

2. There was and continues to be a dispute as to whether there was a legally binding contract to that affect. It seems that some funds, maybe considerable funds, have already been advanced and that the dispute also involves trust issues, with the same object of determining whether there was any obligation to provide funds or further funds.
3. That being the nature of the underlying dispute, on the 28th April 2011 the "Swiss Parties" brought proceedings in Switzerland asserting that there was a contract or legal obligation binding on the Butterfield Trust. On the 11th July 2011, the latter brought proceedings in Bermuda claiming a declaration that there was no contract or binding legal obligation. On the 22nd September the Swiss parties withdrew the Swiss proceedings on the basis, which was announced on their web site, that they were prepared to have the matter litigated in Bermuda. After some correspondence between the respective lawyers, the Butterfield Trust decided to withdraw their proceedings in Bermuda, and on the 19th October 2011 they sought leave to discontinue them. That application came before the Chief Justice on the 20th March 2012.
4. We have been referred to the exchanges that took place between the lawyers at that time. They include an email dated the 3rd October 2011 in which the Butterfield Trust representatives sensibly proposed that the Swiss parties should respond to the originating summons by filing affidavit evidence "and any counterclaim" forthwith. The response from the lawyers representing the Swiss parties was that the issue was such as to require a full scale trial and an action commenced by writ, because factual issues were involved and witnesses would be required. The matter could not proceed on documents alone. The lawyers representing Butterfield Trust replied "We respectfully reject the assertion made in your letter that the procedure we have adopted is inappropriate."
5. The issue therefore at that stage might have been thought to be one which would interest only lawyers of a somewhat academic bent, namely, whether the proceedings should continue by way of originating summons or by way of writ. The letter from the Butterfield Trust representatives continued - "the

originating summons procedure is therefore the appropriate means for the Bermuda court to determine the questions of Bermuda law raised by the Swiss claim.” That issue as to the form of the proceedings could have been resolved quickly and speedily. But surprisingly, the letter continued “However it appears that those questions are now moot in the light of the public statement made by the Swiss parties that it has abandoned the Swiss claim.” The letter went on “In the circumstances the appropriate procedural course appears to us to be for the Butterfield Trust to seek leave to discontinue its claim for declaratory relief and attain an order for costs against the Swiss parties”. It seems that that view was advanced on the basis that the sole object of the Bermuda proceedings which had been instituted by the Butterfield Trust was to deal with the situation created by the Swiss proceedings. But on their face the Bermuda proceedings were designed to raise the substantive issues which had arisen between the parties, and the Swiss parties’ lawyers had indicated quite clearly that they were now content for those issues to be decided by the Bermuda court in the Bermuda proceedings.

6. When the application was made it was initially resisted by the Swiss parties on the basis that it made more sense for the Butterfield Trust proceedings to continue, nevertheless, the application was pursued, it came before the Chief Justice and having given leave to discontinue he considered the question of costs, which was the only matter in dispute before him. He ordered that each party should bear their own costs of the proceedings except that Butterfield Trust should pay the Defendants, that is the Swiss parties’ costs, of the application made to him. The Butterfield Trust now appeals against the Costs Order.
7. Meanwhile, the Swiss parties have brought fresh proceedings in Bermuda which the Butterfield Trust is defending. This raises or will raise substantially the same issues as the originating summons. And I would interpose that the reason why the Butterfield Trust sought to discontinue the proceedings in which they were Plaintiffs in order that the Swiss parties could become the Plaintiffs in fresh proceedings against them is a total mystery, to me at least, on the information available to the Court.

8. The Butterfield Trust as Appellant submits that the judge was in a situation where costs should follow the event. The reason for the discontinuance was that the Swiss parties had withdrawn their proceedings in Switzerland and “therefore”, they say, the Bermuda proceedings became unnecessary. As already indicated, I find it difficult to follow why their response to the other parties’ willingness to have the issue heard in Bermuda was to discontinue the proceedings they had already started with that object in mind.
9. The appeal raises the question for this Court as to what was the correct approach for the Learned Judge to adopt. Broadly, the Learned Judge had a discretion as to what costs order to make in a situation such as this. There is some support for the view that in a case of discontinuance, with or without leave to do so, the normal order would be to require the Plaintiff, who is discontinuing, to pay the Defendants’ costs of the proceedings unless there is some good reason why they should not do so. I would prefer to put it more broadly and ask, what is the appropriate order to make in all circumstances of the case, bearing in mind that the Plaintiff started the proceedings and caused the Defendant to incur the costs of defending them? Here the Plaintiffs, as already stated, say that they discontinued the proceedings because the Swiss parties had withdrawn the proceedings in Switzerland. As I have already observed, that is illogical at best.
10. There has been some discussion as to what was the relevant event for the purposes of the usual approach which is that the costs order depends upon the event. Normally that means the outcome of the proceedings in which the costs order has to be made. Was the event, as the Appellant submits, the withdrawal of the Swiss proceedings, or was it perhaps as the Learned Judge may have indicated some view as to the ultimate outcome of this apparently illogical and certainly rather confused dispute? So far as the underlying contractual dispute was concerned, there was no outcome. The Learned Judge stressed, using my own words, not his, that the parties, both parties, lived to fight another day. The Swiss parties gave an undertaking that they would bring fresh proceedings in Bermuda.

11. In an illogical situation, maybe the Learned Judge thought that was the best practical result. He said that there should be no order as to the costs of the Originating Summons but that the Plaintiffs should pay the costs of their application to discontinue.
12. A question has been raised as to whether the Learned Judge might have deferred the order as to costs, until such time as the main proceedings, as I will call them, are resolved. But if that were done, it would still be necessary for the judge in the main proceedings, at some future date, to make an order as to the costs for the originating summons proceedings as distinct from the main proceedings themselves.
13. We have been reminded that the Learned Judge's exercise of his discretion should not be disturbed by this court except in limited circumstances. In my view, I cannot say that the Learned Judge was wrong to decide as he did. He probably did so on the basis that as things stood with reference to the substantive dispute both parties appeared to have withdrawn their claims, and future proceedings could take care of themselves. I would hold that he was entitled to take that view and I would dismiss this appeal.

Signed

Evans, JA

Signed

Zacca, P

Signed

Auld, JA