1985 November 21

[A. LOIZOU, MALACHTOS, PIKIS, JJ.]

SPYROS ELEFTHERIADES,

Appellant-Plaintiff,

v.

CYPRUS HOTELS LTD.,

Respondents-Defendants.

(Civil Appeal No. 6780).

Civil Procedure—Civil Procedure Rules, Order 15 rules 1 and 2—Discontinuance or withdrawal of actions—Trial Judge refusing leave to withdraw the proceedings, notwithstanding that both parties agreed as they reached an out of Court settlement of the action—Discretion exercised in a manner unwarranted by law—Said refusal constitutes a serious departure from our adversary system of trial.

Civil jurisdiction—Nature of—The role of the Judge in Civil litigation is that of an impartial arbiter.

On the 10.1.1982 the appellant-plaintiff found near the entrance of the Ledra Hotel, which he entered lawfully for the purpose of congratulating a newly wed couple, a brooch, which he handed over to one of the officers of the Hotel on condition that if the true owner was not found the brooch would be returned to him.

Eventually and after the respondents-defendants, i.e. the owners of the Hotel, refused to hand the brooch over to him, the appellant sued the Hotel. At some stage during the hearing the parties reached a settlement and brought its terms to the knowledge of the trial Judge.

The trial Judge gave judgment whereby he refused to give leave to the parties for the withdrawal of the action on the ground that the behaviour of the plaintiff was not the behaviour of an honest finder of goods but the calculated behaviour of a finder who simply wanted to keep

the object found for himself. The trial Judge characterised the plaintiff as "dishonest" and directed that copy of the minutes of the proceedings and a copy of the judgment he gave in refusing leave be sent to the Attorney-General of the Republic for any action she might deem necessary.

This is an appeal from the said judgment. It should be noted that the Attorney-General intimated that she found nothing to justify any action on her part in the circumstances.

Held, allowing the Appeal, (A) Per Loizou J., Malachtos J., concurring: (1) Leave to discontinue or withdraw the action was sought on the basis of Ord. 15, r. 1* of the Civil Procedure Rules. Settlement of actions before, at the commencement or during a hearing is a frequent occurrence in our Courts. If the aid of the Court is not taken to enforce the terms of the settlement, the Court order should include the clause "Judge's Order if necessary" and in all cases of doubt or difficulty it is well to reserve "Liberty to apply". It is the settlement of any action in which an infant, a lunatic or a Poor Person is concerned that must be sanctioned by the Court.

(2) The conduct of counsel was not in any way unbecoming. On the contrary he acted on good authority. Nor does this Court share the view that the plaintiff was in any sense dishonest. *(Parker* v. *British Airways Board* [1982] 1 All E.R. 834 cited with approval).

(3) The intimation by the Attorney-General that she found nothing to justify any action on her part adds to the reasons why this appeal should be allowed.

(4) The exercise of the trial Judge's discretion in refusing leave was not warranted in law as his fear that a criminal offence has been committed could adequately be dispelled by the proper course he took of referring the record to the Attorney-General.

(B) Per Pikis J. The case is unusual in that while both parties wanted to bring litigation to an end, the trial Judge refused to allow them to do so. If the parties had

* This rule is quoted at pp. 683-684.

adhered to the formalities prescribed by Order 15, r. 2 of the Civil Procedure Rules and submitted to the Registrar "a consent in writing signed by the parties" for the discontinuance of the action, that would have put an end to the case. In principle, it should make no difference to the outcome of the case where a similar statement is made before the trial Judge for leave to discontinue the proceedings under Order 15 r. 1.

(2) The role of the Judge in civil litigation is arbitral. The Judge has no responsibility for the prosecution or presentation of the case of the parties. Where the parties are agreed that litigation should come to an end because of an out of Court settlement, any attempt on the part of the Court to keep the proceeding in being and, further, initiate inquiries about the fate of the proceedings is a serious diversion from our adversary system of trial and as such cannot be countenanced.

(3) In this case the trial Judge misconceived the application for discontinuance. He was not asked to approve the settlement and far less to incorporate any part of it in an Order of the Court. He was simply asked to dismiss the action. In such circumstances the position could not be any different from that contemplated by Order 15, r. 2.

(4) There are other aspects of the case that cannot be left unnoticed. Upon refusal of the application for withdrawal the duty of the Judge was to require the parties to complete their case. Instead he issued a judgment which though inconclusive in the result, in as much as the case was left in abeyance pending the reaction of the Attorney-General, it contained findings of fact that made continuation of the case before him impossible. The Judge had no such right.

(5) The most unsatisfactory aspect of the case are the wholly unjustified criticisms made of counsel and the unmerited characterisation of the plaintiff as "dishonest".

Appeal allowed.

Cases referred to:

Fox v. *Star Newspaper Ltd.* [1898] 1 Q.B. 636;

Mundy v. *The Butterley Co.* [1932] 2 Ch. 227;

Green v. *Rozen* [1955] 2 All E.R. 797;

Parker v. *British Airways Board* [1982] 1 All E.R. 834;

Kypreos v. *Kypreos* (1984) 1 C.L.R. 565;

Covell Matthews & Partners v. French Wools Limited [1977] 2 All E.R. 591;

Hytrac Conveyors v. *Conveyors International* [1982] 3 All E.R. 415;

Eleftheriades and Another v. *Mavrellis and Another* (1985) 1 C.L.R. 436;

Evangelou and Another v. *Ambizas and Another* (1982) 1 C.L.R. 41;

Air Canada v. *Secretary of State* [1983] 1 All E.R. 910.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Nicosia (Michaelides, D. J.) dated the 22nd June, 1984 (Action No. 3510/83) whereby leave to the parties for the withdrawal of the action which had been settled between them out of Court was refused.

P. Lyssandrou, for the appellant.

G. Triantafyllides, for the respondents.

The following judgments were given.

A. Loizou J. This is an appeal from the judgment of a Judge of the District Court of Nicosia by which he refused to give leave to the parties for the withdrawal of the action which they had settled between them out of Court and brought the terms of the settlement to his knowledge. Instead, he directed that copy of the minutes of the proceedings and copy of the judgment he gave in refusing leave, be sent by the Registrar of the Court to the Honourable the Attorney-General of the Republic for any action that she might deem necessary.

The settlement reached was as follows:-

"I, the undersigned Spyros Eleftheriades hereby declare that I have taken delivery of, from the Cyprus Hotels Ltd., owners of the Ledra Hotel, a brooch, consisting of one gold sovereign bound with gold decorative base in a ray shape which I found in the Ledra Hotel on the 10th January, 1982. Moreover, by this present, I declare that in case the owner of the said brooch is found I undertake to deliver same to him reserving all my rights emanating from the law including my rights on the basis of Cap. 149 or of any other law."

This settlement reached, discloses most of the facts, but in order to complete the picture, it may be mentioned that the plaintiff who was in the said hotel on the 10th January, 1982, found near the main entrance, which he entered lawfully for the purpose of congratulating a newly wed couple holding their wedding reception there, this brooch which he handed over to one of the officers of the hotel on duty at the Reception on condition that if its true owner was not found same would be returned to him.

In his judgment the learned trial Judge made the following findings:

"It is clear from the evidence of the plaintiff that the brooch was found on 10.1.1982 on the premises of 'Ledra' hotel 2-3 meters from its main entrance, and so I find.

I am certain, however, that the plaintiff's clear intentions from the very beginning, were to keep the brooch, for the following reasons. He was standing within a crowd. The real owner, most probably, was standing next to him. He picked the brooch up and said nothing. He might have announced viva-voce the finding, without giving any particulars of the brooch and upon the claimant supplying them hand it over to him. He remained silent instead....

The first thing which occurred to his mind was not to find the owner but 'to make a rough valuation'. He then put the jewel in his pocket and remained

there in the queue. He failed to make an announcement over the hotel's loudspeakers or in any other way so as to inform the person who lost it if he or she was still on the premises. He simply handed it to the receptionist. Taking into consideration the lapse of time between the finding and the delivery to the receptionist, I cannot exclude the possibility that he did so out of fear that somebody might have seen him. Then he remained silent again. He does not report the matter to the police. He does not make a publication in the press. He makes no effort to find the owner, a duty indirectly cast on him by s. 126 of Cap. 149. He simply waited for a whole year. The passage of time which would, in his thinking, (or the hotel manager's thinking) create good title for him is his main concern. Then, 18 months later, he sues the hotel after their refusal to hand over the brooch to him. Then 26 months after the finding and after the filing of the action he published a notification in the press in the circumstances described above. Taking into account the demeanour of the plaintiff while giving evidence in Court and the facts of the case I have no doubt whatever in my mind that his behaviour from the very beginning was not that of an honest finder of goods. It was the calculated behaviour of a finder who simply wanted to keep the object found for himself. There are many cases where the law judges of a man's previous intentions by his subsequent acts. See *The Six Carpenters case 8 Rep. 146 Webster* v. *Watts*, 11 Q.B. 311. I have no hesitation at all in saying that he was dishonest and his dishonesty becomes more glaring by the very fact that he ardently desisted and refrained from reporting the finding to the police. He made a very bad impression to the Court."

He then proceeded to make an extensive analysis of the legal position regarding finders of chattels, by reference to sections 71, 126 and 127 of our Contract Law, Cap. 149. and the commentary based mainly on Judicial Interpretation to be found in *Pollock and Mulla's Indian Contract and Specific Relief Acts*, 9th edition p. 678. He also re-

ferred to the position at Common Law and to relevant English Case Law.

I do not, however, intend to deal at any length with this aspect of the case as in our view and as it will be seen shortly such analysis is not essential for the purposes of this judgment.

The action which was defended was, in the course of its hearing and after the evidence of the plaintiff, which was the only evidence adduced on his behalf, settled on the terms hereinabove referred to and in fact after a statement by counsel for the defendants that no evidence would be adduced on their behalf.

Leave to discontinue or withdraw the action was sought on the basis of Order 15, rule 1 of our Civil Procedure Rules, which reads as follows:-

"1. The plaintiff may, at any time before the receipt of the defendant's defence, or after the receipt of the defendant's pleaded defence before taking any other proceedings in the action (save any interlocutory application), by notice in writing, wholly discontinue his action against all or any of the defendants or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay such defendant's costs of the action, or if the action be not wholly discontinued, the costs occasioned by the matter so withdrawn. Such costs shall be taxed, and such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action. Save as in this rule otherwise provided, it shall not be competent for the plaintiff to withdraw the record or discontinue the action without leave of the Court or a Judge, but the Court or a Judge may before or at or after the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise as may be just, order the action to be discontinued, or any part of the alleged cause of complaint to be struck out. The Court or a Judge may, in like manner and with the like discretion as to terms upon the application of a defen-

dant, order the whole or any part of his alleged grounds of defence or counter-claim to be withdrawn or struck out, but it shall not be competent to a defendant to withdraw his defence or any part thereof, without such leave."

In the *Annual Practice for the year 1960,* p. 59 the following are mentioned about the above provision:-

"This order is a complete code on the subject of discontinuing an action or withdrawing defence. The former power of a plaintiff at common law to claim a non suit, or of a plaintiff in equity to dismiss his bill at his own option, at any time no longer exists. The term 'discontinuance' is used in a broad sense, and is intended to cover both forms of procedure *(Fox* v. *Star etc. Co.* [1898] 1 Q.B. 636, 639; [1900] A.C. 19)".

At Common Law and before the Judicature Act a plaintiff was allowed to discontinue his action at any time before judgment or to withdraw the proceedings before the Jury were sworn or to elect to be nonsuited and was yet at liberty to re-enter the cause or bring a second action. This, however, has been greatly curtailed. There is no longer such a thing as a non-suit in the High Court, (see *Fox* v. *The Star Newspaper Co. Ltd. (*supra). Now the plaintiff may discontinue his action or withdraw any part of it by giving notice in writing to the defendants. If he does so before the defence is delivered or even after its delivery, before taking any other proceeding in the action save any interlocutory application he may discontinue without leave and may yet bring a second action. He must, however, pay the costs of the first action or the second action will be stayed. *(Mundy* v. *The Butterley Co.,* [1932] 2 Ch. 227.) At any later stage of the action he can only discontinue by leave of the Court and it can be made a condition for giving such leave that no further proceeding shall be taken in the matter.

As stated in the Annual Practice 1960, p. 593, by reference to the corresponding English provision, leave may be refused to a plaintiff to discontinue the action before judgment if the plaintiff is not wholly dominus litis or if

the defendant has by the proceedings obtained an advantage of which it does not seem just to deprive him.

The learned trial Judge then posed the question as to what would be the effect of discontinuance of that action if leave was granted by him and he referred to the case of *Fox* v. *Star Newspaper Company* (supra) and quoted from the judgment of Chitty L.J. where he said:

> "The principle of the rule is that after the plaintiff had proceeded with his action to a certain point, and brought the defendant face to face with him *he is not then entitled to escape the determination of the issue between them by a side door.* He is no longer dominus litis. *The Judge has then the power of saying whether the action shall be discontinued or not.* It would be a great mistake in my judgment, in construing the rule to reply on any special meaning of the word 'discontinue.' The substance of it is clearly that when a plaintiff has gone to such a point, that he has brought his adversary face to face with him, it is only by leave of the Judge that he can withdraw so as to have the power of bringing a fresh action for the same cause."

He then dealt with the effect of the compromise reached by counsel and referred to the case of *Green* v. *Rozen* [1955] 2 All E.R. 797 in which Slade J., mentioned five ways in which a question can be disposed of when terms of settlement are arrived at when the action comes on for trial or in the course of the hearing. The learned trial Judge then concluded as follows:-

> "If I were to approve the combined application, that would mean that the dishonest plaintiff would obtain possession of the brooch for an indefinite period and thus benefit from his wrongful behaviour. The fact that so much time has elapsed since the 'finding', the non reporting to the police and the approval of the defendants, make it mathematically certain that the plaintiff will retain the brooch for ever, and the sanction of the Court, if given, will have the only effect of clothing the said possession with legality.
>
> In the light of the authorities cited and the facts of the case I am not prepared to approve the settlement

reached or grant permission for the discontinuance or withdrawal of the action."

Settlement of actions before, at the commencement or during a hearing is a frequent occurrence in our courts. In England in Jury cases a Juror is often withdrawn, some times at the suggestion of a Judge. In non-jury cases where for any reason one side or the other wishes to avoid having a judgment recorded against it a common form is to adjourn sine die by consent. If the aid of the Court is or may be desired in any case where judgment is not taken to enforce the terms, the Court order should include the clause, "Judge's order, if necessary" and in all cases of any doubt or difficulty it is well to reserve "Liberty to apply." It is the settlement of any action in which an infant, a lunatic or a Poor Person is concerned that must be sanctioned by the Court.

Apparently the learned trial Judge took the view that this settlement might amount to some kind of collusion of a criminal offence. I am unable to share the view of the learned trial Judge that the conduct of counsel was in any way unbecoming. On the contrary he acted on the basis of good authority. Nor do I share the view that the plaintiff was in any sense dishonest. With this observation made I do not intend to go into that aspect of the case any further, but I cannot help referring to the case of *Parker* v. *British Airways Board* [1982] 1 All E.R. 834, the circumstances of which are very similar to those of the present case. It was held:

"The finder of a chattel who was not a trespasser acquired a right to keep it against all but the true owner if the chattel had been abandoned or lost and if he took it into his care and control, but that right was subject to the superior right of an occupier of a building to retain chattels attached to that building, and also to retain chattels on or in it if he manifested an intention to exercise exclusive control over the building and the things which were on or in it. Since the airline, as occupiers of the premises, had shown neither an intention to exercise control over lost chattels in their lounge nor an intention that permission to enter granted to members of the travelling

public was on terms that the commonly understood maxim 'finders keepers' would not apply, the plaintiff's prima facie right as finder of the bracelet against all but the true owner prevailed over the airline's rights as occupiers of the premises where the bracelet was found. Accordingly the appeal would be dismissed (see p. 843 etc.)".

It should also be mentioned that complying with the direction of the Court, the matter was referred to the Hon. Attorney-General who, after examination of the whole case, intimated that she found nothing to justify any action on her part in the circumstances. This is a fact that adds to the reasons which lead me to the conclusion that the appeal should be allowed and that the parties should be allowed on the terms of the settlement to settle the action and bring an end to litigation.

I have gone through the authorities relevant to the Civil Procedure Rule in question and the facts and circumstances of this case and I have come to the conclusion that the exercise of the Judge's discretion in refusing leave was not warranted in law as his fear that a criminal offence has been committed could adequately be dispelled by the proper course he took of referring the record of the case to the Honourable Attorney-General for any action that she might deem necessary.

In the circumstances the appeal should be allowed but there should be no order as to costs either in this Court or in the Court below as none have been claimed.

MALACHTOS J.: I agree that the appeal should be allowed for the reasons given by my brother Judge Loizou, and I have nothing else to add.

PIKIS J.: I, too, join in the order allowing the appeal on the terms indicated in the judgment of Justice A. Loizou. Important questions must be addressed to, in the appeal, affecting the administration of justice, specifically the nature of civil jurisdiction with particular reference to the role of the Judge in civil litigation. The case is unusual in that while both parties wanted to bring litigation to an end, the trial Judge refused to allow them to do so, requiring them in effect to carry on with litigation they intended to

abandon after an out-of-court settlement. Pending the resumption of the hearing of the case, adjourned sine die, the Judge directed that the record of the proceedings, as well as his lengthy judgment, be transmitted to the Attorney-General for such action on her part as she might deem necessary. Had the parties adhered to the formalities prescribed by Ord. 15, r. 2, Civil Procedure Rules, and submitted to the Registrar "a consent in writing signed by the parties" for the discontinuance of the action, that would have put an end to the case. In principle, it should make no difference to the outcome of the case where a similar statement is made before the trial Judge by application for leave to discontinue the proceedings under Ord. 15, r. 1, Civil Procedure Rules.

Order 15 rule 1 is designed to confer discretion upon the Court to impose appropriate terms for the withdrawal of an action, mostly in the interest of other parties to the proceedings. As I had occasion to explain in *Kypreos* v. *Kypreos*[1], the rule embodied in Ord. 15 r. 1 replaced the common law rule that permitted the plaintiff to abandon his action at any stage by exercising the adjectival right of "non-suit", and the corresponding rule of equity, entitling the pursuer to dismiss his bill at his option. But as I stressed reviewing the nature of the discretion conferred by this rule, "a party will not ordinarily be compelled to litigate against his will". It was indicated that Graham, J., put the matter in perspective in *Covell Matthews & Partners* v. *French Wools Limited*[2], where he summed up the principles upon which the discretion of the Court is exercised on an application to discontinue:-

> "The principles to be culled from these cases are, in my judgment, that the Court will, normally at any rate, allow a plaintiff to discontinue if he wants to, provided no injustice will be caused to the defendant. It is not desirable that a plaintiff should be compelled to litigate against his will. The Court should therefore grant leave, if it can without injustice to the defendant, but in doing so should be careful to see that the defendant is not deprived of some advantage which he

[1] (1984) 1 C.L.R. 565.
[2] [1977] 2 All E.R. 591 at p. 594, Letters A-B.

has already gained in the litigation and should be ready to grant him adequate protection to ensure that any advantage he has gained is preserved."

Where the parties are agreed that litigation should come to an end because of an out-of court settlement, any attempt on the part of the Court to keep the proceedings in being and, further, initiate inquiries about the fate of the proceedings, is a serious diversion from our adversary system of trial and as such cannot be countenanced. It is worth reminding of the observations of Lawton, L.J., with which the other two members of the Court of Appeal concurred, in *Hytrac Conveyors* v. *Conveyors International*[1]: "It has to be remembered by all concerned that we do not have in this country an inquisitorial procedure for civil litigation". The parties to the proceedings, it must be emphasized, are responsible for the prosecution or defence of their case depending on their position in the proceedings. The role of the Judge is arbitral, having no responsibility for the prosecution or presentation of the case of either party.

In this case, the Judge wholly misconceived the application of the plaintiff, seconded as it was by defendants, for the unconditional discontinuance of the case upon an out-of-court settlement. The Court was not asked, as suggested in the judgment, to approve the settlement and far less to incorporate any part of it in an order of the Court. Simply, the Court was asked to dismiss the action in view of an out-of-court settlement having been reached between the parties. In such circumstances, the position could not be any different from that contemplated by Ord. 15 r. 2. Had the parties signed the statement envisaged in the latter rule and lodged it with the Registrar, the Judge would have had no say in the matter. The action would have been discontinued and stood dismissed.

There are other aspects of the case that cannot be left unnoticed. Upon refusal of the application for withdrawal the duty of the Judge was to require the parties to complete their case then at the advanced stage of addresses. Instead, he proceeded to issue a lengthy judgment which though inconclusive in the result, inasmuch as the case was left

[1] [1982] 3 All E.R. 415, 418, Letter D.

in abeyance pending the reaction of the Attorney-General, it contained findings of fact that made continuation of the case before him impossible. The Judge had no such right. It is impermissible to make findings of fact on the merits of the case, except in the context of a final judgment disposing of the action. Also, it is injudicial to declare the law applicable to the facts of the case, except at the end of the day and then in order to dispose the case according to law.

Perhaps the most unsatisfactory aspect of the case are the criticisms made of counsel, wholly unjustified. as A. Loizou, J. points out, and the unmerited characterisation of the plaintiff as "dishonest". The case requires us to remind of the position of the Judge under our adversarial system of administration of justice. For that. there is no lack of precedent. In *Eleftheriades and Another* v. *Mavrellis and Another* (1985) 1 C.L.R. 436, 444-445, we depicted the role of the Judge in the following terms: "The role of a Judge under our adversarial system of the common law, is that of an impartial arbiter; in the discharge of his adjudicative duties he must distance himself from the arena of litigation". And in the earlier case of *Evangelou and Another* v. *Ambizas and Another* (1982) 1 C.L.R. 41, we were more specific about the distance a Judge must observe from the conflict before him (see pp. 61, 62):

> "Although a Judge may intervene in order to ensure that the proceedings follow the course ordained by the rules of evidence and procedure, he must avoid interfering beyond the limits indicated above and especially refrain from passing unnecessary comments that may create the impression of his descending into the arena of trial. A Judge must invariably distance himself from the conflict that unfolds before him and maintain strictly his arbitral position throughout the proceedings".

Adherence to the above standards not only it upholds the stature of the judiciary but ultimately enhances its effectiveness as well.

Particularly instructive on the role of a Judge, under our judicial system are the observations made by Members of

the House of Lords[1] in *Air Canada* v. *Secretary of State (No 2)*[2] to the effect that the nature of the adversarial system is such as to confine the task of the Court to deciding a case fairly between the parties on the evidence available. It is not the function of the Court "to ascertain some independent truth by seeking out evidence on its own accord".

Nothing said in this judgment is meant to doubt either the integrity or devotion to duty of the trial Judge. On the contrary, it appears that it is his zeal in seeing that justice, as he perceived it, is done that led him go wrong.

A. Loizou J.: In the result the appeal is allowed and the order of the trial Court is varied accordingly by recording the dismissal of the action as settled. There will be no order as to costs here or in the Court below.

Appeal allowed with no order as to costs.

[1] Lord Fraser, Lord Wilberforce, Lord Edmund-Davies
[2] [1983] 1 All E.R. 910.