PARTIES:	PARAP HOTEL PTY LTD & ORS v NORTHERN TERRITORY PLANNING AUTHORITY & ANOR
TITLE OF COURT:	In the Supreme Court of the Northern Territory of Australia
JURISDICTION:	Supreme Court of the Northern Territory of Australia exercising Territory jurisdiction
FILE №:	№ 26 of 1993
DELIVERED:	Delivered at Darwin 28 May 1993
HEARING DATES:	Heard at Darwin 22 April 1993
JUDGMENT OF:	Mildren J

CATCHWORDS:

COSTS - Discretion - Subject matter of proceedings no longer in existence - Plaintiffs allowed to discontinue action - Each party to bear own costs

COSTS - General principle - Court not to consider theoretical prospects of success - Ordinarily grant plaintiff leave to discontinue except in exceptional circumstances where such result unjust

JT Stratford & Son Ltd v Lindley & Others (№2) (1969) 3 All ER 1122, followed

REPRESENTATION:

Counsel

Plaintiffs:	A Wyvill / J Trier
First Defendant:	C McDonald
Second Defendant:	J Reeves / L Silvester

Solicitors

Plaintiffs:	Philip & Mitaros
First Defendant:	Solicitor for the N.T.
Second Defendant:	Mildrens

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

№ 26 of 1993
(9303058)

BETWEEN:
PARAP HOTEL PTY LTD
First Plaintiff

AND:
ANNE HAYWARD
Second Plaintiff

AND:
JTR INVESTMENTS PTY LTD
Third Plaintiff

AND:
NORTHERN TERRITORY
PLANNING AUTHORITY
First Defendant

AND:
RED TOWER PTY LTD
Second Defendant

CORAM: Mildren J.

REASONS FOR JUDGMENT
(Delivered 28 May 1993)

This is an application by the plaintiffs for leave to discontinue these proceedings against the defendants, pursuant to r25.03 of the *Supreme Court Rules*. The second plaintiff, Anne Hayward, also seeks an order against the second defendant — Red Tower Pty Ltd — that it pay the second plaintiff's costs of the action. The first defendant ("the Authority") did not appear at the hearing. I was informed by counsel that the Authority consented to the granting of leave to discontinue the action so long as no order for costs was made against it.

The second defendant ("Red Tower") opposed the orders sought and made an application of its own that the proceedings be dismissed with costs as an abuse of process.

Background

Red Tower is the registered proprietor of Lots 2700 and 2701 Gregory Street, Parap, on which it conducts a business known as "Casablanca Motel and Bogart's Restaurant." This land is zoned R3 under the *Darwin Town Plan*.

On 29 June 1992, an application was lodged with the Authority applying for consent to use the land for the purposes of "hotel in respect of bar area pursuant to clause 9.2 of the *Darwin Town Plan*." Red Tower does not concede that the form of application made was authorised by it. The purpose of the application as it appears to have been understood by the Authority, was to enable Red Tower to use the bar in its restaurant to sell or supply liquor to persons other than restaurant patrons or guests of the motel. By instrument of determination № DV4594, dated 17 July 1992, the Authority granted consent to the application to "develop Lots 2700 and 2701 ... for the purpose of a hotel bar as ancillary to the motel" in accordance with certain drawings.

On 10 December 1992 JTR Investments Pty Ltd, which operates a hotel known as the Parap Hotel in Parap Road, Parap, issued a Writ in action № 331 of 1992 ("the first action") against the Authority and Red Tower seeking declarations (a) that the instrument of determination DV4594 is void and of no effect and (b) that the granting of consent on or about 7 July 1992 to develop Lots 2700 and 2701 pursuant to s112(1)(a) of the *Planning Act*, to the application of the second defendant on or about 29 July (*sic*) 1992 in respect of Lots 2700 and 2701 is void and of no effect.

On 2 February 1993, Miss Hayward, who owns residential units on Lots 2698 and 2699 Drysdale Street, directly adjoining Red Tower's land, sought an order that she be joined as a plaintiff to the first action. This application was heard by the Master on 4 February. Red Tower opposed

that application. One of the reasons for that appears to have been that Red Tower was unsure of JTR Investments Pty Ltd's *locus standi*, and wished to see a Statement of Claim before considering its position. JTR Investments Pty Ltd indicated that it proposed to issue its Statement of Claim shortly. The Master ordered it to deliver its Statement of Claim within fourteen days, and adjourned Miss Hayward's Summons *sine die*, with liberty to restore it on two weeks' notice after service of the Statement of Claim by JTR Investments Pty Ltd.

JTR Investments Pty Ltd did not deliver a Statement of Claim. Instead, on 15 February 1993, it joined with Miss Hayward and Parap Hotel Pty Ltd, the registered proprietor of the land on which JTR Investments Pty Ltd operated its hotel, as plaintiffs in the present proceedings against the defendants, which were commenced by Originating Motion. The relief sought in these proceedings was originally the same as that sought in the first action. At the same time as these proceedings were commenced, an affidavit was filed by the plaintiffs' solicitors in support of a Summons for the declarations sought. By letter dated 19 February 1993, the plaintiffs' solicitors advised the solicitors for Red Tower as follows:

> "We refer to the above proceedings and also to the proceedings commenced by Originating Motion on 15 February 1993.
>
> In view of the proceeding commenced on Originating Motion, we would suggest that no further action be taken in Action No. 331 of 1992 at this juncture. At the moment we are considering whether it is appropriate to consolidate the two actions.
>
> Accordingly, we do not propose to issue a statement of claim, or further pursue the application for joinder of an additional plaintiff at this stage.
>
> Please confirm that, in the interest of saving costs to all parties, you accede to this course of action."

It should also be noted that in 1992, Red Tower had applied to the Liquor Commission for a liquor licence so as to enable it to sell alcohol to customers without providing a substantial meal, and that hearing had been part heard in December 1992. The resumption of that hearing was due to take place on 22 March 1993, and five days had been set aside for that hearing to take place. The plaintiffs' purpose in bringing both of these proceedings was to provide a basis for the refusal by the Liquor Commission of Red Tower's application. Naturally, the plaintiffs hoped to obtain a ruling from this Court before the Liquor Commission hearing resumed.

By a Summons filed on 25 February, in the first action, Red Tower sought an order that the action be dismissed as no Statement of Claim had been filed. By a Summons dated 25 February in those proceedings Red Tower sought an order that the Originating Motion be dismissed as an abuse of process. On 25 February, those Summonses, together with the plaintiffs' Summons in this matter, were adjourned by Asche CJ until 5 March.

By letter dated 2 March 1993, the plaintiffs' solicitors advised Red Tower's solicitors that they intended to make application to the court on 5 March to amend the Originating Motion to also seek relief in the nature of *certiorari* and to seek an extension of time pursuant to r26.02.

By letter dated 2 March 1993, Red Tower's solicitors advised the plaintiffs' solicitors that:

> "... without any admission that your three clients were entitled to commence the proceedings in action № 26 of 1993, we advise you that the proper course of action is for the first and third defendants (*sic*) to discontinue their action and for you to pay the costs of the second defendant occasioned thereby."

The plaintiffs' solicitors, by letter dated 4 March 1993, advised Red Tower's solicitors as follows:

> "The Plaintiffs in proceeding no. 26 of 1993 have elected to proceed, by proceeding commenced on originating motion, as this is the most convenient vehicle for resolving the dispute as quickly as possible.
>
> In the circumstances, we therefore submit, that it is appropriate, in order to save costs to all parties, that the proceedings commenced on writ are placed in abeyance until the determination of action no. 26 of 1993. If the Plaintiff is successful in action no. 26 of 1993 then action no. 331 of 1992 will be discontinued.
>
> However, if you are not prepared to agree that this is the appropriate course of action then we are willing to consent to an order to deliver a statement of claim in proceeding no. 331 of 1992 within 14 days of today's date.
>
> In the event that you do not consent to either, action no. 331 of 1992 being placed in abeyance, or, to an order to deliver a statement of claim within 14 days then we will rely on this letter as to costs."

On 5 March 1993, an order was made granting leave to the plaintiffs to amend the Originating Motion and Summons to seek relief in the nature of *certiorari* and the plaintiffs' Summons was adjourned to 19 March 1993. Red Tower's Summonses in both actions were also adjourned to 19 March 1993. On that occasion counsel for the Planning Authority indicated to the court that it would request the Minister to direct an enquiry and furnish a report to the Minister pursuant to s155 of the *Planning Act*. The other parties indicated that they considered this to be an appropriate course likely to save court time and costs to the parties in resolving the dispute. However Red Tower sought an order for the whole of the costs of both proceedings up to that date on much the same grounds as are now being pressed. That application was adjourned also until 19 March 1993.

On 18 March 1993, JTR Investments Pty Ltd filed a notice of discontinuance in relation to the first action. Pursuant to

r25.05 liability for the costs of the first action is to be determined in accordance with the relevant rules relating to costs. Rule 63.11(6) provides that a party who discontinues a proceeding shall pay the costs of the party to whom the discontinuance relates. That rule is subject to such other order as the court makes: r63.11(9). It was not contended that the court should make any other order. On 16 March 1993, the plaintiffs in the present proceedings also filed a notice of discontinuance. That notice was ineffective because r25.03 requires either the leave of the court or the consent of the parties, and Red Tower refused its consent. The reason the plaintiffs chose to discontinue was because, so I was told from the bar table without objection, that the Minister had revoked the instrument of determination pursuant to his powers under s155 of the *Planning Act*, with the result that the whole subject matter of both the action and these proceedings had ceased to exist.

On 19 March 1993, the Summonses were all adjourned until a date to be fixed, and did not come on for hearing again until 22 April. It was at that time that the plaintiffs made application for leave to discontinue this action and Red Tower pressed its application for these proceedings to be dismissed; and both the plaintiffs and Red Tower respectively sought orders for costs against each other.

Rule 63.03(1) provides that subject to the *Rules*, and any other law in force in the Territory, the costs of a proceeding are in the discretion of the court. Ordinarily a party who discontinues an action is liable to pay the other party's costs (r63.11(6)), but that rule is subject to any other order the court may make (r63.11(9)). What order ought properly to be made in the circumstances of this case, where the whole subject matter of the litigation has ceased to exist through the lawful actions of someone not a party to the litigation? Obviously in such a case the

action will never be tried on its merits. The courts will not try a purely academic question; and in any event, neither side wishes the action to be tried on its merits, except in so far as it is necessary to do so to determine the question of costs. Is the case to go on, then, simply to determine costs? Neither side was able to refer me to any authorities on the point, but it seemed to me at the time of hearing the application that the general rule should be that each party should bear their own costs, but that in an exceptional case the court might depart from that general rule if one party could show that it was plain beyond doubt that, without having to decide any facts in contention, it must inevitably have succeeded. Both parties contended that, for reasons urged upon me, such was the position in this case, and that such facts as were needed for the court to reach this conclusion were not in dispute.

Since the application has been heard, the decision of the Court of Appeal in *JT Stratford & Son Ltd v Lindley & Others (№2)* (1969) 3 All ER 1122 has come to my attention. In that case, the House of Lords had, on appeal, upheld an order of a single justice who granted an interim injunction, and ordered that costs be in the cause. The action never came on for trial; after a few desultory steps, it became dormant, neither side wishing it to go on. But neither side wished to pay the other's costs. Eventually the defendants applied to have the action dismissed for want of prosecution and the plaintiffs sought leave to discontinue, on terms that the defendants pay the plaintiffs' costs. The applications were heard by a master who granted leave to discontinue, each party to bear their own costs. On appeal, Lord Denning MR put the matter this way (at 1123):

> "It is plain that neither side wishes to go on with the action so as to get his own costs. But neither side wishes to pay the other side's costs. Each will fight rather than pay the other side's costs. So what is to be done? Is this case to go on simply about costs? I think not."

Later, Lord Denning MR said (at 1124):

> "Counsel for the plaintiffs has urged us to award the plaintiffs the costs because they would very probably have won if the action had been tried on its merits. I decline to go into that question. We cannot try the action at this stage."

Winn LJ said (at 1124):

> "I agree with all that has been said by Lord Denning, MR, about the impracticability of any assessment of theoretical prospects of success had the parties gone to trial and about the breadth of discretion then available to the tribunal."

Cross LJ said (at 1125):

> "I have no doubt that the order which was made here did justice between the parties because, although each side was prepared to go on with the fight rather than pay the other side's costs, neither side wanted the issue to be determined for its own sake."

In the end result, the court upheld the Master's decision to grant leave to the plaintiffs to discontinue, and the order that each side pay their own costs. It seems to me that the approach in that case is analogous to the situation here and there is no significant difference between a case where the action cannot proceed because the subject matter of the litigation has evaporated, and one where neither side wishes to proceed to have the merits determined for their own sake. Nevertheless, whilst *JT Stratford & Son Ltd v Lindley & Others (№2)* establishes that, as a general rule, the court will not go into the theoretical prospects of success and will ordinarily grant the plaintiff leave to discontinue and order that each party bear their own costs, there must be exceptional circumstances where such a result would be unjust, and, without wishing to lay down any limits to the circumstances under which it would be just to depart from the general rule, it seems to me that one such exception would arise in a case such as this, where the action was well short of being ready for trial, if one party or the other could show

that they would have been entitled to summary judgment on the undisputed facts known to the court at the time the court was asked to exercise its discretion.

The plaintiffs' argument

Mr Wyvill for the plaintiffs contended that the instrument of determination was bad on its face because it purported to consent to an application to develop the subject land for the purpose of a hotel bar as ancillary to the use of the land as a motel. It was submitted that the use of the land as a hotel bar was a prohibited use in an R3 zone under the *Darwin Town Plan* and amounted to permitting the land to be used as a hotel. Further, it was submitted that the use of the land as a hotel could never be ancillary to the use of the land as a motel, and I was referred to the judgment of Matheson J in *Minister for the Environment and Planning v District Council of Stirling* (1990) 53 SASR 505, where his Honour discusses the leading Australian authorities on ancillary and dominant uses, and in particular (at 513) part of a passage which his Honour quoted with approval from the judgment of Glass JA in *Foodbarn Pty Ltd v Solicitor-General* (1975) 32 LGRA 157 at 161:

> "'*It may be deduced that where a part of the premises is used for a purpose which is subordinate to the purpose which inspires the use of another part, it is legitimate to disregard the former and to treat the dominant purpose as that for which the whole is being used. Doubtless the same principle would apply where the dominant and servient purposes both relate to the whole and not to separate parts.* But the trial judge specifically found that sales by retail were not ancillary to other purposes of the defendants and no attempt has been made to subvert that conclusion. *Where the whole of the premises is used for two or more purposes none of which subserves the others, it is, in my opinion, irrelevant to inquire which of the multiple purposes is dominant. If any one purpose operating in a way which is independent and not merely incidental to other purposes is prohibited, it is immaterial that it may be overshadowed by the others whether in terms of income generated, space occupied or ratio of staff engaged. The ordinance is nonetheless being disobeyed.*' [Emphasis added.]"

It was submitted that the use of part of the premises as a bar for the consumption of liquor on the premises to any member of the public was not, and never could be, subordinate to the purposes which inspire the uses of the other parts of the premises, *viz*, as a motel and licensed restaurant. Consequently, as the proposed use was prohibited, consent to that use was forbidden by the provisions of the *Darwin Town Plan*.

Mr Reeves, for Red Tower, submitted that the difficulty with the argument lies in the provisions of the *Darwin Town Plan*. The definition of "hotel" is as follows:

> "'hotel' means premises which require a licence under the *Liquor Act*, whether or not accommodation is provided for members of the public and whether or not meals are served, but does not include a motel or licensed club."

This is an unusual definition, because there are many premises not being either motels or licensed clubs, which have licenses under the *Liquor Act*, e.g. grocery stores and restaurants. Obviously this definition is not similar to that which the word 'hotel' has in common use. Secondly there is the use of the word "require" in the definition. Businesses which do not sell liquor (and some 'hotels' as that word is commonly used do not) do not require any licence at all.

The definition of "motel" under the *Darwin Town Plan* is as follows:

> "'motel' means a building or place wholly or principally used for the accommodation of travellers and the vehicles used by them, whether or not the building is also used to provide meals to the travellers or to members of the general public and whether or not the premises are licensed under the *Liquor Act*."

Whilst the definition of 'hotel' excludes 'motel,' Mr Reeves submitted that the definition of 'motel' not only did not specifically exclude 'hotel' but could in fact

include premises which were a hotel in the ordinary sense of the word. The definition of 'motel' is also not entirely in accord with the ordinary use of that word in the English language. There are many premises these days which are called hotels in ordinary language and which are principally used for the accommodation of travellers and their vehicles, e.g. the Sheraton Hotel in Alice Springs, and the Travelodge in Darwin. The difference between the definitions of 'motel' and 'hotel' seems to lie in whether the premises are principally used for the accommodation of travellers and their vehicles, whether or not the premises are licensed under the *Liquor Act*. If that is so, the premises, even if licensed under the *Liquor Act* to sell liquor to any member of the public is a 'motel.' It is to be noted that neither definition specifies what sort of licence under the *Liquor Act* is envisaged, i.e. whether for consumption of liquor on or away from the premises, or whether the licence permits sale of liquor to any member of the public, or only to certain members of the public, such as those who are accommodated at the premises or who are provided with a substantial meal at the premises' restaurant. The obscurity of these definitions makes it difficult to say whether or not the use of part of the premises as a "hotel bar" (a term not defined by the *Darwin Town Plan*) is plainly not either already within the use contemplated by 'motel' as defined, or at least capable of being ancillary to that use. I think it is plain that "hotel bar" is intended to bear its ordinary English usage, *viz,* a bar at which liquor is sold to any member of the public for consumption on the premises. It is plain that such a use is not ancillary to the use of the premises as a place wholly or principally used for the accommodation of travellers and their vehicles, and cannot be therefore justified if that use would be prohibited. However the premises are also used as a restaurant, and are already licensed under the *Liquor Act*. As licences under that Act are no longer divided into categories, but contain such

conditions as the Liquor Commission considers fit (see *Liquor Act*,ss24 and 31(1)), a building used principally for the accommodation of travellers, which also had a restaurant (a consent use) and was also licensed to sell liquor under conditions which permitted the sale of liquor to any member of the public for consumption on the premises, would still apparently fall within the definition of 'motel,' at least so long as the use of the bar did not become the principle use of the premises. As the definition of 'motel' is not constrained by the type of licence in contemplation, it is at least arguable that a "hotel bar" licence would be, or may be, an ancillary use in some circumstances. In my opinion therefore, due to the peculiarity of the definitions, the matter is not so free from doubt that it is possible to conclude that, as a matter of law, the plaintiffs were bound to succeed.

Mr Wyvill's second argument was that the Authority had proceeded to determine Red Tower's application without giving to the plaintiff, Miss Hayward, any opportunity to be heard, and without even notifying her of Red Tower's application. It was submitted that the Authority was bound to at least act fairly, and that this required at the very least, notice to be given to her as an adjoining neighbour whose interests were likely to be affected by the application.

Mr Reeves points out that the proceedings were never brought by way of judicial review for breach of natural justice (at least not until the Originating Motion and Summons were amended on 5 March), that any breach of natural justice was not the fault of Red Tower, but the fault of the Planning Authority, and that it was not possible to determine whether a breach of the rules of natural justice or fairness occurred without going into evidence. I think the real difficulty with Mr Wyvill's argument is that, even if the action succeeded on this

ground, it by no means follows that of necessity costs would be awarded against Red Tower. Red Tower was in no position to know what steps the Authority had taken to inform Miss Hayward of the application, and it is not clear that Red Tower was proposing to try to uphold the decision of the Authority even if she was not so informed. Furthermore I do not see how the question of which way the costs should go could be determined on this ground without hearing evidence on the merits, which I decline to do.

Red Tower's submission

The substance of Red Tower's submission, that the present action is an abuse of process, and therefore liable to be dismissed, rests upon the fact that JTR Investments Pty Ltd had brought the first action for substantially the same relief, that Anne Hayward's application to be made a party to that action had been deferred until a Statement of Claim had been issued, that no Statement of Claim was delivered, and the present action was brought to circumvent the Master's order. Mr Reeves submitted that in these circumstances, the present action is an abuse of process, and that the court had no alternative but to dismiss it, particularly as the first action had not been discontinued. In support of this submission I was referred to *Williams v Hunt* [1905] 1 KB 512, where the court stayed a second action improperly brought, whilst another action in respect of the same subject matter between the same parties was still on foot.

Even if it were an abuse of process to commence these proceedings without discontinuing the first action, a point I do not find it necessary to decide, that does not mean that the court must dismiss this action. The remedy granted in *Williams v Hunt, supra*, was a stay, not an order for dismissal. In any event, the court has a discretion, and it may have ordered that the first action be stayed (or dismissed) if the present action was a more convenient

method of proceeding. I cannot with certainty say it would not have taken that course; indeed, I consider that such a course was likely. The first action has, in the meantime been discontinued and Red Tower is entitled to tax its costs in that action. In the result I am not persuaded that the inevitable result is that this action would have been dismissed.

Conclusion

In the end result I consider that the proper course is to allow the plaintiffs to discontinue this action and to order that each party is to bear its own costs, and there will be orders accordingly.