996, they filed a Notice of Intention to proceed with the action after one month from the expiration of the notice taking effect. This notice was served on the attorneys-at-law for the Petroleum Corporation of Jamaica on 19th March 1996. Up to that point in time no statement of claim had yet been filed in the matter. The reason for this could not have been the change of attorneys-at-law for the appellants as although there was a notice of such change filed on 18th March 1996 and

served on the Corporation's attorneys-at-law the following day, Mr. John Graham had been the attorney-at-law having conduct of the suit from the outset of the matter. He would be expected, therefore to be the one to move the matter forward so as to cause it to proceed in a timely and expeditious manner in keeping with the timetable laid down by the Rules governing claims in the Supreme Court.

There was another period of somnolence for some three years and eight months during which the matter was allowed to be at rest before the attorneys-at-law for the appellant once again awoke from their slumber to file another notice of their intention to proceed with the action on the 12th November 1999. This was served on the Corporation's attorneys at-law on 24th November 1999. At that date more than seven years had passed after the filing of the writ of summons. No statement of claim had been filed in the matter. This was followed shortly thereafter by the filing of the summons by the attorneys-at-law for the Corporation on 3rd December 1999, to dismiss the action for want of prosecution.

As no Statement of Claim had been filed, the time for continuing with the action had run out as more than six years had elapsed from the time that the alleged cause of action arose.

Faced with this hopeless situation, the attorneys-at-law for the appellant having conduct of the suit took what could only be termed as one last desperate move thus aptly described by the learned trial judge below:

"the matter took on an unethical and sinister turn". On February 21 2000, the attorney-at-law for the appellant wrote directly to the general manager of the Corporation seeking to resolve the matter. In doing so, he failed to inform their attorneys-at-law who he was well aware, were the same attorneys-at-law acting for the defendant Corporation. This could only be seen as an attempt on his part to effect a resolution of the claim behind their backs.

To complete the entire picture it may be convenient at this stage to set out in detail the letter referred to above and the response of the Attorneys-at-law for the Corporation. First, the letter of February 21, 2000:

> "Petroleum Corporation of Jamaica Limited
>
> 36 Trafalgar Road
> Kingston
>
> Attention The General Manager
>
> Dear Sirs:
>
> Re: Petcom Portmore Service Station
>
> This is to advise that we act on behalf of Select Holdings Limited. Our client is the owner of all that parcel of land known as Lot 6 Portmore registered at Volume 1203 Folio 185 of the Register Book of Titles and which is adjacent to the Petcom Service Station.
>
> On the 27th day of April 1992, we filed writ of summons against Petroleum Corporation of Jamaica in respect of contamination of the ground water in the sob-soil below the land by petroleum hydro carbons, gas and grease.

The suit has been in abeyance because we had been given the impression by Petroleum Corporation of Jamaica Limited that the contamination had been removed.

An assessment was recently done to the sub-soil and it was discovered that the contamination still exists. We are enclosing a copy of the report which was done for your information.

Our client has entered into a contract to sell the property to MCD Properties Inc. (McDonald's in the United States of America) and the contamination is causing a serious problem which could result in the sale being aborted.

We recommend that you communicate with us as a matter of urgency so that we can discuss and hopefully resolve the matter

Yours faithfully
Patterson Phillipson & Graham
Per: John G.Graham

c.c. Select Holdings Limited
Attention: Mr. Adrian Genus."

Then the response:

"Myers, Fletcher & Gordon

Patterson, Phillipson & Graham
Attorneys-at-law
Attention: Mr. John Graham

March 9, 2000

Needless to say we will not consent to the filing of your client's Statement of Claim out of time.

As to your letter of February 21, 2000, to our client, our comments are as follows:

> 1. Our client is well aware that you act on behalf of Select Holdings Limited as your Notice of Change of Attorney on behalf of the plaintiff was served on us on March 18, 1996, and your Mr. Graham's former firm which represented the plaintiff at the outset, was the firm upon which our appearance was served on May 22 1992.
>
> 2. As regards the reason proffered by you for the suit being "in abeyance" our client disagrees entirely. In the view of our client and ourselves, the sole reason for the suit being "in abeyance" is the failure of your client's attorneys-at-law to file a statement of Claim on his behalf and to in any way proceed with the action.
>
> 3. As regards your recommendation to our client that it communicate with you, please be assured that no such communication from our client to you will be forthcoming. In other words, your recommendation to our client (which you know is wholly improper) is rejected
>
> Please be guided accordingly.
>
> Yours faithfully,
> Myers, Fletcher & Gordon
>
> Per: Sandra Minott-Phillips (Mrs)
> cc. Petroleum Corporation of Jamaica Limited."

From this incontrovertible evidence and while it is apparent that the second action is between the same plaintiff but a different defendant, the cause of action from an examination of both the endorsements to the writ of summons and the statement of claim in the latter action in substance and effect, are the same. The attorneys-at-law having conduct of the matter have at all material times remained the same from the outset of the proceedings in 1992, and throughout the changes of

attorneys-at-law, from "Broderick and Graham" to "Patterson, Phillipson and Graham" and finally to "John G. Graham and Co." There is no plausible reason that can be called in aid to explain the delay of so long a period, which in no uncertain terms does qualify as inordinate and inexcusable. Nor for that matter can the period from the filing of the writ on April 27 1992 in suit C.L.1992/S-124, **Select Holdings Ltd. v Petroleum Corporation of Jamaica**, which proceedings were allowed to remain extant until March 20, 2000, a period of seven years ten months and seven days, before a Notice of Discontinuance was filed in the matter be explained. On these bald and incontrovertible facts the appellant certainly had no basis for advancing ignorance as to the proper defendant as being the reason for dispensing with the suit filed in C.L.1992/S. 124

The reference in the letter of 27th March 2000, from John Graham to Myers, Fletcher & Gordon, which in part was to the effect that:

> "We would like to restate that your client did not proceed with the suit because they had received communication emanating from your client in a letter dated 27th March 1992 stating that: Petcom is conducting a clean-up of the gasoline from ground water in the immediate vicinity of the gasoline station."

could hardly have afforded a reasonable explanation for a delay of the magnitude referred to. Moreover, it was following on this letter that the writ was filed on April 27 1992, followed by several attempts on the part of

the respondent's attorney-at-law to press the attorney-at-law having conduct of the suit on behalf of the appellant to bring the matter forward to the trial stage. The fact was that, as the learned trial judge below remarked, "after eight years no statement of claim had yet been filed in the matter."

It is of importance to note that the Notice of Discontinuance was filed more than six years after the alleged cause of action arose which action was now statute-barred. When therefore, the attorneys-at-law for the respondent took out the summons seeking to dismiss the action for want of prosecution, this could be seen as nothing more than an attempt on their part to finally put an end to a claim which up to that stage, was ~~mere~~ now statute-barred.

The sudden and dramatic change of position taken by the attorney for the appellant in filing a second claim against the Petroleum Company of Jamaica can only be seen, therefore, as nothing more than a last desperate attempt to stave off the inevitable, realizing no doubt, that, the reliefs sought in the respondent's summons in the light of the long delay in their failure to put in a statement of claim, stood every chance of success.

The critical question that now needs to be examined therefore, is, whether, given the history and the uncontroverted facts relating to the matter, if the plaintiff/appellant was allowed to proceed with the present suit, a fair hearing of the matter would be possible. What is plain is that

blame for whatever delay that has occurred has to be laid fully at the door of the attorneys-at-law having conduct of the suit.

In filing the Notice of Discontinuance in suit C.L. S. 124/92 the attorney-at-law for the plaintiff/appellant sought thereby to stay the hand of the attorneys for the respondent whose summons sought dismissal of that claim for want of prosecution.

The affidavit filed in support of the summons had established not only delay of such a magnitude to be described as both inordinate and inexcusable, but after such a long period of time, was prejudicial to a fair trial of the action. Added to all this was the fact that from May 27 1998, the original claim had now become statute-barred.

Learned counsel for the appellant sought to contend that the second claim being against a different defendant it could not be seen as being the same matter as the first action. Furthermore as the cause of action related to a tort that is a continuing one, the plaintiff was entitled to claim for the entire period that the tort subsisted. The fact that the previous action relates to a period dating back to 1992, would not afford a basis for a court exercising its inherent jurisdiction to strike out the action as being an abuse of the process of the court. Counsel cited in support the cases of **Buckland** v **Palmer** [1984] 3 All E.R. 554 at 558 and **Hardy** v **Elphick** [1973] 2 All E.R. 914.

In **Buckland v Palmer** two separate claims were brought by the plaintiff in respect of the same cause of action in negligence. In the first claim the plaintiff having obtained judgment for the excess over and above the sum for which his vehicle was insured, his insurers upon new facts emerging, and discovering that the defendant's vehicle was uninsured at the time of the accident out of which the claim arose, brought a second action to recover the amount paid to the insured for the damage to his vehicle.

On appeal from an order by the County Court judge refusing to strike out the second action as being an abase of the process of the Court, the Court of Appeal allowing the appeal held:

> "It was an abuse of the process of the Court to bring two actions in respect of the same cause of action but where there had been no judgment in the first action, that action could in appropriate circumstances be revived and amended to enable an adjudication to be made on the whole of the plaintiff's claim. Furthermore, where the original claim was brought in the county court and the second claim was enlarged so that it was outside the county court's jurisdiction, the whole matter could be transferred to the High Court. Since it was open to the insurers to apply for a removal of the stay on the first action and to amend the plaintiff's claim in that action they would suffer no injustice if the court were to exercise its discretion by refusing to permit them to commence a fresh action. Accordingly, an order striking out the second action would be made but without prejudice to an application to remove the stay on the first action and for leave to amend the particulars of claim in that action."

On the facts in this case, the original claim now being statute-barred, there were no special circumstances existing to allow for a court to exercise its discretion to grant an amendment of the original claim and so revive the action. Indeed, given the nature and extent of the delay, a Court of Equity would not lend its aid to a stale claim.

In **Hardy** v **Elphick** (supra) also relied on by learned counsel for the appellant, the facts related to two causes of action, which, although arising out of the same subject matter viz; a contract for sale of land, the cause of action were not the same. The second action, therefore, could not be regarded as being an abuse of the process of the court, as the court held that, it could not be said that the 1972 action disclosed no cause of action, for the allegation of an oral agreement afforded a cause of action. The agreement alleged in the 1972 action was different from that alleged in the1971 action and founded a different cause of action.

In responding, learned counsel for the respondent submitted that if there is a cause of action which arose at a particular time the party wronged has a period of six years to bring its claim. If the damage which sustained is eight years later, damages which can be recovered is only for the damage sustained which is closest to the period that the action is brought. On the other hand if in 2000 the plaintiff is saying that the damage claimed was in respect of the years 1992 to 1999, then that period will be outside the limitation period.

Learned counsel submitted that the damage of the defendant cannot alter the situation as it is the same damage that is being complained of. In support of her contention, she drew the court's attention to the letter of March 25 1992, (pages 23-24 of the record of appeal). She argued that the damage referred to in this letter related to the same damage which was being complained about in the letter of February 21 2000, (pages 51-52 of the record), of which reference was previously made and is set out in extenso earlier in this judgment. It may be convenient at this stage to set out the contents of the letter of March 25. The letter reads as follows:

> "March 25,1992 BY HAND
>
> Petroleum Corporation of Jamaica
> 36 Trafalgar Road
> Kingston 10
>
> Attention: The Managing Director
>
> Dear Sirs:
>
> Re: Petcom Service Station, Portmore
>
> We act on behalf of Select Holdings Ltd. the owner of all that parcel of land registered at Volume 1203 Folio 185 which adjoins the Petcom Service Station.
>
> Our client recently commenced excavation work on the obovementioned parcel of land for the purpose of constructing a commercial building. Whilst undertaking the excavation work, our client discovered that certain petroleum based substances had permeated the soil and there was a particularly strong smell of gasoline in the

soil. Because of the obvious dangers which are inherent in such a highly flammable substance, our client was obliged to discontinue its construction work. A soil test was carried out on a sample taken from the area and a copy of the result is enclosed for your information.
Our investigations reveal that the leakage of gasoline from a storage tank has resulted in this situation.

This is to alert you that this state of affairs has caused and is causing our client to suffer loss and damage as a result of its inability to pursue construction work at this time. We have been asked to request that you do the following:

(i) Immediately undertake the remedial work necessary to make our client's premises safe and advise us of this promptly along with an appropriate written certification from an expert.

(ii) Indicate to us your willingness to settle our client's claim for the loss it has suffered and which it will continue to suffer until such time as this unfortunate matter has been remedied.

Please let us hear from you within seven (7) days.

Yours faithfully
Broderick & Graham

Per: John G. Graham
Enclosure

c.c. Select Holdings Ltd.
Attention: Mr. Adrian Genus."

Learned counsel next drew the court's attention to an extract from an authoritative work on Limitation Periods 2nd Edition by Andrew McGee at page 64, under the subhead "Continuing Torts". She submitted that whereas damage results from day one to two and an action is brought

after the second day, then the claim can encompass both days. On the other hand if the claim is not launched until after six years (i.e. after the limitation period) then the damage can only include that arising after the limitation period. It follows therefore, that if in 2000, the plaintiff is saying that the damage claimed was in respect of the years 1992 to 1999, then that claim will be in respect of the damage outside of the limitation period.

The court's attention was next drawn to the closing paragraphs of the letter of February 21, 2000, to which reference has already been made. This states:

> "We recommend that you communicate with us as a matter of urgency so that we can discuss and hopefully resolve the matter."

The original writ of summons having been filed as far back as April 27 1992, and with the matter at that stage being litigated, at the time this letter was being written by Mr. John Graham, counsel argued, this hope of a resolution of the matter could not have been the reason why the previous suit was not proceeded with. All of this posturing on the part of the appellant was against a background of two notices of their intention to proceed with the action C.L. S 124/92 having been filed i.e. on March 18 1996, and again on November 17 1999. As the writ of summons was filed on April 27 1992, the limitation period would have run its course six years after the cause of action arose. On this score the second notice of

intention to proceed filed on November 17 1999, would have been out of time and would have been of no assistance to the plaintiff.

In light of the above the submissions have much force and in my opinion are with much merit. Learned counsel having conduct of this suit from the outset, in the face of these uncontroverted facts could hardly contend that, the second writ of summons filed after the first claim was statute-barred, was for reason that the wrong tortfeasor was sued. The tenor of the letters referred to and the documents filed in the matter to which our attention has been drawn would make any such claim entirely fallacious.

It may now be convenient to turn to the law and an examination of how the Courts in our own jurisdiction have dealt with similar applications. Learned counsel for the respondent relied on **West Indies Sugar** v **Stanley Minnell** [1993] 30 J.L.R. 542 and **Wood** v **H. G. Liquors Ltd and Another** [1995] 48 W.I.R. 240.

The facts in both cases make very interesting reading. It may be convenient to set out the headnote in the reports.

In **West Indies Sugar** v **Minnell** (supra) the respondent served a writ on the plaintiff four years after the accident which gave rise to the cause of action. The writ was served in June 1988. The appellants entered an appearance in August 1988. Nothing was done by the respondent until he filed a summons in July 1992, to extend time to file the statement of

claim out of time. The Master found that there was inordinate delay but the appellant would not be prejudiced in its defence and granted the extension. The defendant appealed. This court held:

> "(1) Inordinate delay by itself can be relied on to show prejudice and while it is true that the appellant did not take steps to file a summons to dismiss the case for want of prosecution the court had an inherent jurisdiction to do so.
>
> (ii) The paramount interest is that of the administration of justice and the Master was obliged to determine whether a fair trial could have taken place, the appellant ought to have known the case that it had to meet and to prepare a defence from September 1988.
>
> (iii) The issue of the witnesses' credibility after so long a period of time had elapsed should be addressed that is, would they still have recall of the details of the accident. In such circumstances prejudice ought to be inferred against the appellant."

In allowing the appeal and dismissing the action for want of prosecution this Court said inter alia (per dictum of Forte, J.A. (as he then was) p. 543 (D)):

> "In **Allen** v **Sir Alfred McAlpine & Sons** [1968] 1 All E.R. 543, Lord Denning M.R. went straight to the heart of the matter:
>
> 'The principle on which we go is clear; when the delay is prolonged and inexcusable and is such as to do grave injustice to one side or the other, or to both, the Court may in its discretion dismiss the action straight away, leaving the plaintiff to his remedy against his own solicitor who has brought him to this plight.'

> Diplock L.J. (as he then was) in the same case was of like mind in expressing similar views in the matter."

The learned Judge of Appeal also cited **Birkett** v **James** [1977] 2 All E. R. 801, where in returning to the same subject matter reiterated the principles which should govern the exercise of the court's power to dismiss an action for want of prosecution. In that case the Learned Law Lord said:

> "The power should be exercised only where the Court is satisfied either (1) that the default has been intentional and contumelious e.g. disobedience to a premptory order of the court or (2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, or (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or have caused serious prejudice to the defendant either as between themselves and the plaintiff or between each other or between them and a third party."

Downer, J.A., in coming to the same conclusion that the appeal be allowed, while recognizing that the matter related to a summons to enlarge the time for filing a statement of claim under Section 192 of the Civil Procedure (Code) Law, saw the application as closely connected to an application for a dismissal of the action for want of prosecution where the facts indicated that the nature and extent of the delay was prolonged and inordinate. This would put the matter in the category of one coming within the general powers of the Court under Section 224 of

the Civil Procedure (Code) Law, or, the Court exercising its inherent jurisdiction. The requirement in the rules is for a statement of claim to be filed within ten days following entry of appearance.

No matter what the nature of the application, Downer, J.A. saw the underlying principle to be extracted from the decided cases to be (p. 547A):

> "A party who is guilty of inordinate delay is liable to fail if he seeks enlargement of time to set his house in order. In both instances the other crucial features is the prospect of there being a fair trial of the issues when either summons is filed. It is to be noted that where there is inordinate delay this by itself will make a fair trial impossible."
>
> (Emphasis added)

In **Wood** v **H. G. Liquors Ltd. and Another** (supra) the facts are: following a road accident in February 1981, in which a person sustained injuries from which he died, the appellant issued a writ in February 1987, claiming damages on behalf of the near relatives of the deceased and his estate. Although the respondent, (driver involved and his employer) consented in June 1988, to an extension of time for the filing of the statement of claim, no further steps were taken in the action and the first respondent (a company) applied for the action to be dismissed for want of prosecution. It was stated that they necessarily relied on persons who were employed to the company at the time of the accident, and who, because of the extent of the delay had now become unavailable. The

appellant maintained that the first respondent had failed to show any actual prejudice flowing from the delay.

In January 1993, the Master dismissed the action for want of prosecution. The appellant appealed against the Master's order. His attorney accepted responsibility for the delay in pursuing the matter. It was held by this Court by a majority dismissing the appeal that:

> "The delay in prosecuting the claim had been inordinate and inexcusable and there was a substantial risk that justice would not be done (e.g. by reason of the non-availability of witnesses), accordingly, it was unfair to allow the claim to proceed even in the absence of evidence that the delay would operate to the disadvantage of the first respondent. The failure to deliver a statement of claim in due time gave rise to a discretion to dismiss the claim for want of prosecution." (Emphasis added)

Then Reckord, J., in the instant case in the concluding paragraphs of his judgment in striking out the plaintiff's claim said:

> "I have no doubt in my mind that the action brought by the plaintiff in this 2nd suit (i.e. suit against Petcom) is based on the facts relied on in the previous action against Petroleum Corporation of Jamaica. I agree with counsel for the defendant that this an abuse of the process of the Court. As far as the plaintiff's case that this is a continuing nuisance is concerned, that is rejected out of hand."

Given the history of the matter giving rise to this present claim, and, the conduct of the attorney having conduct of the suit which tells its own

story, the comments made by the learned judge were in my opinion well founded.

Most of what has been expressed up to this point does support a conclusion in favour of the respondent based on the nature and extent of the delay on the part of the attorney-at-law for the appellant in bringing the matter forward in a timely manner, thus rendering a fair trial at this stage unlikely or impossible. This also raises a question which naturally arises for serious consideration, viz, given the fact that the appellant now has filed a Writ and a Statement of Claim which appears to have some semblance of validity on the face of it, why should they be made to suffer a possible injustice by the dismissal of the present claim because of the neglect on the part of their attorneys-at-law?

The answer to this question is to be found in a statement of principle which governs delay of the magnitude such as that in the instant case, and which, although already expressed in this judgment, needs to be repeated in order to re-emphasize its importance in such matters. In **Allen v Sir Alfred McAlpine & Sons** (supra) Lord Denning M.R. said (at page 547E):

> "The principle on which we go is clear, when delay is prolonged and inexcusable and is such as to do grave injustice to one side or the other, or to both, the Court may in its discretion dismiss

> the action straight away, leaving the plaintiff to his remedy against his own solicitor who has brought him to this plight."
> (Emphasis supplied)

CONCUSION

In none of the cited cases has there been delay approaching the magnitude of the instant case. Nevertheless, it was recognized that where the delay was inordinate and inexcusable, this very fact rendered the fair trial of an action impossible. The attorneys for the appellant have sought to offer as the reason for their inaction over this very long period that the original claim was allowed to remain dormant, their belief that some effort was being made by the Petroleum Corporation to resolve the matter. In the light of a number of requests from the Corporation's attorneys, for the appellant to file a statement of claim, this went unheeded. Of equal importance as well was the conduct on the appellant's attorneys own part evincing an intention to proceed to take a further step in the matter. This belief if it existed, must have been at best a pious hope on their part. When the factors giving rise to the filing of the second writ is examined, arising as it was out of the same set of circumstances as the original one, it is my opinion that to allow an action

to proceed after such a long period would be doing a very grave injustice to the respondent.

I would dismiss the appeal, affirm the judgment of Reckord, J. and order costs to the respondents to be agreed or taxed.

Downer, J.A:

By a majority (Downer and Smith, JJA : Bingham, JA dissenting))

(1) Appeal allowed. Order below set aside.

(2) Statement of Claim restored save for averment of negligence

(3) Paragraph 8 of Defence struck out.

(4) Expedited hearing in the Court below ordered.

(5) The taxed or agreed costs both here and below to the appellant to be taxed if not agreed.