Appeal pending. Fixture 25/8/82 753 X

Deposits

IN THE HIGH COURT OF NEW ZEALAND
IN ADMIRALTY
AUCKLAND REGISTRY

A.D.26

Appeal reported [1982]

Special Consideration

BETWEEN: STARKIST OVERSEAS INC.

First Plaintiff

A N D STARKIST FOODS INC.

Second Plaintiff

A N D: THE SHIP "M.V. FIJIAN SWIFT" AND REEF SHIPPING COMPANY LTD

First Defendant

A N D REEF SHIPPING AGENCIES LIMITED

Second Defendant

AND

BETWEEN: NELSON FISHERIES LIMITED

Plaintiff

A N D: THE SHIP "M.V. FIJIAN SWIFT" and REEF SHIPPING COMPANY LTD

First Defendant

A N D: REEF SHIPPING AGENCIES LIMITED

Second Defendant

Hearing: 12 October 1981

Counsel: D.S. Firth and R.B. Stewart for first defendant.
Miss M.S. Davis and B.G. Impey for second defendant.
N.C. Anderson for first and second plaintiffs.

Judgment: 12 October 1981

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ORAL JUDGMENT OF VAUTIER, J.

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In these proceedings in the Admiralty jurisdiction of this Court the plaintiffs by a motion dated 20 August 1981 seek an order for the striking out of a counterclaim filed by the first defendant on 13 February 1981. The grounds advanced in the motion are that this counterclaim is identical in all material respects with a counterclaim filed by the first defendant on 18 February 1977 which counterclaim was the subject of a notice of

discontinuance filed on 31 January 1978 and, further, that the filing of an essentially identical counterclaim or of any counterclaim in these circumstances is unauthorized and/or vexatious and/or an abuse of the procedures of this Court. Reference is also made to an affidavit filed in support, in which the facts as abovementioned are confirmed, and there is exhibited a letter from the first defendant's solicitors to the plaintiffs' solicitor in which they mention, with reference to the notice of discontinuance, that the counterclaim will become the subject of separate proceedings either in the United States or in New Zealand once a determination of the action brought by the plaintiff is known. This course has obviously been since re-considered.

Mr Anderson in his submissions in support of the motion refers to the fact that by virtue of Rule 4 of the Admiralty Rules 1975 (Serial no. 1975/85) the rules and practice of this Court apply in the absence of specific provision in the Admiralty Act 1973 or those rules except where there is inconsistency with these. That is not suggested here. His primary submission is that the Court has an inherent jurisdiction to strike proceedings out as unauthorized, vexatious or abusive proceedings and that the filing of a further counterclaim when a previous counterclaim has been discontinued is not authorized by Rule 241 of the Code of Civil Procedure. A proceeding or a step in proceedings unwarranted by any enactment or rule of Court, he submitted, is much more than a mere irregularity. As to this he relied upon the dictum of Lord Herschell to that effect in Smurthwiate and Others v. Hannay and Others [1894] AC 494 at p.501. As to the jurisdiction to strike out in such circumstances as these,

he relied upon the dictum of McGregor J. in Hart v. Grace [1968] NZLR 53, where proceedings had been issued which did not comply with a number of the Rules of the Code and where at p.56, line 25, it is said :

> "The plaintiff has a full right to move the Court to strike out the proceedings as vexatious, oppressive or as an abuse of procedure, or on the ground of failure to comply with the rules of Court."

Rules 129A to 135 of the Code make provision with regard to counterclaims in an action. The case of Birmingham Estates Company v. Smith [1880] 13 Ch.D. 506 shows that a defendant has a right to plead by way of a counterclaim any right or claim for which he could maintain an action. The first defendant here did not file its original counterclaim within the time limited by R.130, but that clearly was a mere irregularity which was waived by the plaintiffs filing a statement of defence to the counterclaim. The important rule for present purposes is R.132 whereunder it is provided :

> "A copy of such statement of counterclaim shall be filed in Court and served on the plaintiff, and all further proceedings thereon shall be taken in the same manner as if the defendant had commenced an independent action against the plaintiff, except that the plaintiff shall file his statement of defence in the same office, and said counterclaim shall be tried at the same place as the statement of claim in the original action, and such trial shall take place immediately after the trial of the original action."

There is no specific provision in our Code regarding discontinuance of counterclaims but R.241 provides that

the discontinuance of an action shall not be a defence to any subsequent action on the cause of action discontinued provided the costs of the previous action have been paid.

It is to be noted that in the present case there is no reliance placed by the plaintiff upon the proviso with regard to the payment of costs. The submission is that the use of the words "any subsequent action" in R.241 have the effect of confining the defendant who has discontinued a counterclaim to bringing a separate action if he wishes to proceed again on the cause of action pleaded in the counterclaim discontinued. Reference is made to the contrasting provisions of R.272 whereunder a plaintiff who has been non-suited may on payment of costs proceed again on the same statement of claim. The fact that there is no similar provision under R.241 shows, it is said, the intention that the words "subsequent action" in R.241 are intended to convey the ordinary meaning as regards the word "action" and the word does not in the context of the Rule, it is said, include a counterclaim.

Mr Firth submitted that the word "action" in both places where it appears in R.241 must be read by virtue of R.132 as including a counterclaim. He suggested that there was support for this view in the fact that the corresponding English Rule Ord.21 R.5 expressly refers to "an action or counterclaim". This specific reference, he suggested, was necessary in England because of a decision which is referred to in Vol.2 of the 1979 Annual Practice at p.1006, Lord Kinnaird v. Field [1905] 2 Ch. 306 to the effect that a counterclaim is not an action within the former Ord.26 R.32. The rule in our Code was intended, however, he suggested, to achieve the same result as the English rule.

Mr Anderson, on the other hand, submits that there is support for his argument in the English rule in that that rule goes on to refer only to subsequent actions and not subsequent actions and counter-claims. The differences in the English rules (including the fact that there is now under those rules no provision for non-suits in common law actions) are such that no real help, I think, is gained by considering these rules. I do comment, however, that from my reading of those rules and various authorities referred to in the Annual Practice, the position in England on this particular point appears to me to be the same as I conclude it to be in New Zealand.

The cases to which Mr Anderson referred, namely Nireaha Tamaki v Baker [1903] 22 NZLR 97, Graves v Graves [1893] 69 LT 420, Perkins v Deckson [1938] NZLR 128, which he conceded deal with different procedural questions, do not in my view really assist in any way in arriving at a conclusion in the present case. Tamaki v Baker (supra), for example, was concerned with the question of the right of a plaintiff to discontinue when that plaintiff is suing in a representative capacity, as was there contended to be the position.

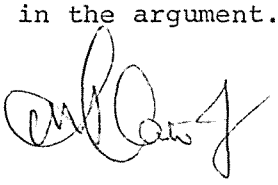
Counsel having been unable to find in their researches any decision in point, the matter must be determined simply, I think, on a reading of our rules and an interpretation of the intention shown by these rules. My conclusion is that Mr Firth is right, and that R.241 gives the defendant a right to file a fresh counterclaim after discontinuing an earlier one providing costs are paid. He can do this, in my view, at any time while the plaintiff's action remains undisposed of, but not

of course afterwards. I refer to The Salybia [1910] P. 25.

Rule 132, in my view, gives definite rights to a defendant to advance his counterclaim in all respects as though it were an ordinary action but with the added right to have it tried at the same place and immediately after the trial of the original action. These two rights can only, I think, be effectively secured to the defendant if he is permitted to proceed again after discontinuing his counterclaim by filing a fresh counterclaim in the action instead of commencing a separate action. The combined effect of the two rules, in my view, shows that R.241 requires "action" to be read in each place as including where necessary "counterclaim". I do not think that any assistance can be gained by contrasting R.272 which is a rule relating to a situation where quite different considerations arise. The way in which that rule is framed, of course, enables the plaintiff, if he can secure a hearing, to proceed to trial again immediately without the delay which would be occasioned by his having to file a new statement of claim.

This conclusion renders it unnecessary for me to consider the matters of fact and further submissions advanced by Mr Anderson as supporting the exercise of any discretion that the Court has in the matter in a way favourable to the plaintiff's contentions. He agreed that these matters would only be of relevance if I concluded that the application was one in respect of which the Court has discretion to deal with it either way. I do not think that the rules confer any such discretion.

The plaintiff's motion is accordingly dismissed, with costs of $125.00 to the first defendant and $25.00 to the other defendants who were represented but whose counsel took no part in the argument.



Solicitors:

John Collinge, Esq., Auckland, for plaintiffs

Russell McVeagh & Co., Auckland, for defendants