IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2012-485-1504
[2013] NZHC 622

IN THE MATTER OF	Claims in contract and tort
BETWEEN	FLEXI SOLUTIONS LIMITED Plaintiff
AND	THE ATTORNEY-GENERAL Defendant

Hearing: 25 March 2013

Counsel: W Sharplin in Person for Plaintiff
H L Dempster with A Jacobs for Defendant

Judgment: 27 March 2013

JUDGMENT OF THE HON JUSTICE KÓS

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[1] The plaintiff Flexi Solutions Limited applies for an order granting it "the right to bring this claim to trial at a later date when it has funding to do so". Its application is opposed by the Crown.

[2] What happened hitherto in these proceedings is set out clearly in a minute by Mallon J dated 4 December 2012.

[3] The plaintiff is an ammunition manufacturer. It filed its statement of claim on 25 July 2012. The claim arose from an agreement made in 1988 under which the plaintiff provided the Army with "PG40" 40 millimetre practice grenade rounds. In 2006 the Army advised the plaintiff that there were failures with some rounds. An internal investigation occurred. The Army refused the plaintiff's request to agree to an independent investigation. The Army cancelled the agreement. Flexi Solutions then issued these proceedings. Although it filed the proceedings itself, the statement

of claim appears to have been drafted by a solicitor. Four causes of action were pleaded. They were defamation, injurious falsehood, breach of the Fair Trading Act and breach of implied duty of co-operation. Damages were estimated at $12 million, and $162,158 special damages were claimed for what was said to be the unnecessary recasing of the original consignment of ammunition.

[4] On 29 August 2012 the Crown filed a counterclaim. It sought damages of $124,560 and further as yet unspecified damages for the repair of allegedly damaged weapons and the cost of obtaining substitute ammunition.

[5] On 4 October 2012 the plaintiff filed an amended memorandum stating:

> If it pleases the Court FSL wishes to withdraw this action.

The stated reasons for doing so were that its legal advisors, who had been acting on a contingency basis, had withdrawn and the plaintiff did not have the funding necessary to take the case on at the High Court.

[6] On 24 October 2012 the Crown advised that it interpreted the plaintiff's memorandum as a notice of discontinuance. On that basis it too was filing a notice of discontinuance of its counterclaim. It was however seeking costs against the plaintiff under Rule 15.23.

[7] The issue with which Mallon J was concerned on 4 December 2012 was whether the plaintiff's memorandum of 4 October 2012 was in fact discontinuance. As to that, Mallon J said:

> In these circumstances I consider that the appropriate course is for the plaintiff's memorandum to be treated as an offer to discontinue on the basis that costs are to lie where they fall. The defendant should consider whether it wishes to accept that offer (bearing in mind the points the plaintiff has made in its memoranda on costs) so as to bring this matter to an end. Failing that, there may need to be submissions on whether the plaintiff is able to continue with the existing claim as filed, or will need to file a fresh claim (which will in turn depend on whether the plaintiff has discontinued its claim in accordance with the Rules).

[8] The matter was then resolved in a further minute issued by Mallon J on 30 January 2013.

> The position is that [the plaintiff] wishes to discontinue its claim providing costs lie where they fall. The defendant has advised that it accepts that offer. Accordingly, the proceeding is at an end ...

[9] However, on 4 February 2013 the plaintiff filed the present application, described in [1] above. It said in support that in withdrawing, it pleaded with the Court "in the interests of fairness and justice, to be awarded the right to refile and bring this claim to the Court for hearing."

[10] Mr Sharplin who appeared in person today for the plaintiff (the Crown not objecting) said he was hopeful that at some point his company would have the money with which to seal its claim against the Crown. Plainly he feels very aggrieved at the way in which he has been treated by the Army. One cannot but have sympathy for the predicament Mr Sharplin finds himself in certainly as to the effects of his efforts to represent his company in the unfamiliar firing range of litigation.

Issue

[11] The question before me is whether the Court has jurisdiction, where a proceeding has been discontinued, to allow that proceeding to be revived.

Discussion

[12] It is clear that Mallon J received the plaintiff's original memorandum on the basis that it was a conditional notice of discontinuance. The condition (as to costs lying where they fall) then being met, it was treated as a discontinuance. I do not think that analysis can be faulted.

[13] It is also clear that the memorandum's status as a discontinuance was raised with the plaintiff within three weeks of its filing its memorandum. And the effect of a discontinuance – "[bringing] this matter to an end" – was made clear by Mallon J on 4 December 2012.

[14] Rule 15.21 provides that the effect of a discontinuance is that the proceeding then "ends". That is to say, that the proceeding is terminated. The only remaining

matter, which no longer arose, was whether costs lay to be determined.[1] But a discontinuance takes effect under the Rules regardless of that consideration.

[15] The provisions of Rule 15.21 are consistent with common law and Equity before the institution of the High Court Rules. The effect of discontinuance is to terminate the proceeding, but without prejudice to a new proceeding based on the same cause of action being commenced. At common law, the plaintiff could seek non-suit. At Equity, the plaintiff could seek a dismissal of its own bill.[2] The extant proceeding comes to an end.[3]

[16] A new proceeding may then be instituted. It may however be stayed if the plaintiff has failed to pay costs in the earlier proceeding. It may also be stayed if it amounts to an abuse of process. Explicit provision for that is made in our Rule 15.22, but it does not apply here. An example is the decision of the House of Lords in *Castanho v Brown & Root UK Ltd*.[4] There proceedings were discontinued, after some interim payments had been made by the defendants (who admitted) liability, in order to reissue the proceedings in a more lucrative jurisdiction. Discontinuance was set aside. Another example is *Packer v Meagher,*[5] in which discontinuance was seen as depriving the defendant of the opportunity to answer serious allegations made publicly.[6]

[17] In my view the position under High Court Rule 15.21(1), is clear. Just as it was at law and in Equity. Discontinuance terminates a proceeding. The Court does not have jurisdiction to grant the plaintiff the right to revive his claim and bring it to trial at a later stage. To permit such an indulgence would be unjust to other litigants, who are entitled to act in reliance upon the plaintiff's unequivocal election.

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1 High Court Rules, r 15.21(2).
2 Cairns *Australian Civil Procedure* (8th ed, Thompson Reuters, NSW, 2009) at 508.
3 *Cooper v Williams* [1963] 2 QB 567 at 584 per Lord Denning MR.
4 *Castanho v Brown & Root UK Ltd* [1981] AC 557.
5 *Packer v Meagher* [1984] 3 NSWLR 486 (NSWSC).
6 Faced with a similar situation, Harrison J in *Bradbury v Westpac Banking Corporation* HC Auckland CIV 2006-404-1328, 13 February 2008 issued a judgment setting out his view on the want of merit of the plaintiff's now discontinued action.

Result

[18] Application dismissed.

[19] If costs are in issue, brief memoranda not exceeding three pages may be filed within 10 and 20 working days respectively.

Stephen Kós J

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And to:
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