

ROYAL COURT
(Samedi Division)

164A

21st August, 1997

Before: Advocate B. I. Le Marquand, Greffier Substitute.

Between:	Roger De Vos	Plaintiff
And:	Link Engineering Limited	Defendant

Application by the Plaintiff for leave to discontinue the action upon terms. Application by the Defendant to strike out the action for failure to file a Statement of Claim. Applications by the Defendant for a related action to be stayed pending the discontinuance of this action and/or alternatively for the related action to be stayed pending payment in full of any Order for costs made in favour of the Defendant upon the discontinuance of this action.

Advocate M.J. Thompson for the Plaintiff.
Advocate N.M. Santos-Costa for the Defendant.

JUDGMENT

5 THE GREFFIER SUBSTITUTE: Two actions have been commenced in relation to the same matters. The first action was commenced by a simple Summons dated 17th June, 1997, and came before the Royal Court on 27th June, 1997, upon which date it was placed on the pending list with file reference number 97/148. That action was in respect of various fees and expenses.

10 The second action was commenced by an Order of Justice dated 28th July, 1997 and on 15th August, 1997, this was placed on the pending list with file reference number 97/178. In this second action the same fees and expenses are claimed but the Plaintiff also claims damages.

15 On 11th July, 1997, a representative of Ogier & Le Masurier indicated to a representative of Crill Canavan that the Plaintiff intended to widen their claim. Ogier & Le Masurier at first suggested that the action by simple Summons simply be stayed with the action by Order of Justice proceeding to trial or alternatively that the two actions be consolidated. The Defendant
20 objected to these courses of action and his lawyers indicated instead that the first action should be withdrawn upon terms.

5 There was then lengthy correspondence between the parties' respective lawyers in relation to the terms upon which the withdrawal of the first Action should occur. The position of the Plaintiff was that the situation should be treated as being analogous to the amendment of a pleading and that, therefore, the Plaintiff should be ordered to pay the costs which were wasted by reason of the procedural changes. Although in correspondence the Defendant's lawyers sometimes referred to wasted costs, it is clear that what they really intended was that all the costs in relation to the first action be paid by the Plaintiff.

10 On 28th July, 1997, the Defendant's lawyers wrote to the Plaintiff's lawyers indicating that they were issuing a Summons seeking to strike out the original simple Summons upon the basis that no statement of claim had been filed, in accordance with the Royal Court Rules, within twenty-one days from the date upon which that action had been placed on the pending list. On 4th August, 1997, the Order of Justice was served upon the Defendant. Also on 4th August, 1997, a date was fixed for the hearing of the Plaintiff's Summons seeking to withdraw the first action upon terms.

15 On 7th August, 1997, the Defendant issued a second Summons seeking a stay of the Order of Justice pending the withdrawal of the first action with various alternative or additional applications including an application for an Order under Rule 6/24 (3) of the Royal Court Rules, 1992, as amended, that the claim contained in the Order of Justice be stayed pending the payment in full of any of the Defendant's costs incurred in relation to the first action in relation to which an Order might be made upon discontinuance.

20 All these Summonses came before me on 21st August, 1997.

25 The first and main decision which I had to make was as to which of the parties were correct in their approach to the Order for costs which ought to be made upon discontinuance of the first action. It was clear to me that all the claims made in action 97/148 were also made in action 97/178. If it were not for the difference in the forms of action, 97/148 being commenced by simple Summons seeking a liquidated sum and 97/178 being commenced by Order of Justice, this would have been a situation in which the Plaintiff would simply have sought leave to amend their original pleading and this would have normally been granted upon the usual terms as to costs, which in a case such as this would have meant the costs thrown away by reason of the amendment as the Defendant had never filed any answer.

30 In a case such as this where no part of the original claim is being abandoned but a new action is merely being launched because the new action must be in the form of an Order of Justice as there was a claim for general damages, it seems to me to be

wholly inappropriate that the Plaintiff be ordered to pay all the costs in relation to the first action and wholly appropriate that the Court proceed upon the basis of costs thrown away.

5 Accordingly, the approach taken to this matter by the Plaintiff from the start of negotiations between the Parties has been correct and the approach taken by the Defendant incorrect. However, I am bound to take into account the fact that the
10 issuing of the Summons by the Plaintiff is a procedural step which was required. Accordingly, as the Defendant has lost on this point and as the Defendant ought to have consented to discontinuance of the first action upon the basis of costs thrown away, I ordered that the Defendant be condemned to pay the costs of and incidental to the hearing of the Plaintiff's Summons on
15 this day but made no Order in relation to the remaining costs of and incidental to that Summons.

 I turn now to the Defendant's Summons dated 4th August, 1997, seeking to strike out the Plaintiff's claim as being an abuse of
20 process by reason of the failure of the Plaintiff to file a statement of claim within the twenty-one day period. At the time when the Defendant issued this Summons it was well aware of the fact that the Plaintiff did not intend to proceed with the first action but intended to issue an Order of Justice. Accordingly,
25 the issue of this Summons was both an aggressive and an unnecessary step. At the most I would have ordered that the Plaintiff comply with the Rules but, in the light of the Plaintiff's clear intention to withdraw this first action, and to proceed with an Order of Justice, I would never have made such an
30 order. Accordingly, the applications contained in this Summons are dismissed and the Defendant condemned to pay the costs of and incidental thereto.

 I turn now to the Defendant's Summons dated 8th August, 1997. By the time this Summons was issued the Defendant already knew
35 that the Plaintiff was applying by Summons for leave to discontinue the first action. The first paragraph of the Summons seeking a stay of the Order of Justice pending withdrawal of the first action was, therefore, completely unnecessary. The second
40 paragraph related to the terms upon which withdrawal of the first action should be allowed and this was a matter which would already have been before me under the terms of the Plaintiff's summons. The third paragraph sought under Rule 6/24 (3) of the
45 Royal Court Rules a stay of the Order of Justice pending the payment in full of any costs ordered in favour of the Defendant upon the withdrawal of the first action.

 Rule 6/24 (3) reads as follows:-

50 "**(3) Where a party is liable to pay any costs under provisions of paragraph (1) of this Rule, then if, before payment of such costs, he subsequently**

brings an action for the same, or substantially the same, cause of action, the Court may order the proceedings in that action to be stayed until those costs are paid."

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Clearly, it would often be appropriate where a party has discontinued one set of proceedings upon terms and then commenced a second similar set of proceedings, for the Plaintiff not to be allowed to continue with those proceedings until the costs of the first set of proceedings were paid. However, I have already found that the present situation should be treated, as far as possible, in an analogous manner to the amendment of a pleading. In the case of the amendment of a pleading where the usual terms as to costs are imposed upon the amending party, that party is free to proceed with the action. It would only be in the eventuality of that party refusing to satisfy an Order for costs, after the taxation thereof, that the other party could consider applying to the Court for a stay of those proceedings pending payment of those costs. That situation has not arisen in this case because I only made an Order for costs in favour of the Defendant on the day of the hearing and that Order has certainly not yet been taxed nor the Plaintiff given an opportunity to satisfy it.

It is, therefore, inappropriate for me to grant such a stay at this point in time and the application contained in paragraph 3 of the Summons dated 8th August, 1997, is also dismissed.

It follows that the said applications contained in the said Summons dated 8th August, 1997, were either unnecessary or have been dismissed and accordingly I ordered that the Defendant be condemned to pay the costs of and incidental to that Summons.

Finally, I had to determine what costs the Plaintiff should be ordered to pay in favour of the Defendant upon discontinuance of the first action. I decided that this should be all the costs of an incidental to the first action with the exception of the following:-

- (1) the costs in relation to which I had made specific Orders against the Defendant;
- (2) the remaining costs in relation to the Plaintiff's Summons dated 4th August, 1997;
- (3) the costs relating to the withdrawal of the action and the terms in relation thereto; and
- (4) the costs incurred by the Defendant in relation to the first action which if not so incurred would have been incurred in relation to the second action.

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Finally, I have already indicated my disagreement with the aggressive and unnecessary steps taken by the Defendant. In my view, once it became clear that there was not agreement between the parties as to the terms upon which discontinuance of the first action should occur, that issue ought to have been brought before me as soon as possible without the lengthy correspondence entered into between the parties. My view on this has influenced the Orders for costs which I have made because I have effectively left both parties to bear their own costs in relation to the unsuccessful negotiations.

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Authorities

Royal Court Rules 1992, as amended: Rule 6/7, 6/24.

R.S.C. (1995 Ed'n): O.18, r.r. 1, 19.
O.21.
O.62, r.r. 5, 10.

Everlo (Baron) -v- Fitel Ltd & Ors. (1987-88) JLR 687.

Bene Ltd -v- Hanson & Partners (13th June, 1997) Jersey
Unreported.