IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO: C.L. 2000/ A-129

BETWEEN	**JOHN AIRD**	**PLAINTIFF/ RESPONDENT**
AND	**ESSO STANDARD OIL S.A. LIMITED**	**DEFENDANT/ APPLICANT**

Alton E. Morgan Esq., instructed by Alton E Morgan & Co for the Plaintiff/Respondent;

Maurice Manning Esq., instructed by Nunes, Scholefield & Deleon for the Defendant/Applicant.

This is an application by way of a summons under section 243 of the Judicature (Civil Procedure Code) Law, filed on behalf of the Defendant in the instant suit, pursuant to which the Defendant seeks a stay of proceedings in the instant suit, unless and until the Plaintiff pays to the Defendant, the costs of another action between the same parties, to which costs, Defendant claims to be entitled. The defendant also seeks costs of this application, to be agreed or taxed. Section 243 of the Code is in the following terms:-

Staying Second Action till costs paid.

> 243. If any subsequent action shall be brought before payment of the costs of a discontinued action, for the same or substantially the same, cause of action, the court or Judge may, if they or he think fit, order a stay of such subsequent action until such costs have been paid.

There is an affidavit sworn by Donovan Jackson, a partner in the firm of the attorneys of record for the Defendant, in which he deposes to certain circumstances in relation to another lawsuit between the same parties, (Suit No. C.L. A 186 of 1996). Essentially, the affidavit sets out the basis for the proposition that the instant suit is the same as the prior suit, and that the defendant is entitled to certain costs from the plaintiff in respect thereof, which costs have not actually been quantified or determined. The affidavit in paragraph 5 thereof, acknowledges that the Plaintiff has not made any application to the court to

discontinue the previous suit, which on its argument is the same suit, but has now commenced a new suit, without satisfying its obligations to the Defendant as to costs. It is in the following terms:-

> "That the Plaintiff has not sought the leave of this Honourable Court to discontinue Suit No; C.L. A. 186 of 1996 before proceeding with the present Suit which is substantially the same cause(s) of action that the Plaintiff previously sought to prosecute. Had an application been made to discontinue, the Defendant would have written to the Plaintiff seeking its agreement to other costs of the proceedings which would not have formed a part of our letter of August 16, 2000".

It seems to me that the acknowledgement that the Plaintiff has not discontinued its action as seems required by section 243 of the Code, (or even sought to discontinue its previous suit) is fatal to this application given the unequivocal terms of the section quoted above, but in view of the interesting submissions made before me on both sides, I reserved judgment.

Paragraph 3 of Mr. Jackson's affidavit sets out the circumstances concerning the first suit in relation to which costs were incurred and/or were awarded to the Defendant against the Plaintiff. Mr. Manning for the Defendant submitted that all the factors which are the subject of the statement of claim in the earlier suit are repeated in the statement of claim for the second suit, and the only difference is that in the latter suit, there is an allegation of the Plaintiff being evicted. He submitted that "it would be unfair and an abuse of the process of the court", if the Plaintiff were allowed to proceed with both suits, at the same time that there were costs, albeit undetermined, outstanding from the Plaintiff to the defendant in relation to the first suit.

In support of his submission, Mr. Manning referred to two (2) cases, **Thames Investment and Securities plc v Benjamin and others, [1984] 3 AER 393** and **Martin**

v Earl Beauchamp, Law Reports Vol XXV, Chancery Division. The headnote of the Thames Investment case is as follows:

> "Where an application for particular relief is dismissed with costs and the applicant has failed to pay the costs the court should, as a general rule, exercise its discretion to refuse to allow the applicant to make a second application for the same or equivalent relief. Although the appellant cannot be said to have failed to pay the costs of the first application until they have been quantified, nevertheless where they have not been quantified by the time of the second application, then in fairness to the respondent the second application ought to be stayed until the applicant pays into court the court's estimate of the costs of the first application".

It seems that this case does not really help the Defendant applicant here, as the pre-requisite for its application would seem to be:-

(a) an application for particular relief;

(b) which has been dismissed with costs against the applicant;

(c) a subsequent application by the same applicant seeking the same relief.

This is not the case here.

The second case cited by Mr. Manning is, with respect, equally unhelpful. In that case, it was held that "although M formerly sued as personal representative of E.B., and now sued as personal representative of W.J., the action was in substance a second proceeding for the same matter under the same alleged title, and that proceedings must be stayed until the costs of the old suit had been paid". Here, again, the decision to stay the proceedings is premised upon the decision that the subsequent proceeding was "in substance a second proceeding for the same matter". Clearly, if the application is to succeed, the applicant must show that this is the same matter.

In response, Mr. Morgan for the Plaintiff/Respondent made two (2) submissions. He first submitted that in order to come within the purview of section 243 on which the applicant

was relying, it would have to be shown that there had been a discontinuance. Further that although costs may have been ordered against the Plaintiff, these were to be taxed or agreed, and there had been no attempt to tax the costs, nor had they been agreed. The reference to "such costs" in section 243, could only be understood in these presents to mean "such costs as had been determined by taxation or agreement". His second submission was that, in any event, the subsequent suit is based upon an entirely different cause of action. In this regard, he relied extensively upon the decision in the Court of Appeal in the prior suit, **Esso Standard Oil S.A. Ltd, (Defendant/Appellant) v John Aird, (Plaintiff/Respondent) SCCA No. 3/99.**

In Mr. Manning's earlier submission, he had had to concede that the difference between the first and the second actions was that the second action now was based upon the allegation of the eviction of the Plaintiff which took place on the 31st of January 1997. In looking at the judgment of Forte P., it is clear that the second suit is based upon a second cause of action. Indeed, in that appeal, learned counsel for the defendant/appellant, had argued that the decision in favour of the plaintiff by a judge on a Motion, was wrong in that it purported to give relief in relation to the said eviction, which had not occurred at the time of the filing of the writ. As was stated by Forte P., in the appeal:-

> "He (attorney for the defendant/appellant) maintained that no amendment of the writ or statement of claim could be granted in this case, as the events which would necessitate the amendment were events which created a new cause of action, and therefore could not become an issue for decision in the instant case. The respondent would have to bring a new action in respect of the alleged unlawful eviction by the appellant.........A perusal of the transcript before us, discloses the correctness of Mr. Robinson's submission that no pleaded facts appear in the Writ or Statement of Claim to ground the claim for damages arising out of the alleged eviction on the 31st January, 1997".

Indeed, in the Appeal, counsel for the plaintiff/respondent had argued that the claim for damages did not constitute a new cause of action but was only a "new ground of claim". This submission was rejected by the Court of Appeal. "The subsequent action of eviction allegedly done by the appellant is not another ground for claiming that the notice is unlawful, but another cause of action which is alleged to have arisen because the notice is unlawful. .... The incidents of 31st January, 1997 created a new cause of action, and could not form a claim in the present Writ of Summons". (Per Forte, P., at page 13-14, of SCCA No 3/99)

Finally, I wish to make a couple of observations on section 243 itself. It is clear that it gives the court or judge a discretion as to whether to stay the proceedings in the event that the requirements of the section are fulfilled. Thus, even where those requirements were clearly fulfilled, it would still be open to the court to exercise its discretion and deny the application. In light of my views above, it is not necessary to consider the necessity of exercising any discretion. However, if that were necessary, I would have to say that the defendant/applicant has sufficient other remedies as to make it unnecessary to pursue this application. It may apply to have the suits consolidated, and it is certainly open to it to pursue its costs in the prior action. It could also pursue a remedy to strike out the suit as being an abuse of the court's process, if it were able to show that the suits were actually the same, though that seems an impossible task in the circumstances.

In light of conclusions which I have reached as set out above, it is my decision that the application should be denied, with costs to the plaintiff/respondent to be agreed or taxed.

ROY K. ANDERSON, JUSTICE
April 16, 2001.