IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU

CIVIL CASE NO 22/1983

JUDGMENT NO

OF 28th March 83

BETWEEN:	GEORGE ARTHUR ELLIS	First Plaintiff
	GEOFFRY JOHN McINNES	Second Plaintiff
	PHILIP STEPHEN McINNES	Third Plaintiff
	STEPHEN HAROLD DOBIN	Fourth Plaintiff
	BERNARD CHARLES ALFORD	Fifth Plaintiff
	GORDON GILL	Sixth Plaintiff
A N D:	THE ATTORNEY GENERAL (Representing the Government of the Republic of Vanuatu)	Defendant

CORAM: The Honourable Mr. Justice F.G. Cooke.
Mr. W. McKeague, Counsel for the Plaintiffs.
Mr. S. Hakwa, Counsel for the Defendant.

JUDGMENT

On the 16th day of February 1983, a writ of Summons was filed in the Supreme Court by the Plaintiff implying that the Government of Vanuatu were in breach of a contract with them.
On the 23rd of February 1983, the Attorney General on behalf of the Government of Vanuatu filed a Memorandum of Appearance.
On the 10th of March 1983, a Summons was filed in the Supreme Court by Mr. Silas Charles Hakwa, Counsel for the Attorney General for an order that the Plaintiffs' statement of claim be struck out under Rules of the Supreme Court, and under the inherent jurisdiction of the Court, on the ground that it discloses no reasonable cause of action against the Defendant, and that the Plaintiffs' action against the Defendant be dismissed.
Mr. Hakwa submitted that the statement of claim was vague and difficult to understand what was the basis of the claim.

He referred to clause 5 and indicated that that was the first mention of any contractual arrangements. He stated that throughout the statement of claim there was no clear statement as to the existance of a contract. He submitted that generally on the face of it and reading the statement of claim it was not clear whether a contract was alleged as a fact. Further, it was submitted by counsel that the statement of claim does not contain any facts or allegations which would suggest there was any consideration.

Counsel referred to case of Cooke v Richman 1911 2.K.B. page 1125 at 1130. The Court in that case agreed that consideration for any contract not made under seal is always material and it is advisable to set it out in the statement of claim. At page 1130 Bankes J stated:-

"I agree with Mr. Du Pareq for the defendant, to this extent, that under the present system of pleading, if an agreement were set up in a statement of claim without saying what was the consideration, the defendant would be entitled to apply to strike it out or to apply for particulars of the consideration.

Counsel referred to Order 18/19/5 of the Supreme Court Rules and the High Court Order 21 R 16 as to matters which the Plaintiff must raise by pleadings.

Counsel then referred to the Supreme Court Pratice (known as White Book) Order 18 Rule 7/5 which relates to all material facts and should have been set out in the statement of claim. He then referred to the case of Bruce v Odham Press Limited 1936 1 A.E.R. page 294 where Scott L.J. stated, "The cardinal provision of Order 19 Rule 4 of Rules of the Supreme Court is that the statement of claim must state the material facts. The word "material" means necessary for the purpose of formulating a complete cause of action; and if anyone "material' statement is omitted the statement of claim is bad, and is liable to be 'struck out', or "a further and better statement of claim' may be ordered under Rule 7.

Counsel said that under Rule 18/7/2 of the White Book, each parties must plead all material facts on which he means to rely on at the trial. He then referred to the case of West Rand Central Gold Mining Company v Rex 1905 2 K.B. at page 399 - Lord Alverstone C.J. when making observation on pleading stated, "Upon all sound principles of pleadings it is necessary to allege <u>what must</u> and <u>not what may</u>, be a cause of action.

Counsel then referred to an agreement alleged to be made and quoted Order 18 Rule 12/5 of the 'White Book' which states:-

The pleading should state the date of the alleged agreement, the names of parties to it, and whether it was made orally or in writing, in the former case stating by whom it was made and in the latter case identifying the document and in all cases setting out the relevant terms relied on. <u>If the agreement be not under seal the consideration also must be stated.</u>

Where a contract is alleged to be implied from a series of letters or conversations or otherwise from a number of circumstances, the contract should be alleged as a fact, and the letters, conversations or circumstances set out generally, and further particulars requiring details <u>will not generally</u> be ordered.

Counsel then referred to Order 18 Rule 19/5 of the White Book which referred to his submission that the statement of claim disclosed no reasonable cause of action and referred me to the cases of South Hetton Coal Company v Shotton and Easington Coal and Coke Company 1898, 1 Ch. page 465, and the Attorney General, of the Duchy of Lancaster v London and North Western Railway Company 1892, 3 Ch page 275.

In the first case, the owner of a certian coal mine proposed to receive sealed tenders from two parties who were competing for the purchase of them and undertook to accept the highest net money tender. One of the competitors offered such a sum as would exceed by 200 pounds, the amount offered by the other. It was held that a tender in this form did not answer the description of the highest net money tender, and an order was made striking out the statement of claim in an action for specific performance of an alleged contract founded on such tender as disclosing no reasonable cause of action.

In the second case, Smith L.J. at page 278 stated:-

"It seems to me that when there is an application made to strike out a pleading and you have to go to extrinsic evidence to show that the pleading is bad, that rule does not apply. It is only when upon the face of it, it is shown that the pleading discloses no cause of action or defence, or that it is frivolous and vexatious, that the rule applies."

In that particular case he held that it was manifest that you must go to extrinsic evidence to show that the pleadings is bad, therefore the rule does not apply. Generally the case confirmed that an application to strike out a statement of claim or stay proceedings may be made by the defendant in a proper case before filing his defence. Counsel then reiterated his submission that on the face of the statement of claim there is no reasonable cause of action.

Mr. McKeague for the plaintiffs submitted that a cause of action is merely a set of facts which it is alleged by a party that have certain legal results. It is not a set of facts which guarantee the plaintiff a remedy or that the Court will provide him with some relief. Neither is it a set of facts which preclude any defence. Further it is not a question whether a statement of claim can be sustained but a question whether on pleadings to date it is obviously unsustainable.

Mr. McKeague then referred to page 264 of the White Book and a statement by Scrutton L.J. (Order 18 Rule 7/2). He said, "The practice of the Courts is to consider and deal with the legal result of pleaded facts although the particular result alleged is not stated in the pleadings." (Lever Bros. Ltd v Bell (1931) 1 K.B. page 357), except where to ascertian the validity of the legal result would require the investigation of new and disputed facts which had not been investigated at the trial.

Mr. McKeague referred to Mr. Hakwa's main complaint that there is no clause in the statement of claim stating the consideration and went on to stress that consideration is not necessary a physical fact - not necessary money - not necessary goods or physical exchange that can be stated and referred to Order 2[illegible].R. 26 which states:-

Whenever any contract or any relation between any persons is to be implied from a series of letters or conversations, or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations, or circumstances without setting them out in detail, etc.

Mr. McKeague then referred to Order 18/19/5 of the White Book in dealing with a reasonable cause of action.

It is stated therein, "A reasonable cause of action means a cause of action with some chance of success when only the allegation in the pleading are considered (Lord Pearson in Drummond - Jackson v British Medical

Association (1970) 1 W.L.R. 638.
But the practice is clear. So long as the statement of claim or the particulars (Davey v Bentrick (1893) 1 Q.B. 185) discloses some cause of action, or raise some question fit to be decided by a judge or a jury, the mere fact that the cause is weak and not likely to succeed, is no ground for striking it out."
Mr. McKeague further contended that in addition to the power of striking out, the Court can order an amendment. Order 18/19/5 second paragraph: "Where the statement of claim presented discloses no cause of action because some material has been omitted, the Court, while striking out the pleadings, will not dismiss the action, but give the plaintiff leave to amend.
I agree that so long as the statement of claim or the particulars disclose some cause of action, or raise some question fit to be decided by a Judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out.
That was decided in the case of Wanlock v Maloney and others, 2 A.E.R. R 871 CA.
In that case a plaintiff issued a writ, and delivered a statement of claim. alleging conspiracy which had caused him damage, against three defendants. His statement of claim was a long and wandering document which he prepared himself, but his writ and statement of claim disclosed a cause of action. After this had been remodelled and re-delivered the defendants delivered lengthy defences, admitting some allegations, denying others, and making various affirmative allegations, and the plaintiff delivered replies to these defences.
Although the plaintiff's claim seemed unlikely to succeed, the case was not a plain and obvious one. The defendants applied under Order 18 & 19 of the White Book and under the inherent jurisdiction of the Court, to strike out the writ, statement of claim, and replies and to stay or dismiss the action on the grounds that those pleadings disclosed no reasonable cause of action, and were vexatious and an abuse of process. Eventually ten affidavits were filed on this application, five on each side. After a hearing which took more than two full days, and at which there was no oral evidence or cross examination, the master delivered a twenty two page judgment and struck out the plaintiff's pleadings.
On appeal by the plaintiff, it was held that the appeal must be allowed, because the course taken by the master amounted to a trial of the case in Chambers, without discovery, oral evidence or cross-eaamination, and so was neither authorised by the rules nor a proper exercise of the inherent jurisdiction of the Court.
To try the issues in this way is to usurp the function of the trial judge. In the case of Lawrence v Lord Norreys (1890) 15 App. Cases page 219, Lord Herschell said -
"It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. <u>It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases.</u>

I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable and one which it was difficult to believe could be proved!" In the Wenlock case Danckwerts L.J. in ending his judgment said at page 874, "In my view, the way in which this case has been dealt with is quite contrary to the practice of the Court and is thoroughly undesirable. I therefore allow the appeal."

If it appears clearly that there is no contract between the parties so held in South Hetton Coal Company v Haswell Shotton, and Easington Coal and Coke Company 1898 1 Ch. page 465 or there was not a contract valid in law (1901) 2 K.B. 385, or if relief be asked on a ground which is no ground for such relief (Drefus v Peruvian Guano Company 41 Ch. Div. 151) the statement of claim will then be struck out and the action dismissed.
Striking out however is employed only in plain and obvious cases - so held in the case of Kensley v Foot and others 1951 2 K.B. C.A.

In the application before me, I am of the opinion that the alleged contract could be more clearly stated and the consideration set out thus making it clear to the defendant the claim he has to meet.
I therefore dismiss this application but order that the plaintiff amend his statement of claim and set out more clearly what the alleged contract is and the consideration therefor.
The defendant to file his defence within 14 days from the date the amended statement of claim has been filed.

I order that the costs in this matter be cost in the cause.

Frederick G. Cooke .

Frederick G. Cooke
CHIEF JUSTICE

Dated at Vila this 28th day of March 1983.