[2012] SC (Bda) 16 Civ (13 March 2012)

In The Supreme Court of Bermuda

CIVIL JURISDICTION
2011 No. 225

BETWEEN:

BUTTERFIELD TRUST (BERMUDA) LIMITED

Plaintiff

- and -

(1) RÜTLI STIFTUNG
(2) STIFTUNG SALLE MODULABLE

Defendants

Dates of Hearing: 10 February 2012
Date of Judgment: 13 March 2012

Victor Lyon QC and Nathaniel Turner for the Plaintiff;
David Kessaram and Sarah-Jane Hurrion for the Defendants.

RULING

1. This is a ruling on the plaintiff's application for leave to discontinue the greater part of this action. In the nature of things it is essentially a ruling on the incidence of the costs incurred to date. The plaintiffs are a Bermudian trust company, which is the trustee of a substantial family settlement known as the Art I Trust ('the Trust'). The defendants are Swiss charitable foundations ('the Swiss foundations'). The underlying dispute concerns an alleged commitment by the plaintiff as trustee of the Trust to fund a modern opera-house in Lucerne, Switzerland. The merits of that dispute are not really in issue on this application, and I express no view on them. In very brief summary the Swiss foundations allege that the trust irrevocably committed itself to donate CHF 120M for the construction of the opera house, of which some CHF 5.75M has already been advanced. It is said that the commitment is binding both as a contract and as a declaration of trust, and the thrust of the Swiss foundations' evidence is that this was a pet project of the settlor,

and that when he died the plaintiffs reneged. The trustees contend that the commitment was never perfected and so is unenforceable, and that in any event it was conditional upon various matters, not least a commitment by the local government in Lucerne to fund the recurrent operating costs of the theatre when built, and that this was not forthcoming.

2. On 28th April 2011 the Swiss foundations commenced proceedings in Lucerne before a justice of the peace to enforce the alleged commitment ('the Swiss proceedings'). As a response the trustees commenced proceedings in Bermuda for declarations on non-liability in the following terms:

> (a) A declaration that the Plaintiff is not subject to any contract with the Second Defendant under Bermuda law relating to the funding of the completion of a concert hall in Lucerne as alleged in the Claim referred to below [*i.e. the Swiss proceedings*] or at all;
>
> (b) A declaration that the Plaintiff did not create a Bermuda law trust of CHF 120 million of which the Second Defendant was a beneficiary as alleged in the said Claim or at all;
>
> (c) A declaration that the Plaintiff is not estopped from denying the existence of any such contract or completed gift as alleged in the Claim or at all.
>
> (d) A declaration that there is no bona fide claim, arguable case or dispute under Bermuda law that could properly be the subject matter of the said Claim.

3. On the face of it those declarations were plainly aimed at the Swiss proceedings, although by the introduction of the words "or at all" they also contemplate a free-standing and all-encompassing declaration of non-liability.

4. Once the Bermuda proceedings had been commenced the Swiss foundations entered unconditional appearances in Bermuda. They then abandoned the Swiss proceedings. Their professed reason for doing so was that they wanted a resolution of the matter and accepted that Bermuda was the best place to achieve that. They therefore say that they determined to

participate in the Bermuda proceedings, and this was set out in a press release of 22 September 2011 –

> "In order to avert the lawsuit in Switzerland, the Butterfield Trust took its own measures and initiated legal proceedings against SMF in Bermuda. During these proceedings, it is intended that the courts will establish that SMF has no rightful claims against the Trust. The SMF Foundation Board decided to participate in these proceedings. The Board is confident to be able to substantiate before the competent court in Bermuda SMF's claims against the Trust and to enforce them. Under these circumstances it does not make sense legally or financially to pursue a parallel process in Switzerland. Thus SMF decided not to file the complaint already prepared. However this complaint will serve as fundamental point for proceedings in Bermuda."

5. At first the trustees seemed willing to accept this challenge, and in an email of 3 October between counsel, Mr. Woloniecki for the plaintiff said –

> "I further note from the press release on the SMF website . . . that SMF have elected not to pursue any claim against Butterfield Trust in the Swiss Courts and are content to have the issue of the alleged contractual liability of Butterfield Trust determined by the Bermuda Courts in accordance with Bermuda Law.
>
> Mindful of counsel's obligations under the Overriding Objective I invite you to agree directions for trial. I suggest you file any affidavit evidence, and any counterclaim, within 21 days and my clients have 21 days to reply. I further suggest we agree to a trial on affidavit evidence alone (the documents speak for themselves) and fix this with an estimated length of 2 days."

6. This was followed up on 5 October with draft directions, but counsel for the Swiss foundations demurred on the grounds that the matter required a proper trial with pleadings, discovery and witnesses. The defendants followed that up with an application by summons of 31 October 2011 for a direction that the proceedings, which had been begun by Originating Summons, continue as if commenced by writ action, because they said there were real disputes as to fact which were unsuitable for resolution in Originating Summons proceedings. However, they did not file a formal Counterclaim.

7. In the meantime, just prior to the issues of that summons, the plaintiff itself had changed tack, and rather than continuing to press for an early trial it applied for leave to discontinue (or

withdraw) so much of the Bermuda proceedings as related to the declarations of non-liability. That would leave a small rump action for an accounting by the First defendant, Rütli Stiftung, of how the monies already advanced had been spent. The condition on which the plaintiff sought leave was that the second defendant, Stiftung Salle Modulable, pay the plaintiff's costs 'arising out of and incurred in connection with the Swiss Claim on an indemnity basis to be taxed and paid forthwith if not agreed'. On the face of it, that is a rather unusual request from a discontinuing plaintiff.

8. The basis on which the discontinuing plaintiff asks for its costs is that it says one has to look to see what the real outcome of the proceedings has been, and they rely upon the following statement of principle by Evans JA in First Atlantic Commerce Ltd. v Bank of Bermuda Limited (Civ. App. No. 22 of 2007) at [44]:

> "(3) We do not find it helpful to assume that there is a "normal" or "usual" rule in cases where a claim or counterclaim is discontinued or withdrawn. As the present case amply demonstrates, it remains necessary for the Court to exercise its discretion in accordance with Order 62 Rule 3 and to have regard, first, to the relevant "event", and secondly to "the circumstances of the case" in order to decide whether some other order should be made. Of course, if there are no relevant circumstances, in a straightforward discontinuance case, the nature of the event will be clear. Here the parties are in dispute as to what the "event" was."

9. Here, the plaintiff says that the event was the abandonment of the Swiss proceedings, which had been the professed and only objective of the Bermuda proceedings, and that therefore they have won and should get their costs. They also say that any further proceedings in Bermuda by the Swiss foundations should be stayed until those costs have been taxed and paid. The defendants counter that their withdrawal in Switzerland was solely to enable them to contest the matter in Bermuda, and they point to the public statements to that effect made at the time, and to the fact that they have unconditionally committed themselves to the Bermuda proceedings and participated in them. They say that the plaintiff is abandoning the Bermuda proceedings because of the application that it continue as a writ action, in which discovery could be obtained, something which they say the trustees want to avoid. The plaintiff professes that that is nonsense, and the defendants could commence their own writ action and obtain such discovery – though the

plaintiff also says that if the defendants do start new proceedings they will seek security for costs, and (as noted above) a stay until the costs of these proceedings have been paid.

10. I think that the argument about discovery is unsustainable. The Court can order discovery in proceedings begun by Originating Summons. The distinction between that procedure and a writ action being not that there is no discovery but only that discovery is not automatic and requires an order of the Court. Thus RSC Ord. 24, r. 3 provides –

> “**24/3 Order for discovery**
> 3 (1) Subject to the provisions of this rule and of rules 4 and 8, the Court may order any party to a cause or matter (**whether begun by writ, originating summons or otherwise**) to make and serve on any other party a list of the documents which are or have been in his possession, custody or power relating to any matter in question in the cause or matter, and may at the same time or subsequently also order him to make and file an affidavit verifying such a list and to serve a copy thereof on the other party.” [My emphasis]

11. The foundations have also been slow in formalizing any Counterclaim. Had they done so by now, I would have had little hesitation in saying that the plaintiff’s costs to date should be in the cause, because the substantive issue of liability would still be live. This would be the same whether they discontinued (or withdrew) the claims for declarations or not, because once the defendants mounted an actual cross-claim in the Bermuda proceedings the declarations as to non-liability would become wholly otiose in any event. There is no bar to a counterclaim in an Originating Summons proceedings, and indeed the Rules require that if it is to be done it be done as early as possible:

> “**28/7 Counterclaim by defendant**
> 7 (1) A defendant to an action begun by originating summons who has entered an appearance to the summons and who alleges that he has any claim or is entitled to any relief or remedy against the plaintiff in respect of any matter (whenever and however arising) may make a counterclaim in the action in respect of that matter instead of bringing a separate action.
>
> (2) A defendant who wishes to make a counterclaim under this rule must at the first or any resumed hearing of the originating summons by the Court but, in any case, at as early a stage in the proceedings as is practicable, inform the Court of the nature of his

claim and, without prejudice to the powers of the Court under paragraph (3), the claim shall be made in such manner as the Court may direct under rule 4 or rule 8.

(3) If it appears on the application of a plaintiff against whom a counterclaim is made under this rule that the subject-matter of the counterclaim ought for any reason to be disposed of by a separate action, the Court may order the counterclaim to be struck out or may order it to be tried separately or make such other order as may be expedient."

12. Nor is the Originating Summons procedure necessarily a strait-jacket, as the Court has wide powers to give "such directions as to the further conduct of the proceedings as it thinks best adapted to secure the just, expeditious and economical disposal thereof". This includes directions as to oral evidence and cross-examination, and extends to giving "any directions which it could give under Order 25 if the cause or matter had been begun by writ": see RSC Ord. 28, r. 4.

CONCLUSIONS

13. It seems to me that there is no 'event' or real outcome at this point. The discontinuance of the Swiss proceedings has not resolved the dispute, and I think it clear from the stance of the foundations that they continue to seek a resolution of the matter in the Bermuda proceedings. It may be that they have not done that as effectively as they might. They have not yet counterclaimed for judgment for the sums said to be due, nor have they commenced their own separate writ proceedings for such a judgment, although Mr. Kessaram offers an undertaking that they will do so within three months.

14. Any costs of the Swiss proceedings occasioned in Switzerland are, of course, a matter for the local courts and the local rules. As far as Bermuda is concerned, the plaintiff may have won a tactical victory, but no more than that. The underlying dispute remains unresolved. Moreover, Bermuda exercised extra-territorial jurisdiction over the Swiss foundations for the purposes of resolving the underlying dispute, not simply to subject them to a costs order for proceedings here which the plaintiff will render barren if it withdraws.

15. In those circumstances I do not think it appropriate for the plaintiff to get its costs of the proceedings. Indeed, as far as the plaintiff's own costs are concerned I think that if they wish to

withdraw they should bear them themselves. The only thing that precludes my making them pay the defendants' costs as well is the latter's failure to date to mount an effective Counterclaim.

16. I therefore give leave to discontinue on those terms as to costs. As to the costs of the application to discontinue itself, I should have thought that in view of the outcome they should be the defendants' in any event, to be taxed if not agreed, and that, given the circumstances, they may be taxed forthwith, but I will hear the parties on that if they wish.

Dated this 13th day of March 2012

Richard Ground
Chief Justice