

ROYAL COURT
(Samedi Division)

21st December, 1988

Before: The Deputy Bailiff and
Jurats Coutanche and Gruchy

<u>Between</u>	Reinout Baron Sloet Tot Everlo	<u>Plaintiff</u>
<u>And</u>	Fitel Limited	<u>First Defendant</u>
<u>And</u>	Graciela Chichilnisky	<u>Second Defendant</u>
<u>And</u>	Geoffrey Martin Heal	<u>Third Defendant</u>
<u>And</u>	Michael De Mello	<u>Fourth Defendant</u>
<u>And</u>	Strachan Management Services Limited	<u>Fifth Defendant</u>
<u>And</u>	Philip Eric de Figueiredo	<u>First Party Cited</u>
<u>And</u>	Raymond Gerard Connell	<u>Second Party Cited</u>
<u>And</u>	Judicial Greffier	<u>Third Party Cited</u>

Advocate A.P. Begg for the plaintiff
 Advocate A.O. Dart for the First Defendant
 Advocate A.R. Binnington for the Second
 and Third Defendants
 Advocate P.C. Sinel for the Fourth Defendant
 Advocate C.M.B. Thacker for the Fifth Defendant,
 First and Second Parties cited.

DEPUTY BAILIFF: On the 12th August, 1988, the learned Bailiff signed the plaintiff's Order of Justice. Service of the Order of Justice operated as an immediate interim injunction (i) restraining the first, second, third, fourth and fifth defendants and the first and second parties cited, through themselves or their employees, servants, or agents, or attorneys (a) from registering, or attempting to register at the Judicial Greffe a Special Resolution, approved at a general meeting of the shareholders of the first defendant on the 18th July, 1988, and confirmed at a further general meeting of the shareholders of the first defendant on the 2nd August, 1988, whereby a revised set of Articles of Association of the first defendant, which Articles were to eliminate any reference to a subscription and shareholders' agreement or its terms, dated the 1st August, 1985, between the second, third and fourth defendants and the plaintiff, as the said agreement was declared null and void by all signatories in the Memorandum of Agreement dated the 15th March, 1988, was accepted as the first defendant's Articles of Association in substitution for those then in force; (b) from signing any documentation relating to the passing of the Special Resolution; (c) from doing anything, or acting in any way (including, but without prejudice to the generality of the foregoing), holding any meetings or taking any votes, on the basis of the Special Resolution; and (d) from issuing any further notices of forthcoming meetings of the shareholders or directors of the first defendant, or any resolution to be made in the name of the first defendant, without first giving ten days' prior written notice to Advocate Begg at 20 Britannia Place, Bath Street, St. Helier; and (ii) restraining the third party cited from (a) registering the Special Resolution; (b) acting in any way or doing anything on the basis that the Special Resolution is effective.

The action is currently on the pending list and the injunctions remain in force.

The plaintiff now seeks leave to raise the injunctions and/or leave to withdraw and discontinue the action.

Leave to raise injunctions is, as is the original grant of injunctions, a matter wholly within the discretion of the Court.

Withdrawal and discontinuance of an action is governed by Rule 6/24 of the Royal Court Rules, 1982. The relevant part is to be found in Rule 6/24 paragraph (1) in the following terms:

"Except with the consent of the other parties to the action, a party may not discontinue an action without the leave of the Court, and any such leave may be given on such terms as to costs, the bringing of a subsequent action or otherwise as the justice of the action may require".

It has become the practice of this Court, in matters of this kind, to have regard to the Supreme Court Practice (the White Book). We refer here to the 1988 edition:

Order 21 Rule 3 provides that;

"Except as provided by Rule 2 (which is discontinuance without leave not applicable here) a party may not discontinue an action ... without the leave of the Court, and the Court hearing an application for the grant of such leave may order the action to be discontinued on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just".

At page 372 - paragraph 21/2 - 5/12, we find the following:-

"The Court has a wide discretion as to the terms upon which it may grant leave to a plaintiff to discontinue or withdraw the whole or part of the action it may impose terms as to costs, as to the bringing of a subsequent action or otherwise as it thinks just".

Whilst there is no authority for injunctions to be raised at the instance of the plaintiff who has obtained them, we are of the opinion that the greater includes the lesser, and if the plaintiff can discontinue the whole action with leave, he must be entitled to have leave to abandon the benefit of injunctions granted to him.

However, in the instant case the injunctions are the "raison d'être" of the action; the plaintiff seeks to have the injunctions raised in order that the Special Resolution may, after all, be registered; therefore, he will no longer

wish to obtain the declarations sought in the prayer of the Order of Justice.

Accordingly, we have decided to treat this matter as an application solely for leave to withdraw and discontinue the action.

All counsel agree that the plaintiff is entitled to leave - the White Book at page 372 paragraph 21/2 - 5/11 says that:-

"Nevertheless, it is not desirable that a plaintiff should be compelled to litigate against his will; the Court will normally grant him leave to discontinue if he wants to, provided no injustice will be caused to the defendant nor will he be deprived of any advantage which he has already gained in the litigation which so far as possible should be preserved"

This Court is not going to compel the plaintiff to litigate against his will and subject to what we have to say hereafter, we grant leave to the plaintiff to discontinue the action.

However, as the White Book at page 372 paragraph 21/2 - 5/12 says:-

"The Court has a wide discretion as to the terms upon which it may grant leave to a plaintiff to discontinue the action It may impose terms as to costs, as to the bringing of a subsequent action or otherwise as it thinks fit".

The paragraph continues:-

"(1) As to costs If the order gives leave to discontinue on the payment of the costs, the action survives until the costs are paid".

Mr. Begg accepts that the costs of all other parties must be paid by the plaintiff. However, for reasons connected with the financial state of the first defendant, we are not prepared to delay a discontinuance until the costs are paid. Thus discontinuance will be immediate but we order that the plaintiff will pay the costs of all the other parties, of and incidental to this action, on a taxation basis.

In his Order of Justice the plaintiff by his Advocate undertook to abide by any order of the Court as to damages in case the Court should thereafter be of the opinion that the defendants or any of them, should have sustained damage by reason of the Order of Justice, for which the plaintiff should be liable.

The White Book at page 373 paragraph 21/2 - 5/13 states that:-

"After discontinuance by the plaintiff, the Court will make such further order as may be requisite for giving effect to rights acquired by the defendant in the course of the proceedings. Thus, where a plaintiff has given an undertaking in damages on obtaining an interlocutory injunction, an inquiry as to damages will be ordered after discontinuance (*Newcomen v. Coulson* (1878) 7 Ch. D. 764)"

Mr. Binnington made a strong case that unless "costs" can be given a very wide interpretation to include costs in other proceedings, including proceedings in other jurisdictions, there should be an inquiry into damages. He argued that a great deal of the Court's time, and indeed of counsel's time, had been spent in the intervening months, arguing interlocutory matters on the basis of the existing Articles of Association; the allegations in the Order of Justice now under consideration had been repeated in the second Order of Justice and had been used in support of injunctions; there had been a delay of some four months before the plaintiff came to realise that in his own best interests the new Articles of Association should be registered.

Mr. Dart, as independent counsel for the first defendant supported the argument; much time and effort on the part of many could have been avoided if the decision to accept registration of the new Articles of Association had been made earlier. If the new Articles of Association had been registered the second Jersey action, and the proceedings in New York and London might have been unnecessary and the recent Order of Justice by Baker Lee Limited which occupied the Court last week would have been unnecessary.

At the end of the day Mr. Begg conceded that there were grounds for an inquiry as to damages.

We find it impossible to construe "costs" as including the costs in other proceedings and even less so the costs in relation to proceedings in other jurisdictions. Mr. Binnington and Mr. Dart, supported by Mr. Thacker who kindly saved time by not repeating the same arguments, have made a strong "prima facie" case for damages. Accordingly, we order that an inquiry as to damages will be conducted before the Judicial Greffier after discontinuance.

The most controversial aspect of this matter was the submission by Mr. Binnington that further extraordinary general meetings of the first defendant should be held to ratify the Special Resolution. This would effectively negate all the other decisions of this Court in relation to this and inter-related actions because it would enable Baker Lee Limited as shareholder to 'block' the implementation of the Special Resolution and thus the removal from the Board of the first defendant, of the second and third defendants. No other counsel supported him. Mr. Dart suggested a compromise by means of a condition that removal of the second and third defendants from the Board of the first defendant should be subject to further order of this Court, or alternatively that this Court should order that the second and third defendants should continue as non-executive directors, with their signing-powers on bank mandates removed. As a further alternative Mr. Dart suggested that Baker Lee Limited be granted a seat on the Board, its representative not to be either the second or third defendants.

Mr. Sinel and Mr. Begg opposed strongly any continued presence of the second and/or third defendants on the Board.

Unless the Court has been gravely misled by counsel on both sides over the last three months, the situation of the first defendant is a precarious one, which can be saved only by the injection of capital from parties to whom the presence of either the second or third defendants would be unacceptable.

We agree with Mr. Thacker, that by their Answer to this action the first, second and third defendants are estopped from attacking the validity of the Special Resolution. Whether or not we are correct in that view we believe that any condition on the lines of that proposed by Mr. Binnington would tend to negative the decision of this Court last week when it raised the injunctions granted to Baker Lee Limited. We do not believe that it would be

in the best interests of the first defendant, if it is to be rescued from financial disaster, for any such condition to be imposed and we decline to do so.

This brings us to the last, and difficult point, which could, if urgency did not persuade us otherwise, of the effect of discontinuance on the plaintiff's second action.

Mr. Binnington referred us to page 372 of the White Book paragraph 21/2 - 5/12, as to any other action:-

"A plaintiff who discontinues his action is not prevented from bringing another action for the same subject matter. But where leave is required, the Court will consider all the circumstances and if it seems just will impose a term that no other action shall be brought (Hess v. Labouchere (1898) 14 T.L.R. 350)"

We agree that the plaintiff should not be permitted to bring any further action for the same subject matter, that is to say on the basis of the Special Resolution and we readily impose a term to that effect.

However, Mr. Binnington's submission was not so much about the future as about the plaintiff's existing second action, which contains allegations about the same Special Resolution. He argued that the plaintiff should be required to seek leave to amend his second action in order to remove all allegations relating to the meetings of the 18th July and 2nd August and the Special Resolution.

Again, we are indebted to Mr. Thacker for his suggestion that this Court, having regard to the urgency of the matter, should lay down guidelines and that counsel should attempt to reach agreement on the amendment of the second action with a view to reaching the stage where a consent order could be obtained or, failing this, points of disagreement could be defined in order that this Court might dispose of them in short order.

Mr. Thacker did suggest, at one stage, that this should be done before an order be made on the present application, but accepted that it could be done later if guidelines were laid down.

We are not prepared to delay the present order; but Mr. Begg conceded that there are passages in the plaintiff's second Order of Justice that cannot remain in the light of discontinuance of the first action. At the end of the day we were pleased to note that all counsel agreed with Mr. Thacker's excellent and time-saving proposal.

Thus, we order that the plaintiff's second Order of Justice be amended to delete all attacks and criticisms of the meetings of the 18th July and 2nd August and the Special Resolution there passed. We direct that all counsel will confer and attempt to reach agreement on the amendments to be made. When counsel are ready the Court, subject to availability of its members, will convene at short notice, as we have done so many times on this and related actions, either to make a consent order or to decide any defined remaining points of disagreement.

The application is allowed - there will be immediate discontinuance of the plaintiff's first action, on the several conditions that we have stipulated.

Authorities cited:-

- Pestana -v- de Franca (unreported J.J. 5th January 1988).
- * Newcomen -v- Coulson (1878) Ch. D. 764.
- Robinson -v- Chadwick (1878) Ch. D. 878.
- Fox -v- Star Newspaper Company (1898) 1 Q.B. 636.
- Robertson -v- Purdey (1906) 2 Ch. D. 615.
- Mundy -v- The Butterfly Company Limited (1932) 2 Ch. D. 227.
- Covell Matthews & Partners -v- French Wools Limited (1978) 2 D.R. 800.
- American International Group Inc. -v- London American International Corporation Limited (1960) F.S.R. 441.
- * Hess -v- Labouchere (1898) 14 T.L.R. 350.

(* Denotes authorities referred to in Judgment).