

**COMMONWEALTH OF THE BAHAMAS**

IN THE SUPREME COURT  
COMMON LAW AND EQUITY DIVISION  
2009/CLE/gen/FP00144/

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**THE GRAND BAHAMA DEVELOPMENT LIMITED**

*Plaintiff*

AND

**CHARLES BASSETT**

AND

**PAMELA BASSETT**

*1<sup>st</sup> Defendants*

AND

**BRUCE PURDY**

*2<sup>nd</sup> Defendant*

**BEFORE** The Honourable Mrs Justice Estelle Gray-Evans

**APPEARANCES:** Ms Karen Brown for the plaintiffs  
Mr Frederick Smith QC along with Ms Jacqueline Banona  
Ms Lisa Fox and Mr Dawson Malone for the defendants

2012: 15 March

**RULING**

Gray Evans, J

1. The plaintiff by three summonses filed respectively on 2 September 2011, 17 October 2011 and 7 November 2011 seek the following relief:
  - a. An order pursuant to Order 59 rule 2(2) of the rules of the Supreme Court (RSC) that there be no order as to costs or, alternatively, for an order that each party bears its own costs.
  - b. That the defendant's application for taxation of costs be stayed pending the court's ruling on the relief sought at a. above in the 2 September 2011 summons.
  - c. That leave be granted to the plaintiff to withdraw the Notice of Discontinuance filed herein on 18 March 2011 and that the plaintiff's application proceed as an application pursuant to order 21 rule 3 of the Rules of the Supreme Court.
  - d. That the defendants be ordered to pay the plaintiff's costs of each of the applications, to be taxed if not agreed.
2. In addition to the aforesaid Rules of the Supreme Court, the plaintiff also applies under the inherent jurisdiction of the court.
3. The plaintiff commenced this action by a specially indorsed writ of summons on 3 July 2009 and obtained leave to serve notice of the writ on the defendants out of the jurisdiction.
4. Appearance was entered by Gouthro & Co on behalf of the first defendants, Charles and Pamela Bassett, on 3 September 2009 and by Callenders & Co., on behalf of the second defendant, Bruce Purdy, on 18 September 2009. On that date, Callenders & Co also filed a Notice of Charge of attorney on behalf of the first defendants.
5. In the said writ, the plaintiff alleges that the first defendants, in breach of the restrictions of the Bell Channel Bay Subdivision, Freeport, Grand Bahama had, in or about June 2006, allowed the second defendant to commence to carry on or allow to be carried on and was at the date of the writ still carrying on or allowing to be carried on the property the trade or business of a cruise and water sports operator known as Blackbeard's Cruises Bahamas.
6. The plaintiff claimed an injunction to restrain the defendants their servants or agents or otherwise howsoever from carrying on or authorizing or permitting to be carried on in or upon any part of the property the trade or business of cruise and or water sports operator or any other trade or business and from using the property otherwise than as a private dwelling house.
7. On 18 March 2011, the plaintiff filed, without leave a notice of discontinuance of the action.
8. RSC order 59 rule 10(1) provides that:

Where a plaintiff by notice in writing and without leave either wholly discontinues his action against any defendant or withdraws any particular claim made by him therein against any defendant, the defendant may tax his costs of the action or his costs occasioned by the matter withdrawn, as the case may be, and, if the taxed costs are not paid within 4 days after taxation, may sign judgment for them.

9. On 27 July 2011 the defendants filed a notice of taxation along with its draft bill of costs totaling some \$77,662.50 and disbursements of \$549.00. The taxation was set for hearing on 19 October 2011. The Notice of Hearing therefor with a return date of 19 October 2011 was filed on 1 September 2011.
10. On 2 September 2011, the plaintiff's first summons was filed and was supported by the affidavit of Charisse Brown filed 20 September 2011 in which she deposes, inter alia, as follows:
  - a. Despite numerous letters to the defendants between 29<sup>th</sup> June 2006 and 28 November 2008, the defendants failed and/or refused to discontinue the breach aforesaid.
  - b. ~~On or about 17 January 2011, the defendant, Charles Bassett telephoned the plaintiff to advise that the second defendant had ceased operation of the aforementioned business at the property; and a visual inspection of the property by employees of the plaintiff confirmed that the breach had in fact been discontinued.~~
  - c. The aforesaid breach of restrictions having been discontinued, this action effectively became academic and the plaintiff had no further interests in prosecuting the same; that the defendants having failed to file and serve a defence, the plaintiff filed the aforesaid Notice of discontinuation on 18 March 2011.
11. Counsel for the plaintiff concedes that pursuant to RSC Order 59 rule 10(1) the defendants are entitled to costs against the plaintiff but submits that this court nevertheless has an inherent jurisdiction to permit the withdrawal of a Notice of Discontinuance of Action where it is fair, just and reasonable to do so. For that submission counsel relies on the case of Arawak Homes Limited v Ferguson and others [2004] BHSJ No. 224 in which Longley Sr J set aside the Notice of Discontinuance on the basis that it would be wrong to permit the defendant in that case to take advantage of a misstep by the plaintiff in filing the Notice of Withdrawal.
12. Counsel for the defendants say that the Arawak Homes case is distinguishable from this case on its facts in that in the Arawak Homes case, the Notice of Discontinuance was filed without leave as a result of a direction by Osadebay, Sr J. (as he then was) that in light of another action, the plaintiff ought to elect which action to proceed with. As a result of certain events that subsequently transpired/occurred, the plaintiff in that case contending that the Notice of Withdrawal had been filed without his instructions or knowledge applied to the Registrar to set aside the proceedings consequent upon the Notice of Withdrawal on the ground that the Notice having been filed without leave was a nullity. The Registrar treated the application as an application to set aside the Notice and gave the plaintiff leave to withdraw the same. On appeal to Longley, J. (as he then was) Longley J found that the plaintiff's filing was a "misstep" as it had been filed as a result of Osadebay J's direction which would not have been given had certain disclosures been made to Osadebay J by the second defendant in that case. At paragraph 15 to 17 of his judgment, Longley J said:

**15** It means therefore that if the second defendant succeeds on this appeal the title to this property will remain unresolved, and the plaintiff will lose the opportunity to effectively challenge his acquisition. Both parties would have an interest in resisting this, if justice is to prevail. Apart from that, if left unresolved, the second defendant may be the recipient or beneficiary of a fraudulent acquisition.

**16** Should he be permitted to take advantage of the plaintiff's misstep in this action? I think not, particularly since the misstep may have been precipitated by counsel for the second defendant in this action, who ought to have known better than to allow the judge to give a direction requiring the plaintiff to elect because while the first defendant could probably seek to question the propriety of a second claim against him for the same subject matter, the same could not possibly be said for the second defendant and so by joining in may have misled the court as to the exact nature of 510/1985.

**17** In these circumstances, it seems to me that it would be wrong to permit the second defendant to take advantage of a situation, which is palpably wrong and which he helped to shape if only by refusing or failing to fully disclose to the court that there was no action against him.

13. As indicated, Mrs Brown, at paragraphs 10 and 11 of her affidavit gives the reasons for the discontinuance of the action, namely that the plaintiff decided that to continue the action would have been a purely academic exercise.
14. In those circumstances, I must agree with counsel for the defendants that the filing of the Notice of Discontinuance in this case without leave does not appear to be a "misstep" but rather, was deliberate and premeditated.
15. Further, I note from the correspondence passing between the parties exhibited to the affidavit of Jacqueline Banona filed herein on 12 March 2012 in opposition to the plaintiff's applications, that since 2010 there were negotiations to settle the matter. It appears that those negotiations progressed to a point where the plaintiff was prepared to settle the action on the following terms:
  - (1) Bruce Purdy would cease operating from the premises;
  - (2) Charles Bassett would not proceed with the defence and counterclaim as pertains to him.
  - (3) The plaintiff would settle the defendants' costs in the sum of \$20,000.00.
16. The plaintiff's counsel did not agree to item 3 of the defendants' proposal and proposed instead that the issue of costs be determined by the Court.
17. On 24 November 2010, counsel for the defendants wrote to counsel for the plaintiff accepting the plaintiff's counter proposal and indicated he was looking forward "to receiving *"your 'Notice of Withdrawal of Action by Consent' stating inter alia that your client will pay our client's costs to be taxed if not agreed."*
18. Thereafter correspondence continued between counsel but it appears that the issue of costs could not be agreed. However, notwithstanding the failure to agree on the liability or quantum of costs, counsel for the plaintiff proceeded to file a Notice of Withdrawal without leave.

19. The notes to the English Rules Order 21 rule 2 is clear – where a plaintiff withdraws an action without leave the defendant is entitled under RSC Order 29 rule 10 without order to tax his costs.

At note 21/5/9 the learned authors state:

"It is open to a plaintiff to apply for and obtain leave to discontinue, even when he could do so without leave, in order to avoid the necessity of paying costs which discontinuance without leave involves, and in a proper case leave may be given to discontinue without paying costs."

20. It seems to me, that in light of the defendant's unmistakable intention to seek costs in this matter, the plaintiff ought not to have proceeded to file the Notice without leave, as it certainly was at liberty to apply for leave to withdraw at which time it could be heard on the issue of costs. However, having filed the Notice without leave, as Mr. Smith opines, by premeditation and deliberation, the plaintiff cannot now, in my view, when faced with the costs implications of its action cry "misstep."

21. In the circumstances and for all the reasons submitted by the defendants, I refuse to grant the order sought by the plaintiff, that is, to set aside, or grant leave to withdraw, the Notice of Discontinuance of Action filed herein without leave on 18 March 2011.

22. The plaintiff will have to take its chances with the Taxing Master.

23. The costs of this application are to be paid by the plaintiff to the defendants, to be taxed if not agreed.

DATED this 15<sup>th</sup> day of March, A.D. 2012

**Estelle G. Gray-Evans**

**Justice**

