THE HIGH COURT

[2010 No. 7155 P.]

BETWEEN

JOINT STOCK COMPANY TOGLIATTIAZOT

PLAINTIFF

AND

EUROTOAZ LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Noonan delivered on the 3rd day of May, 2019

1. This application is brought by the plaintiff for leave to discontinue these proceedings pursuant to O. 26, r. 1 of the Rules of the Superior Courts. It provides as follows:

> "1. The plaintiff may, at any time before receipt of the defendant's defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing in the Form No. 20 in Appendix C, 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defendant's costs of the action, or, if the action be not wholly discontinued, the costs occasioned by the matter so withdrawn.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. The plaintiff may, however, at any time prior to the setting down of any cause for trial wholly discontinue his action, with or without costs to be paid by any party, upon producing to the proper officer a consent in writing signed by all parties or by their solicitors and such costs (if any) shall be taxed. 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 discontinue the action without leave of the Court, but the Court 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 may, in like manner, and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged grounds of defence or counterclaim to be withdrawn or struck out, but it shall not be competent to a defendant to withdraw his defence, or any part thereof, without such leave."

Factual and Procedural Background

2. The plaintiff is a very substantial undertaking carrying on business in the Russian Federation. It is said to be the world's largest producer of ammonia. The defendant is a limited liability company registered in Ireland. These proceedings concern allegations about the defendant's alleged entitlement to a shareholding in the plaintiff. The defendant does not carry on any business in this jurisdiction or elsewhere. It appears to have little or no assets beyond its claimed shares in the plaintiff.

3. By two letters dated respectively the 15th and 19th October, 2009, the defendant wrote to three administrative entities in the Russian Federation claiming to be entitled to shares in the plaintiff worth more than one billion roubles and further that the plaintiff fraudulently and unlawfully rejected the defendant's claim to the shares. The shares were alleged then to have amounted to 10% of the shareholding in the plaintiff but was subsequently diluted to 4.4%. No complaint is made by the defendant of the dilution.

4. The letters in question were written in the Russian language and were published only to the three parties in Russia. In May of 2010, the defendant issued proceedings against the plaintiff in the Russian Federation seeking to establish its right to the shares and claiming that its rights had been fraudulently denied by the plaintiff ("the Russian proceedings"). On 26th July, 2010, the plaintiff issued proceedings against the defendant in this jurisdiction ("the Irish proceedings") in which the plaintiff claims, *inter alia*, damages for defamation arising out of the publication of the letters in Russia.

5. The plaintiff also claims certain reliefs under Russian law and an injunction restraining the defendant from publishing like words defamatory of the plaintiff or denigrating its business reputation. In an affidavit sworn in opposition to this motion by a director of the defendant, Andrey Babichev, Mr. Babichev avers that he believes that the proceedings in Ireland were issued by the plaintiff in retaliation for the Russian proceedings brought by the defendant. In its defence, the defendant pleads that the Irish proceedings were brought by the plaintiff in essence for the purpose of stifling the Russian proceedings.

6. The proceedings in both jurisdictions followed a protracted course. By motion dated 12th May, 2011, the defendant sought to challenge the jurisdiction of the Irish Courts to hear the claim on the basis that Ireland was *forum non conveniens* for the resolution of the dispute. That motion was abandoned by the defendant and was struck out with costs to the plaintiff on the 19th December, 2011. The plaintiff set the matter down for trial in the non-jury list on 14th January, 2013 and the defendant took objection to this course indicating that it required trial by judge and jury. On 4th July, 2013 the plaintiff issued a motion seeking an order directing trial of the proceedings by Judge alone which was opposed by the defendant. On 31st July, 2013, the High Court made an order directing trial by judge alone.

7. That Order was appealed by the defendant to the Supreme Court. Following the establishment of the Court of Appeal, the appeal was transferred to that court. Little or nothing happened for the best part of five years until the appeal was listed in the call-over list of the Court of Appeal on 2nd May, 2018. Directions were given on that date and it was adjourned to the 1st November, 2018 for the purposes of allocating a hearing date for the appeal. On 20th July, 2018, the defendant's solicitors wrote to the plaintiff's solicitors indicating that the defendant intended to withdraw the appeal. On 15th October, 2018, the defendant gave one month's notice of intention to certify the matter as ready for trial and to apply for a hearing date in accordance with practice direction HC75. The matter appeared in the Court of Appeal list on 1st November, 2018 when the appeal was struck out with costs to the plaintiff.

8. On 31st October, 2018, the plaintiff's solicitors indicated by telephone to the defendant's solicitors that the plaintiff intended to discontinue the proceedings and on 15th November, 2018, wrote formally to confirm that position. In that letter it was suggested that the proceedings be struck out with no order as to costs on the basis that the plaintiff would not enforce the costs orders previously made in its favour. The defendant responded that it was not agreeable to this course and wished the matter to proceed to trial. That led to the within motion being issued.

9. With regard to the Russian proceedings, it would appear that on 18th October, 2010, the arbitration court of Samara Oblast found

in favour of the defendant and directed the plaintiff to register it as the owner of the shares. That ruling was successfully appealed by the plaintiff on 21st December, 2010 but it seems that a second appeal court, following a hearing on 17th March, 2011, overruled the first appeal court's decision and returned the matter to the lower arbitration court. It would appear that at the same time, criminal proceedings were in train in Russia and a decision was given on 29th December, 2010 and affirmed on appeal on 15th April, 2011 which the defendant pleads recognised it as a victim of fraud. On 17th July, 2012, the Supreme Commercial Court of the Russian Federation found in favour of the plaintiff.

10. In August, 2014 the Supreme Commercial Court was merged into an enlarged Russian Supreme Court. After the decision of the 17th July, 2012 was made, the defendant claimed to have discovered new facts and applied to the eleventh Arbitrazh Court of Appeal in Samara by motion to reconsider the case. In December, 2015, the Arbitrazh Court for Povolzhsky District dismissed the defendant's motion. The defendant appealed to the new Russian Supreme Court and the appeal was rejected on 2nd March, 2016, essentially it would appear on limitation grounds. The parties are agreed that the effect of the decision of the Russian Supreme Court of 2nd March, 2016 is that the defendant has no current entitlement to be registered as owner of the shares. There is however dispute as to the meaning and effect of other rulings of the Russian courts and in particular, the defendant argues that the only Russian court to have determined the claim on the merits found in its favour. Although the plaintiff suggests that the Russian proceedings have now finally concluded, Mr. Babichev says that the defendant is entitled to reopen the proceedings upon the conclusion of the criminal complaint and intends to do so.

Evidence on the Application to Discontinue

11. This motion is grounded on the affidavit of Máire Conneely, a solicitor in the firm of A&L Goodbody who represent the plaintiff. In this affidavit, Ms. Conneely sets out the background to both the Irish and Russian proceedings and in a number of paragraphs, sets out the reasons why the plaintiff wishes to discontinue. In the course of so doing, she refers to the fact that the plaintiff appointed a new chairman, Petr Ordzhonikidze, in May of 2017. She purports to give evidence of decisions taken by the chairman and board of the plaintiff and the reasons for them. All of this evidence is clearly hearsay and objection has been taken to it by the defendant. Ms. Conneely does not indicate in her affidavit whether she received this information from the chairman or if not, from whom.

12. As previously noted, the defendant's replying affidavit was sworn by one of its directors, Mr. Babichev, in the Russian language and this affidavit has been translated into English. Mr. Babichev challenges many of the assertions in Ms. Conneely's affidavit and complains that insofar as it relates, *inter alia*, to actions or decisions of the chairman, is entirely hearsay. The plaintiff put in a further affidavit in response to Mr. Babichev's affidavit but again sworn by Ms. Conneely. Despite therefore being challenged directly on the hearsay nature of Ms. Conneely's affidavit, the plaintiff apparently declined the opportunity to procure an affidavit from any officer of the plaintiff who could swear positively to the facts even if only by affirming the contents of Ms. Conneely's affidavits. It seems to me it must therefore be assumed that the plaintiff has made a deliberate choice not to put evidence from any of its officers before the court for reasons that remain undisclosed. This is clearly an unsatisfactory state of affairs.

13. In argument, the plaintiff's counsel accepted that parts at least of Ms. Conneely's affidavit are indeed hearsay, and in particular those parts to which I have referred dealing with the plaintiff's reasons for wishing to discontinue. Counsel however contended that as this is an interlocutory application, hearsay evidence is admissible under the rules. The defendant on the other hand submitted that the application is not interlocutory but rather final in nature and accordingly there is no admissible evidence before the court which deals with the plaintiff's reasons for discontinuing, an essential prerequisite for the court to exercise its discretion, in counsel's submission.

14. In that regard, the defendant relied upon the judgment of this Court (Murphy J.) in *F.&C. Reit Property Asset Management Plc v. Friends First Managed Pension Funds Limited* [2017] IEHC 383. That was an application by the defendant for inspection of documents discovered by the plaintiff. In response to the application, the plaintiff relied upon an affidavit from its solicitor which contained hearsay evidence. The court held that the application was not interlocutory in fact and accordingly, the evidence was inadmissible. However, Murphy J. went on to express the view that even if it were an interlocutory application, she would still not admit the evidence. She referred to O. 40, r. 4 which provides:

> "Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, and shall state his means of knowledge thereof, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted. …"

15. At p. 13 of the judgment, the court noted:

> "Order 40, rule 4 does not give an automatic entitlement to a party to rely on hearsay evidence but rather gives the Court discretion to allow the admission of hearsay evidence. It appears to the Court that the rationale for creating an exception to the general requirement that applications should be evidence based, is that in urgent applications which are truly interlocutory in nature (within the meaning of s. 28(8) of the Supreme Court of Judicature Act (Ireland) 1877) where there may be a requirement to protect the status quo pending the hearing of an action, it may not be possible to garner all appropriate evidence immediately, and so, the rule gives the Court a discretion to admit hearsay.
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> The admission of hearsay even in interlocutory applications should be the exception and not the rule. Order 40, rule 4 does not, in the Court's view, grant a general dispensation from the normal rules of evidence but rather permits the Court in appropriate circumstances to allow hearsay evidence."

16. I agree with these views. Hearsay evidence in interlocutory applications should not be admitted as of course but only where it is unavoidable for genuine reasons of urgency or difficulty in procuring direct evidence. One can readily understand the imperative for the court to be able to receive hearsay evidence in applications which are in their nature urgent, such as applications for interim or interlocutory injunctions or inquiries under Article 40 of the Constitution. The exception to the rule in interlocutory cases can also be rationalised by the implicit recognition that such applications may be revisited at a later stage of the proceedings. In the normal way therefore, where it is not evident from the surrounding circumstances, some explanation should be offered, even in interlocutory applications, for the necessity to rely on statements of belief rather than direct evidence.

17. In the present case, no reason of any colour is advanced for such statements of belief being necessary. I therefore accept the defendant's submission that Ms. Conneely's evidence insofar as it purports to deal with the reasons for discontinuance at any rate, ought not be admitted, even if this is to be regarded as an interlocutory application.

18. However, for reasons which will become clear, that does not in my view dispose of the matter. In any event, the defendant's approach to this evidence is somewhat ambiguous because on the one hand, it is objected to as being hearsay but on the other, it is relied upon by the defendant to buttress some of its own arguments.

Discontinuance of Proceedings

19. The origins of O. 26. r. 1 were considered in the judgment of the Supreme Court delivered by Finnegan J. in *Smyth v. Tunney* [2009] I.R. 322 where he said (at p. 339): -

> "A starting point as to the law in this jurisdiction is Wylie on the Judicature Acts (1st ed. 1906). At page 437 he states that Order 26, Rule 1, forms a complete code as to the discontinuance of an action or the withdrawal of a defence or counterclaim and cites as authority *Fox v. Star Newspaper Company* [1898] 1 Q.B. 639, a judgment of the Court of Appeal. That judgment was upheld by the House of Lords reported at [1900] A.C. 19. The rule in issue in that case is identical to that in the 1905 Rules. Chitty L.J. in the Court of Appeal said:-
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> > 'It seems to me that order XXVI is intended to form a complete code applicable to the whole subject of discontinuing an action.'
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> This view of Order 26, Rule 1, persisted in England and Wales - service of a notice of discontinuance put an end to the action but without prejudice to the right of the plaintiff to institute fresh proceedings on the same grounds but subject to an exception where service of a notice of discontinuance was an abuse of the court's process when the discontinuance could be set aside on application by the other party to the cause."

20. The exception referred to by Finnegan J. relates to a number of cases, subsequently discussed in his judgment, where a notice of discontinuance served by a plaintiff as of right under the rules was set aside as amounting to an abuse of process. These authorities are to be distinguished from those where, as here, the plaintiff was obliged to obtain the leave of the court before discontinuing. In the latter category, the principle was summarised thus by Graham J. in *Covell Matthews v. French Wools Limited* [1977] 1 WLR 876 (at 879):-

> "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 the plaintiff should be compelled to litigate against his will. The court shall 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 has already gained in the litigation and should be ready to grant an adequate protection to ensure that any advantage he has gained is preserved".

21. One of the authorities discussed in *Smyth v. Tunney is Castanho v. Brown & Root (U.K.) Limited* [1980] 1 WLR 833. The plaintiff was a Portuguese sailor who was rendered a quadriplegic by an accident that occurred on an American ship lying in an English Port. While the plaintiff was in hospital, he instructed English solicitors to issue proceedings claiming damages. The defendants admitted liability and made two interim payments to the plaintiff. The plaintiff was subsequently approached by American lawyers who persuaded him that if he sued in Texas, he would obtain much higher damages than would be available in England. He accordingly instructed the American attorneys to issue proceedings in the US and served notice of discontinuance, which was then permitted under the rules, of the English proceedings. The High Court struck out the notice as an abuse of process but was overruled by the Court of Appeal on the essential ground that a notice of discontinuance served in accordance with the rules could not amount to an abuse of process. A dissenting judgment was delivered by Lord Denning M.R., who said (at p. 855):-

> "if I am right in thinking that leave is necessary, then the court can do what is right and just. It can insist on repayment – at once in cash – as a condition of giving leave to discontinue; or alternatively it can allow the plaintiff to retain the interim payments (and not repay them) on condition that no other action shall be brought for the same cause (see *Hess v. Labochere*, (1898) 14 TLR 350, per A.L. Smith L.J.); or it can refuse leave and insist on the case going to judgment (see *Fox v. Star Newspapers Company Limited* [1898] 1 QB 636; [1900] AC 19). There are some words of Chitty LJ. [1898] 1 QB 636, 639, which fit this case;
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> > stage the plaintiff, who has brought his adversary into court, shall not be able to escape by a side door and avoid the contest. He is then to be no longer *dominus litis* and it is for the judge to say whether the action shall be continued or not and upon what terms.'
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> The 'certain stage' in this case is when interim payments have been sought and received and spent."

22. The House of Lords overturned the Court of Appeal, agreeing with the views of Lord Denning. The principle judgment was given by Lord Scarman who said (at p. 571):-

> "The court has inherent power to prevent a party from obtaining by the use of its process a collateral advantage which it would be unjust for him to retain: and termination of process can, like any other step in the process, be so used. I agree, therefore, with Parker J. and Lord Denning M.R. that service of a notice of discontinuance without leave, though it complies with the rules, can be an abuse of the process of the court."

23. Another case where a notice of discontinuance was struck out, also discussed in Smyth v. Tunney, was *Ernst & Young v. Butte Mining plc* [1996] 1 WLR 1605 where a notice of discontinuance was served to prevent the service of a counterclaim in circumstances where the defendant had intimated an intention to counterclaim but had agreed to set aside a summary judgment.

24. The judgment in *Smyth v. Tunney* was more recently applied in *Murray v. Minister for Education and Science* [2017] IECA 216, by the Court of Appeal. In giving the court's judgment, Finlay Geoghegan J. referred to Smyth v. Tunney in extenso and concluded (at para. 30):-

> "30. It appears to me that the Supreme Court per Finnegan J. in *Smyth v. Tunney* tacitly recognised that the Irish courts have an inherent jurisdiction to set aside a notice of discontinuance. Such a conclusion appears to follow from his reference to the similarity of O. 26 r. 1 with the English Rules prior to 1998, and the citation with apparent approval of the English persuasive authorities in which notices were struck out on the application of a defendant as an abuse of process. The position in relation to the jurisdiction of the court where the application to strike out is by the party who served the notice of discontinuance is, perhaps, less clear.
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> 31. As a matter of logic, however, once it is determined that the court has an inherent jurisdiction to strike out a notice of discontinuance then the question becomes the circumstances in which it may or should exercise such inherent jurisdiction."

25. Each of these cases concerned the setting aside of a notice of discontinuance served as of right and demonstrate that the court has an inherent jurisdiction to set such service aside where it amounts to an abuse of process. Different considerations apply where leave is required to discontinue. At that stage, the principles described by Graham J. above fall to be applied. In *Cindy Royce Creations Inc. v. Campbell* [1992] Lexis Cit. 3182, the plaintiffs were American companies trading in the manufacture and sale of jewellery in New York. Their premises were burgled and a substantial quantity of jewels stolen. The underwriters declined the claim and the plaintiffs sued.

26. They were met by the defence that a principal of the plaintiffs had been fraudulently involved in the burglary and further that the plaintiffs had fraudulently inflated the amount of the claim. The trial ran for 30 days, during the course of which counsel for the plaintiff, on instructions, accused three of the defendants' witnesses of a conspiracy on the part of the underwriters to defraud an innocent assured. The plaintiffs then sought to discontinue. The trial judge refused to allow the plaintiffs to discontinue and considered that as very serious allegations had been made against the defendants' witnesses, they were entitled to have the case decided. The Court of Appeal upheld the trial judge's decision. Lord Donaldson M.R. said (at p. 5):-

> "The plaintiff here was alleging not only that his was an honest claim for loss but that the defendants' witnesses were dishonestly and fraudulently trying to keep him out of his money. That was a perfectly proper allegation in the sense that it was relevant to the issues in dispute in the action and, if there was a material which might have supported it if it had been accepted, then it was something which could properly be ventilated. But it was being ventilated, as indeed it had to be, under the privilege which attaches to all proceedings in the courts. It was being ventilated in public and, if it had been ventilated anywhere otherwise than in court or in Parliament, there would have been an immediate libel or defamation action, and rightly so. So the judge had to take account of the legitimate interests of the defendants' witnesses. He had to consider whether, these allegations having been made, they should be allowed to remain in the air."

27. Accordingly, leave to discontinue *simpliciter* was refused, as in Fox v. Star Newspaper where again the trial was at hearing when the application to discontinue was made.

28. In *Re Walker Windsail Systems Limited* [2006] 1 All E.R. 272, the defendants, a husband and wife, were the former directors of a company which had gone into liquidation. The liquidator pursued proceedings against them for misfeasance in relation to the company which included allegations of dishonesty. The defendants incurred legal expenses in excess of £100,000 defending the case. The liquidator eventually applied for leave to discontinue with no order as to costs on the basis that the proceedings no longer served any useful purpose as there was no prospect of recovery.

29. The High Court allowed the liquidator discontinue with no order as to costs and Mr. Walker, by then a litigant in person, appealed. The principal judgment of the Court of Appeal was given by Chadwick L.J. who remarked at p. 278:-

> "[23] The stance adopted on behalf of the liquidator is that it is perfectly proper to bring proceedings against a defendant for a claim which can never be met having regard to the assets available to meet it; to pursue that claim until all those assets have been expended by the defendants in defending that claim, perfectly properly; and then to walk away on the basis that the defendants are left to bear all their own costs. If that is what the law permits or requires, then I am bound to say I find that startling."

30. Chadwick L.J. continued at p. 281:-

> "[32] The distinction between *J.T. Stratford & Son Limited v. Lindley (No. 2)* and this case, quite apart from the difference in the wording of the rule, is that in this case Mr. Walker would like to have the question whether or not the allegations of misfeasance and fraudulent trading made against him are well founded, decided; and is quite happy to continue to fight in person to that end. It is the liquidator who no longer wants that issue decided: first because it will not bear him any fruit even if it is decided in his favour and, second, because his own funding position, as counsel frankly accepted, is such that he cannot afford to continue to fight."

31. The court allowed the appeal by giving leave to the liquidator to discontinue but on the basis of paying Mr. Walker's costs. It is notable that despite the fact that Mr. Walker appears to have wanted to fight on to vindicate his reputation, the court nonetheless allowed the discontinuance on terms as to costs.

32. In *Shell E&P Limited v. McGrath* [2007] 4 I.R. 277, the plaintiff instituted proceedings against the defendants for interfering with the plaintiff's right to enter upon certain lands, over which the defendants claimed rights, for the purpose of constructing an onshore gas pipeline. The plaintiff claimed that the defendants had unlawfully obstructed the works. Ultimately, the plaintiff decided to reroute the pipeline and sought to discontinue the action on the basis that the claim was, in effect, now moot.

33. The issue to be determined was the terms upon which the plaintiff should have leave to discontinue but the defendants did not otherwise oppose the application. The plaintiffs sought to discontinue without any order as to costs whereas the first and third defendants argued that the ordinary principle applied that they should be given their costs on the usual party and party basis. The second and fifth defendants claimed that they should be entitled to costs on a solicitor and client basis.

34. Laffoy J. granted the plaintiff liberty to discontinue but on terms that the defendants' costs be paid on a party and party basis. In a detailed judgment analysing many of the authorities above referred to, Laffoy J. considered the interpretation of O. 26, r. 1, saying (at p. 295):-

> "[35] Going back to the wording of O. 26, r. 1, it is clear that, in a situation where a plaintiff cannot discontinue without obtaining the leave of the Court, the Court has a discretion as to whether to grant such leave or not. There is little or no guidance given as to the basis on which the Court should exercise the discretion and, in that sense, the discretion is a broad discretion. It is also clear that the Court may impose terms as a condition to granting leave, but, again, little guidance is given as to how the discretion to impose terms should be exercised, save that the Court should strive to maintain justice between the parties. In relation to the imposition of terms as to costs, the provision for discontinuance at an early stage suggests that the underlying precept is that the requirement of justice will normally result in liability for the costs to the date of discontinuance being borne by the plaintiff. Notwithstanding that, it is clear that what is just must be determined in each case having regard to its particular circumstances.
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> [36] I agree with the submission made by counsel for the plaintiff that it is neither possible nor appropriate on an application under O. 26, r. 1 for the Court to enter upon a consideration of the merits of the issues raised by the plaintiff on its claim. However, I am not satisfied that the plaintiff has adhered to that stricture in making its case that it should

be given leave to discontinue without an order for costs, but I will return to that aspect of the matter later. In a case where the core issues on a discontinuing plaintiff's claim remain to be fought out on the defendant's counterclaim, which is being defended, it is difficult to see how a court could properly assess whether the plaintiff's claim has become 'academic' in any sense other than that the plaintiff no longer wishes to pursue it.

[37] In general, I find it hard to envisage a situation in which a Court would refuse to allow an unwilling litigant to discontinue his action, because of the probable futility of adopting such an approach."

Discussion

35. Counsel for the defendant contends that since the court has a discretion to grant or refuse leave to discontinue, this implies that the plaintiff must give a reason to enable that discretion to be exercised and no admissible reason has been given here. He argues that serious allegations have been made against his client and his client is entitled to be vindicated by a trial. I am not persuaded by the argument that a party who wishes to discontinue litigation must furnish a reason for wanting to do so. None of the authorities suggest that, nor does the rule itself. As has been said before, it is undesirable that parties unwilling to litigate should be compelled to do so, once this results in no injustice to the opposing party. I am not satisfied that any such injustice has been demonstrated by the defendant. What the defendant says in that regard is to be found at para. 43 of Mr. Babichev's affidavit:-

> "The defendant wishes to have the proceedings dismissed because it is entitled to have the proceedings dismissed. The plaintiff alleged that the defendant defamed the plaintiff. Indeed, it alleged it did so deliberately and maliciously. At this juncture, the defendant is entitled to have the issue either dismissed or determined. The plaintiff seeks to level most serious allegations against the defendant and then to avoid having those allegations determined by the Irish Courts."

36. The vast majority of *inter partes* civil litigation involves an allegation of wrongdoing by one party against another, usually by the plaintiff against the defendant. The mere making of allegations, even of the most serious kind by a plaintiff, does not of itself raise a corresponding right in the defendant to have the veracity of those allegations determined by the court. This is recognised by the rule itself which permits a plaintiff to discontinue without leave at any stage up to and after receipt of the defence but before taking any further proceeding save any interlocutory application. Once the claim is discontinued, the allegations remain unproven and the defendant must regard that as his vindication together with the fact that the plaintiff must pay his costs.

37. In principle therefore, a defendant has no right to insist that a case proceeds in order that he may disprove what is alleged against him. While the plaintiff enjoys the position of *dominus litis* he may call a halt to the proceedings no matter how strongly the defendant may object, provided, of course, he does not do so for an improper purpose. The position changes once a certain point is passed and the court then must grant leave to discontinue.

38. This suggests an implicit rationale that some additional detriment or injustice beyond the mere making of allegations in pleadings may accrue to the defendant at that stage which requires the court to adjudicate to avoid such injustice. In general, as Laffoy J. puts it, it is difficult to conceive of circumstances in which a court would refuse to allow discontinuance once any potential unfairness could be addressed by the imposition of terms on the plaintiff.

39. This is also consistent with the jurisprudence which shows that there is no reported case where leave to discontinue was refused in advance of the commencement of the trial. Once the trial commences, however, the circumstances may alter very significantly, where after evidence on oath is given publicly in open court by the plaintiff, the court may reasonably conclude that the only way of avoiding injustice to the defendant is by allowing the trial to continue. None of that arises in the present case.

40. The defendant also seeks to resist this application on the grounds that since the proceedings are, on its case, an abuse of process, the authorities recognise that discontinuance may be refused where such abuse occurs. I think, however, the defendant conflates two different propositions in this regard. The abuse of process jurisprudence relates to cases where, as I have said, notice of discontinuance was served as of right but the court concluded that the notice was served for an improper purpose in proceedings which were otherwise entirely legitimate. Apart from the fact that this case does not concern service of a notice of discontinuance, it is not here suggested that there is an improper purpose in the discontinuance itself but rather in the entire proceedings.

41. In arguing for this conclusion, the defendant analysed the facts of the case in some detail in an attempt to demonstrate that the claim was so unmeritorious as to necessarily involve an abuse of process. As *Shell E&P v. McGrath* makes clear, the one thing the court cannot do in an application of this nature is to embark upon an analysis of the merits. Indeed, if the issue is as clear cut as the defendant suggests, it is perhaps surprising that it has never sought to bring a motion to have the claim dismissed on the grounds of abuse of process, despite the long history to which I have referred. There is certainly ample authority for the court's jurisdiction to grant such an order – see *Sean Quinn Limited v. An Bord Pleanala* [2001] 1 IR 505 and *Lonhro plc v Fayed (No 5)* [1993] 1 WLR 1489 (at 1502).

42. In this application, the defendant seeks to have the plaintiff's claim dismissed rather than discontinued. It would appear that the defendants seek a dismiss because this implies that the claim has been dismissed on the merits. However, under O. 26 r. 1 the court's options are limited to ordering the action to be discontinued or any part of the complaint to be struck out. This is also consistent with the observations of Laffoy J. above that the merits cannot be considered.

43. A dismissal also has the effect of working a *res judicata* between the parties concerning the re-litigation of the same issue in the future – see *White v Spendlove* [1942] 1 IR 224. I intend to address this issue by requiring an appropriate undertaking from the plaintiff as a condition of the grant of leave to discontinue.

Conclusion

44. The defendant has not satisfied me that any injustice will be occasioned to it by the granting of leave to discontinue to the plaintiff. The plaintiff in its motion seeks discontinuance with no order as to the costs, save for those already made in the proceedings. The default position is that the discontinuing plaintiff should pay the defendant's costs and to my mind nothing has been advanced by the plaintiff which would justify a departure from that position. I am further of the view that the justice of the case requires that the plaintiff should not seek to enforce any of the costs orders it has already obtained in its favour.

45. Therefore I propose to grant leave to discontinue on the plaintiff giving an undertaking to the court not to enforce these costs orders together with an undertaking not to institute any further proceedings against the defendant in this jurisdiction arising from the same cause of action.