IN THE SUPREME COURT OF QUEENSLAND O.S. No. 593 of 1988

FULL COURT

BEFORE:

Mr. Justice Kneipp

Mr. Justice Thomas

Mr. Justice Derrington

BRISBANE, 24 OCTOBER 1988

BETWEEN:

DAIKYO AUSTRALIA PTY. LTD. (Plaintiff) Respondent

-and-

G. FILLIPOW (Defendant) Appellant

ORDER

MR. JUSTICE KNEIPP: In my opinion the appeal should be dismissed with costs. I agree with the reasons which have been prepared by my brother Derrington.

MR. JUSTICE THOMAS: I agree, and I agree in the reasons to be published by my brother Derrington.

MR. JUSTICE DERRINGTON: I agree with the order proposed and publish my reasons.

MR. JUSTICE KNEIPP: The order of the Court is that the appeal be dismissed with costs.

IN THE SUPREME COURT OF QUEENSLAND Writ No. 593 of 1988

FULL COURT

BETWEEN:

DAIKYO AUSTRALIA PTY. LTD. (Plaintiff) Respondent

AND:

G. FILLIPOW (Defendant) Appellant

KNEIPP J.

THOMAS J.

DERRINGTON J.

Reasons for Judgment delivered on the 24th October, 1988 by Derrington J.

Kneipp J. and Thomas J. both concurring with those reasons.

"APPEAL DISMISSED WITH COSTS."

IN THE SUPREME COURT OF QUEENSLAND No. 593 of 1988

FULL COURT

Before the Full Court

Mr. Justice Kneipp

Mr. Justice Thomas

Mr. Justice Derrington

BETWEEN:

DAIKYO AUSTRALIA PTY. LTD. (Plaintiff) Respondent

- and -

G. FILLIPOW (Defendant) Appellant

JUDGMENT: DERRINGTON J.

Delivered the 24th day of October 1988.

CATCHWORDS:

Stay or striking out action as abuse of process - Two identical actions for possession of premises in Magistrates Court and Supreme Court - Former adjourned pending determination of latter - No vexation to or oppression of defendant - No abuse of process - Magistrates Court proceedings pursuant to complaint sworn and summons - Not terminated by unilateral letter of discontinuance

Counsel: B.D. O'Donnell for Respondent
G.J. Robinson for Appellant
Solicitors: Hill & Taylor for Respondent
Andrew P. Abaza for Appellant
Hearing date: 13th October, 1988

IN THE SUPREME COURT OF QUEENSLAND No. 593 of 1988

FULL COURT

BETWEEN:

DAIKYO AUSTRALIA PTY. LTD. (Plaintiff) Respondent

- and -

G. FILLIPOW (Defendant) Appellant

JUDGMENT - DERRINGTON J.

Delivered the day of 1988.

The appellant who is the defendant in an action in this Court for possession of land and mesne profits, applied to have the action stayed or alternatively struck out as an abuse of process on the grounds of the co-existence of prior proceedings in the Magistrates Court under the Property Law Act for possession of the premises. Mesne profits, although available in that jurisdiction also, had not been claimed. Those proceedings were commenced by complaint sworn and summons of 22nd January, 1988. The proceedings in this Court were commenced by writ on 22nd February, 1988 and the summons that the action be stayed or struck out was issued on 10th March, 1988.

However, by a letter dated 22nd February, 1988 the solicitors for the complainant who, in the action in this Court, is the plaintiff and the respondent to this appeal, had written to the Clerk of the Magistrates Court referring to the next date set down for hearing of the proceedings in that Court, 18th March, 1988 and stating: "We advise that we do not intend to proceed to trial in the Magistrates Court on the date specified and request that the matters be discontinued".

On 14th March, 1988 at the hearing of the application to stay or strike this action out, the application was refused, and it is from this refusal that this appeal is brought. From counsel's notes of the reasons given for dismissing the application, the argument was confined to the question whether the proceedings in the Magistrates Court could be discontinued by such a letter. The learned Judge at first instance apparently decided that they could so be discontinued.

With respect, this is an error, and before us counsel for the respondent did not finally seek to sustain such a

proposition. This is fortified by the information supplied to us by agreement that on 18th March, 1988, the date upon which the Magistrates Court proceedings were set down to resume, the parties appeared and by consent those proceedings were adjourned pending the determination of this action in this Court; and the respondent here was ordered to pay the costs of the adjournment.

Because the foundation for the dismissal of the application was defective, the matter must be reconsidered de novo, and there is no inhibition on this Court which would otherwise flow from the classification of the original judgment as the exercise of a discretion (House v. The King (1936) 55 C.L.R. 499 at pp. 504-5) or of the proceedings before us as an appeal concerning a matter of practice and procedure (Adam P. Brown Male Fashions Pty. Ltd. v. Phillip Morris Inc. (1981) 148 C.L.R. 170 at pp. 176-6; Queensland Industrial Steel Pty. Ltd. v. Jensen (1987) 2 Qd. R. 572 at pp. 579, 582).

The first question is whether there was any abuse of process on the part of the respondent simply because there were two actions in existence at the same time in respect of the same subject matter and between the same parties. In McHenry v. Lewis 22 Ch. D. 397 at p. 400, Jessel M.R. said:—

> "... In this country, where the two actions are by the same man in courts governed by the same procedure, and where the judgments are followed by the same remedies, it is prima facie vexatious to bring two actions where one will do. And, indeed, this has been recognised, I believe, for ages by the practice of the old Court of Chancery, which always put a plaintiff to his election by an order of course if he was suing for the same cause of action both at Law and in Equity. The same principle applies, it appears to me, wherever the judgment can be enforced ..."

Bowen L.J. at p. 408 referred to "the general principle that the Court can and will interfere whenever there is vexation and oppression to prevent the

administration of justice being perverted for an unjust end".

In Logan v. Bank of Scotland (No. 2) (1906) 1 K.B. 141 at p. 150, Sir Gorell Barnes P. said:—

> "For instance, in this country, where two actions are brought by the same person against the same person in different courts governed by the same procedure, and where the judgments are followed by the same remedies, it is prima facie vexatious to bring two actions where one will lie ..."

The same view was expressed by Ungoed-Thomas J. in Slough Estates Ltd. v. Slough Borough Council (1968) Ch. 299 at pp. 314-315, and in The Christiansborg (1885) 10 P.D. 141 at p. 148, Lord Esher M.R. said:—

> "Where both actions are in England in the same tribunals - because if they are in tribunals where the proceedings are not identical or the remedies are not equally effective the law would apply which is applicable to foreign countries - prima facie it is vexatious, and therefore it would lie on the party who brings the second action to show that it was not so."

In Moore & Ors. v. Inglis (1976) 50 A.L.J.R. 589 after citing these authorities, Mason J. (as he then was) went on to consider whether there were differences in the two actions then under consideration which should lead to a conclusion different from the prima facie result. In the circumstances of that case there was no difference.

In Madden v. Kirkegard Ellwood & Partners (1983) 1 Qd. R. 649 at p. 652, Kelly J. (as he then was) observed that the Court has an inherent jurisdiction to stay or dismiss proceedings which are an abuse of process and that there is also provision under O. 60 r. 2 for a stay of proceedings on the ground that the proceeding is an abuse of process of the Court; but however that the jurisdiction is one which should be very sparingly exercised and in only very exceptional cases: Lawrence v. Norreys (1896) 15 App. Cas.

210 at p. 219; Dey v. Victorian Railway Commissioners (1948-49) 78 C.L.R. 62 at pp. 91-92.

At p. 653, he adverted to the dicta of Brett M.R. in Serrao v. Noel (1885) 15 Q.B.D. 549 at p. 588: "Even before the Supreme Court of Judicature Act 1873, 1875, and still more now, no more actions than one can be brought for the same cause of action"; and by Kay L.J. in Earl Poullett v. Viscount Hill (1893) 1 Ch. 277 at p. 282: "when an action has been brought by which the plaintiff can recover everything to which he is entitled, he ought not to bring another"; and the words of Ungoed-Thomas J. in Slough Estates Ltd. v. Slough Borough Council (supra). He observed, significantly, that in the last mentioned case it appeared to the learned Judge that the plaintiffs were running proceedings before two tribunals concurrently to increase their chances of getting the decision by the time they wanted it, and that he held that this duplication while it existed was in the circumstances vexatious, oppressive and an abuse of process of the Court.

He then turned to Birkett v. James (1978) A.C. 297 in which the issue of a second writ while the first action was still on foot met with the approval, explicit or implicit, of a number of the members of the House of Lords in circumstances where the original action was in danger of being struck out for want of prosecution and the second writ was issued because the period of limitation was running out. Kelly J. then observed:—

> "It would therefore appear that despite the view previously held on the commencing of a second action while the first was still on foot, whether in the same or a different Court, such a course, at all events in the situation where the limitation period is running out, is not now to be regarded as being in itself an abuse of process. The circumstances may, however, be such that the second action would be stayed or dismissed in the exercise of the Court's discretion."

Presumably the latter circumstances would be such where an abuse of process was found to exist, giving rise to the exercise of its discretion by the Court.

While the circumstances in that case were different from those in the present case, the principle is established that the mere co-existence of identical litigation does not lead to the necessary conclusion of abuse of process, although perhaps prima facie so, and that it is necessary to examine the merits in order to determine whether in all the circumstances it is an abuse of process.

It remains to apply these principles to the present case. The plaintiff claims justification for pursuing the second action in the Supreme Court because of the availability in that jurisdiction of the remedy of summary judgment, which is not available in the Magistrates Court. However, there is no evidence to suggest that it was an action in which summary judgment was a reasonable prospect, and indeed this view is fortified because evidence admitted at the hearing of this appeal indicates that there are many complex and serious triable issues raised in defence which would certainly preclude summary judgment. Accordingly, although no doubt the hope of recourse to summary judgment may have been the motivating factor in the commencement of the second action, it has not been established as a distinction in the remedies actually available to the plaintiff which should have moved the primary Judge or this Court. For the purpose of this discussion, the respective remedies available in the two actions are identical.

That is not an end to the matter. The reason supporting any finding of an abuse of process in these cases is not the mere technical existence of two identical actions but rather the vexation to and oppression of the defendant in his being required to run two defences to the same matter. If it is clear, as in Birkett v. James (supra), that the plaintiff intends to run only one action and further intends that the other remain dormant and not be run at the same time as the other, then there is no

vexation, oppression or misuse of the Court's process in fact, which is the substance of the issue.

That is the position in the present case. Although it may have been unsuccessful in discontinuing the Magistrates Court action, the respondent has by that and its later actions consistently manifested an intention that it should not be run while the present action in the Supreme Court is alive. Indeed, the adjournment of the Magistrates Court proceedings was specifically in those terms.

The only other area from which the appellant hopes to seek comfort in argument is by reliance upon the notorious difference between the costs of the Supreme Court action and those of summary proceedings in the Magistrates Court. However, while such a difference in expense may easily be accepted as a fact without proof, that is not the end of the issue, for it is also necessary to consider whether the Magistrates Court is a suitable venue for determination of the matter. The appellant bore the onus of showing that the matter might be conveniently determined in that jurisdiction and, while in a proper case this might have been discharged prima facie by a relatively simple expression of view to that effect so that the evidentiary onus would shift to the plaintiff, this has not been done in the present case.

Rather, this defect in the appellant's proof is shown to be more than a mere technicality in the circumstances of this case because the defence in the Supreme Court action which is now produced to this Court demonstrates that, apart from the very serious consequences of the result to the plaintiff, the issues are so complex and serious that it could not have been properly said by the appellant that the Magistrates Court was an equally suitable tribunal. That being so, there is no weight in the mere proposition that the Supreme Court is a more expensive jurisdiction, and the appellant's argument on this point must fail.

Because an abuse of process has not been demonstrated, there is no foundation giving rise to any discretion in

this Court to stay the action or strike it out, so that it is not necessary to advance to any consideration of discretion.

However, it might be added that on the new material presented on the hearing of this appeal showing that the action has reached an advanced stage and contained complex and serious issues, the discretion of the Court would have been exercised in favour of permitting the action to continue, and the only remaining issue then would have been one of costs. However even that does not now arise as an arguable point.

The appeal is dismissed with costs.