6 pages.

ROYAL COURT

8th November, 1994 222A.

Before: The Judicial Greffier

Between:	Kenvyn Morgan Jones	Plaintiff
And:	Monica Joan Bryant née Furlong trading as Bryant & Co.	First Defendant
And:	Kelvin Peter Myles	Second Defendant
And:	Michael Gilson	Third Defendant

Application by the First Defendant for the Order of Justice to be struck out on the ground that it is vexatious and/or is otherwise an abuse of the process of the Court by reason of an alleged settlement of the action.

Advocate M. St. J. O'Connell for the First Defendant.
Advocate N.M. Santos-Costa for the Plaintiff.

JUDGMENT

JUDICIAL GREFFIER: The Plaintiff invested monies with Bryant & Co during 1987 and 1988 and alleges that these monies were still held by Bryant & Co during the period after 23rd March, 1989, when the First Defendant was registered as the sole proprietor of that business name. The Plaintiff alleges that the sum of almost £100,000 has gone missing and has sued all three Defendants in respect of this.

After an exchange of pleadings the action was set down on the hearing list as between the Plaintiff and the First Defendant only on 15th February, 1994. On 24th March, 1994, Advocate Costa rang Advocate Boxall, who was acting for the First Defendant in order to enquire whether, if the action were abandoned against the First Defendant, the First Defendant would agree to this on the basis of each party paying their own costs.

Subsequently, on 7th April, 1994, Advocate Boxall wrote to Advocate Costa and the second paragraph of that letter reads as follows:-

"I am able to confirm that my client will, at this stage, consent to an Order that the action be withdrawn in full and final settlement of all matters raised therein on terms that each party pay its own costs PROVIDED THAT the caveat presently on the property is cleared off."

Advocate Costa responded to that by a letter 11th April 1994, the second, third and fourth paragraphs of which read as follows:-

"I agree that the caveat will be lifted simultaneously with the action being withdrawn with each party to pay their own costs.

I will prepare an agreed order accordingly for execution by ourselves on behalf of our respective clients and arrange for the matter to be brought back to Court so that the Court may ratify the agreed Order.

I trust this meets with your approval."

On 14th April, 1994, Advocate Boxall replied as follows:-

"Thank you for your letter of 11th April 1994 the contents of which I approve.

I look forward to receiving the draft order in due course."

Subsequently, on 25th May, 1994, Advocate Costa wrote to Advocate Boxall and the first two paragraphs of that letter read as follows:-

"Further to my "without prejudice" letter to you dated the 11th April, 1994, I write to inform you that the basis upon which that letter was sent was that my clients were under a misapprehension as to the nature of the proceedings and their likelihood of success in this regard.

The matter having now been fully explained to them, they no longer wish to withdraw this action and are minded to proceed with it."

Advocate O'Connell represented the First Defendant at the hearing before me because Advocate Boxall was involved in the trial of a case in the Royal Court. Advocate O'Connell submitted that by the exchange of correspondence mentioned above, the Plaintiff and the First Defendant had agreed that the action be withdrawn in full and final settlement of all matters raised therein on the basis that each party would pay its own costs and

upon the basis that the *caveat* presently on the First Defendant's property would be cleared off.

Advocate Costa denied that any such agreement had been reached. He pointed out that there was no mention in his letter of 11th April, 1994, of any agreement being in full and final settlement of the action. He drew my attention to Rule 6/24(2) of the Royal Court Rules, 1992, as amended which reads as follows:-

> ***"(2) Subject to the terms imposed by the Court in granting such leave, the fact that a party has discontinued an action or counterclaim or withdrawn a particular claim made by him therein shall not be a defence to a subsequent action for the same, or substantially the same, cause of action."***

Advocate Costa submitted that, if an agreement had been made to withdraw the action, then, in the absence of express agreement not to bring any further action, it was open to his client to bring another action on the same facts.

Advocate Costa also raised a number of other lines of opposition to the striking out but I do not propose to set these out in full because the First Defendant's Summons failed without my having to determine all these other points.

The parties put before me an extract from the third edition of "The Law and Practice of Compromise" by David Foskett, Q.C. On page 48 of which, at section 4-20 there appears the following:-

> ***"No consensus ad idem. Assuming for present purposes that mistakes involving the identity of the other party are unlikely to arise in the context of compromise, only one other situation falls to be considered under the general heading of "mistake". It arises where one party interprets and accepts the offer of the other in a completely different sense from that which was intended. In such a situation, no contract comes into existence. An example would be afforded where A and B have two separate and distinct disputes running concurrently. A makes an offer of compromise intended to deal with both disputes; B believes that A is attempting to compromise one dispute only and accepts on that basis. Clearly there would be no contract, the parties not being ad idem."***

Both parties addressed me on the principles which I should follow in relation to the application for striking out. They both agreed that if I were to find that an agreement had been reached to settle the whole action which was legally enforceable then striking out would be appropriate both under the heading of

vexatious and under the heading of abuse of the process of the Court.

The opening words of section 18/19/15 of the 1993 White Book are as follows:-

> *""Frivolous or vexatious" - By these words are meant cases which are obviously frivolous or vexatious, or obviously unsustainable."*

Under the heading of "Abuse of the Process of the Court" in section 18/19/17 I found the following helpful paragraph:-

> *"Where proceedings which were viable when instituted have by reason of subsequent events become inescapably doomed to failure, they may be dismissed as being an abuse of the process of the Court (Domer v. Gulf Oil (Great Britain)(1975) 119 S.J. 392)."*

It seems to me that if there were such an enforceable agreement then it would fall within the terms of that paragraph.

However, the general test in relation to striking out is set out at paragraph 18/19/3 of the 1993 White Book and, omitting case references the start of this section reads as follows:-

> *"Exercise of powers under this rule - It is only in plain and obvious cases that recourse should be had to the summary process under this rule. The summary procedure under this rule can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable". It cannot be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. If there is a point of law which requires serious discussion, an objection should be taken on the pleadings, and the point set down for argument under O.33, r3. The powers conferred by this rule will only be exercised where the case is clear beyond doubt. The Court must be satisfied that there is no reasonable cause of action or that the proceedings are frivolous or vexatious or that the defences raised are not arguable. "*

It appears to me that there is considerable doubt as to whether the parties reached an agreement in this case to the effect that the action was settled upon the basis that no further action would be brought on the same facts. The offer contained in Advocate Boxall's letter of 7th April, 1994, has four ingredients to it including that the action be withdrawn in full and final settlement of all matters raised therein. Advocate Costa's letter of 11th April, 1994, only deals with three of these elements and

makes no mention of full and final settlement. There is, in my view, considerable doubt therefore, as to whether the Plaintiff would be prevented from bringing a further action. Indeed, there is, in my view, a serious possibility that the exchange of correspondence may fall within the category of no *consensus ad idem*, in which case no agreement at all would have been reached.

Advocate O'Connell indicated that if I were merely to find that there had been an agreement to withdraw the action upon the basis that it could be brought again then he would not wish to strike out upon that basis as Advocate Costa's client could simply bring another action. As I have already indicated above, I would have had sufficient doubt in relation to that issue not to have struck out the action upon the basis that another action could be brought.

I therefore dismissed the application to strike out without going on to consider Advocate Costa's other lines of defence on this point.

In my view, the particular issue of settlement ought to be dealt with as a preliminary issue prior to the trial.

Having dismissed the application I decided that the costs of and incidental thereto should follow the event but I stayed the enforcement of the order for costs pending trial. I also extended the time period for appealing against my decision until ten days from the date upon which the First Defendant's lawyer would have sight of these written reasons.

Authorities

Tomlin -v- Standard Telephones and Cables Limited [1969] 3 All ER 201.

David Foskett: "The Law and Practice of Compromise" (3rd Ed'n. 1991): Chapter 3: The essential requirements of a valid compromise: p.p.12-39; Chapter 4: The impeachment of a compromise: p.p.40-49.

Royal Court Rules 1982 (as amended): Rules 6/24(2); 6/13.

R.S.C. (1993 Ed'n): O.18, r.19: p.p.343-8.