THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

MONTSERRAT

MNIHCVAP2023/0007

BETWEEN:

DION WEEKES

Appellant

and

[1] PROVIDENCE ESTATE LIMITED
[2] OWEN ROONEY

Respondents

MNIHCVAP2023/0008

BETWEEN:

DAVID BRANDT

Appellant

and

OWEN ROONEY

Respondent

Before:

The Hon. Mde. Margaret Price Findlay	Justice of Appeal
The Hon. Mde. Vicki Ann Ellis	Justice of Appeal
The Hon. Mr. Trevor Ward	Justice of Appeal

Appearances:

Mr. Sylvester Carrot and Dr. David Dorsett for Dion Weekes
Dr. David Dorsett for David Brandt
Ms. Nadia Chiesa for the Respondents

2024: April 17;
June 20.

Civil appeal – Costs – Costs upon a discontinuance – Discretion to depart from the general rule on costs — Whether the learned judge erred in allowing the respondents to discontinue claims against the appellants with no order as to costs – Overriding objective – Whether the *learned judge erred in failing to afford the parties the opportunity to be heard on the issue of costs following the discontinuance – Abuse of process – Locus standi – Whether the learned judge erred in finding that that the preliminary issue (which questioned the locus standi of Mr. Rooney to instruct PEL to bring the claims) amounted to an abuse of the court's process – Ratification – Whether the learned judge failed to appreciate that integral to the argument concerning ratification was the issue of Mr. Rooney's entitlement to direct PEL and the continuing non-compliance of PEL under the Companies Act*

Providence Estate Limited ("PEL"), with Owen Rooney ("Mr. Rooney") as a director, acquired 53 acres of land in Montserrat in 1989. PEL and Mr. Rooney contend that properties belonging to them were illegally sold or fraudulently transferred to others by deception. Mr. Rooney has filed many claims and sought many reliefs, ultimately seeking to recover the property and to be awarded damages. This dispute has resulted in extensive litigation over the past 10 years with Mr. Rooney filing some 42 claims in his own name and in the name of PEL. By notices filed in January of 2015, both appellants applied to strike out the respondents' claims in MNIHCV2013/0026 and MNIHCV2013/0027. These applications were heard in the High Court by Combie-Martyr J and disposed of in a written judgement delivered on 13th August 2015, where she found that in order to justify striking out the claims, the court would have to embark upon a mini trial of the claims which a court is not required to do at that stage of proceedings.

On 29th March 2023, the Government of Montserrat ("GoM") made an application for the determination of a preliminary issue under Rule 26.1(2)(i) of the Civil Procedure Rules 2000 ("CPR"), namely - whether Mr. Rooney had locus standi to bring proceedings in his own name and to direct PEL to issue proceedings. The learned judge determined that since the locus standi issue was common to all outstanding cases before the court, he would consider that application in conjunction with other claims, including claims against both David Brandt ("Mr. Brandt") and Dion Weekes ("Mr. Weekes"). Before the preliminary issue could be heard, Mr. Rooney filed an application on 23rd June 2023 seeking leave to discontinue his claims in MNIHCV2023/0011, MNIHCV2013/0026 and MNIHCV2013/0027 on the basis that there be no order as to payment of any of the defendants' costs ("the Discontinuance Application").

The learned judge heard the preliminary issue on 7th July 2023 and in a written judgment delivered on 9th August 2023, found, inter alia, that PEL had the necessary standing to bring proceedings against individuals for recovery of land and/or damages for fraud and/or misfeasance. He also granted leave to Mr. Rooney to discontinue all claims referenced in the judgment with no order as to costs.

Being dissatisfied, Mr. Weekes and Mr. Brandt filed notices of appeal challenging the learned judge's orders. As both appellants sought to challenge the order granting leave to Mr. Rooney to discontinue his claims with no order as to costs, this Court, by consent, ordered that they be heard together. Mr. Weekes, in his notice of appeal, cited five additional grounds. However, only one other main issue fell to be decided: whether the learned judge erred in finding that the preliminary issue (which questioned the locus standi of Mr. Rooney to instruct PEL to bring the claims) amounted to an abuse of the court's process.

Held: allowing Mr. Brandt's appeal, allowing ground 6 of Mr. Weekes' appeal only and making the orders set out at paragraph 100 of the judgment, that:

1. A court clearly has discretion whether or not to order costs. There is however a general rule or presumption which applies where a claim is discontinued. Rule 37.6(1) of the CPR states that a claimant who discontinues a claim is liable for the costs incurred by the defendant against whom the claim is discontinued, on or before the date on which notice of discontinuance was served. Costs are to be quantified in accordance with the scale of prescribed costs in Part 65 of the CPR, Appendices B and C. The rationale for this presumption or general rule is that where a claimant commences proceedings, he/she takes on the risk of the litigation. If successful, a claimant can expect to recover their costs, but if unsuccessful or the claim is abandoned at whatever stage of the proceedings, it is normally unjust to allow the defendant to bear the costs of proceedings that were forced upon him and which the claimant is unwilling to carry through to judgment.

   Rule 37.6(1) of the **Civil Procedure Rules 2000** applied; **Brookes v HSBC Bank plc; Jemitus v Bank of Scotland plc** [2011] EWCA Civ 354 applied; **Maini v Maini** [2009] EWHC 3036 (Ch) considered.

2. The power to depart from the general rule is to be exercised applying the factors which would normally inform the general discretion in regard to costs. However, a judge who is minded to depart from the general rule should afford a defendant an opportunity to make representations. While the burden of displacing the general rule rests with the party who asserts that it should be displaced, whether the general rule should be displaced is determined by reference to the facts of the particular case and the factors which are prescribed in Part 64 of the CPR. Rule 1.2 obliges a court to seek to give effect to the overriding objective when it purports to exercise any discretion given to it by the rules. That overriding objective mandates that a court deal with cases justly. In this case, the undisputed version of events reveals that without any forewarning to the parties, the judge proceeded to deal with the Discontinuance Application at the conclusion of the delivery of his judgment on the preliminary issue. This would have come as a surprise to the parties and counsel, including counsel for Mr. Brandt who was not present, who were not given an opportunity to make submissions contrary to the principles of fairness and justice integrated into the overriding objective. The appellants should have had an opportunity to put before the judge the full spectrum of factors which should have been applied in departing from the general rule as it is clear that he either did not consider or gave little weight to the same, despite citing legal authorities which would have made it clear that he was obliged to do so. The fact that Mr. Rooney maintained his claims notwithstanding that they were obviously ill-founded as he had no legal interest in the subject matter of the claim is clearly a matter which ought to have been weighed. Accordingly, the learned judge's discretion was not exercised judicially such that his order on costs on the discontinuance must be set aside and the question of be costs remitted to the High Court.

Rule 1.2 of the **Civil Procedure Rules 2000** applied; **Nelson's Yard Management Co v Eziefula** [2013] EWCA Civ 235 applied; **Gajadhar v Public Service Commission** TT 2014 CA 3 applied.

3. There can be no doubt that courts retain a general jurisdiction to control abuses arising out of proceedings that come before them. Often however, as it is in this appeal, the real question is the extent of that jurisdiction. The GoM parties did not join in the strike out application concerning the locus standi of PEL. At paragraph 63(b) of his judgment, the judge merely cited that fact, reinforcing that the objections regarding PEL's standing ought to have been raised by the GoM parties much earlier than occurred. In the premises, it is arguable that the judge's comment could ground a substantive finding of *res judicata* as it relates to the GoM. However, even if it could not, what is clear is that the GoM has not appealed that finding and it is difficult to discern the basis upon which Mr. Weekes would choose in his appeal to challenge observations made in respect of the GoM parties. This is especially so when in more critical findings, the judge disposed of the objections to PEL's locus standi preventing any further argument on the issue and declaring that PEL has locus standi. Mr. Weekes did not (save for the question of ratification) address these findings and this part of his appeal must fail.

   Hunter v Chief Constable of the West Midlands Police [1982] AC 529 applied; **Levi Maximea v The Chief of Police et al** DOMHCVAP2020/0009 (delivered 7th December 2023, unreported) followed.

4. On the question of whether the learned judge failed to appreciate that integral to the argument concerning ratification was the issue of Mr. Rooney's entitlement to direct PEL and the continuing non-compliance of PEL under the Companies Act, Mr. Weekes failed to demonstrate any real or substantial prejudice. The cause of action against him remains the same and it has not been made out that ratification would cause him any prejudice or embarrassment. Accordingly, this aspect of Mr. Weekes' appeal must also fail.

   Bird v Brown (1850) 4 Exch 786 applied; **Smith v Henniker-Major & Co** [2002] EWCA Civ 762 distinguished.

JUDGMENT

[1] **ELLIS JA:** Before the Court are two appeals in which the appellants seek to challenge the decision of the learned judge in the court below to grant leave to the respondent, Owen Rooney ("Mr. Rooney"), to discontinue proceedings with no order as to costs.

[2] In MNIHCVAP2023/0007, the appellant, Dion Weekes ("Mr. Weekes"), also alleges the following grounds of appeal:

(i) That the learned judge erred in law in holding that Mr. Rooney has the locus standi to sue by way of derivative actions.

(ii) That the learned judge erred in law in admitting the documents relied upon by Mr. Rooney as grounding his right of entitlement to Providence Estate Limited ("PEL") and giving leave to stamp those documents late when no stamp duty had been paid.

(iii) The learned judge erred in law in giving leave to Mr. Rooney to issue the claims as derivative actions when no such application was before the court, there was no argument on the issue and in any event, Mr. Rooney had sought leave to discontinue all of his personal claims. The learned judge did not invite submissions on this issue even though it must have occurred to the judge before he finalised his judgment.

(iv) The learned judge erred in law in holding that the action of Mr. Rooney in issuing the various claims were ratified by PEL.

(v) The learned judge erred in law in holding that the application by the Government of Montserrat on the determination of the preliminary issue amounted to an abuse of process.

[3] By consent order dated 10th April 2024, the Court ordered that the appeals MNIHCVAP2023/0007 and MNIHCVAP2023/0008 should be heard together as both appeals seek to challenge the judge's decision to grant leave to Mr. Rooney to discontinue his claims against both appellants with no order as to costs.

Factual Background

[4] The factual background to each of these proceedings is critical to the outcome of these appeals and so it must be set out with some detail. The respondent, PEL, with Mr. Rooney as a director, acquired 53 acres of land situate at St. Peters/Providence Estate in Montserrat in 1989. PEL and Mr. Rooney contend that properties belonging to them were illegally obtained and illegally sold or fraudulently transferred to others by deception, as part of an underlying fraudulent transaction and wide-ranging conspiracy to commit fraud, implicating public officials. Those implicated included notaries public, public officers and attorneys at law. Since 2008, Mr. Rooney has filed many claims suing to recover the land and for damages. The underlying claims in these appeals were commenced on diverse dates in 2013 (MNIHCV2013/0011, MNIHCV2013/0027 and MNIHCV2013/0026). The essence of the claims filed in the court below is that the defendants assisted by committing various acts of fraud, including notarising documents and complicity in the alleged fraudulent transfers. The claims alleged fraudulent misrepresentations, collusion, fraud, forgery, reckless or negligent acts of misfeasance in public office by the defendants and sought, inter alia, declarations that the transfers of title are null and void, declarations of ownership and transfer of title in properties to the appellants, rectification of land registers and restitution of lands to the appellants, and various other declarations relating to filed company documents, injunctions and damages.

[5] This dispute has resulted in extensive litigation over the past 10 years with Mr. Rooney filing some 42 claims in his own name and in the name of PEL. By notices filed in January of 2015, both appellants applied to strike out the respondents' claims in MNIHCV2013/0026 and MNIHCV2013/0027. These applications were heard in the High Court by Combie-Martyr J and disposed of in a written judgement delivered on 13th August 2015. In that judgment the learned judge summarised the respective grounds of each application[1] as well as the legal submissions advanced in support.[2] It was clear that David Brandt ("Mr. Brandt") would have sought to strike out the

[1] Paras. 5.1 and 5.3.

[2] Paras. 21–29 and paras. 37-39 respectively.

claim against him on the basis that: (1) there were no reasonable grounds for bringing the claim; (2) Mr. Rooney is not a proper party before the court; (3) Mr. Rooney has no locus standi pursuant to the Companies Act; (4) the properties in dispute are not owned by Mr. Rooney; (5) the claim is an abuse of process of court; and (6) the pleadings are scandalous and vexatious. Mr. Weekes on the other hand would have advanced several procedural grounds including that: (1) the claim form does not comply with CPR 8.1; (2) the affidavit of Mr Rooney is unsworn; (3) the exhibits referred to are not exhibited; and (4) there is no address for service, as a post box is not a valid address and no affidavit validating an alternative form of service has been filed. Counsel for Mr. Weekes also contended that no particulars of the fraud are given and that the pleadings do not disclose that the defendant, Mr. Weekes, is guilty of criminal conduct or criminal fraud and that no proper case has been made out against him.

[6] After considering the appellants' submissions that Mr. Rooney lacked the requisite locus standi to bring the claim in the name of and on behalf of the PEL, at paragraph 67 Combie-Martyr J held as follows:

> "…the court is of the view that in order to justify striking out the claims taking into consideration the issues raised in the applications, as to (i) ownership of the subject property, (ii) the capacity and (iii) authority in law of the 2nd claimant to bring the claim on behalf of the 1st claimant, would require findings of facts and law by the court at this stage of proceedings. The court is fortified in its position that to do so would require holding a mini trial of the claims which a court is not required to do at this stage of proceedings."

[7] On 29th March 2023, the Government of Montserrat ("GoM") made an application for the determination of a preliminary issue under Rule 26.1(2)(i) of the **Civil Procedure Rules 2000**[3] ("CPR"), namely - whether Mr. Rooney had locus standi to bring proceedings in his own name and to direct PEL to issue proceedings. The learned judge determined that since the locus standi issue was common to all outstanding cases before the court, he would consider that application in

[3] Now Civil Procedure Rules (Revised Edition) 2023.

conjunction with other claims, including claims against both Mr. Brandt and Mr. Weekes.

[8] Before the preliminary issue could be heard, Mr. Rooney filed a Notice of Application dated 23rd June 2023 in which he sought orders that:

> (i) leave be granted to the 2nd Claimant [Mr. Rooney] to discontinue his claims in each of MNIHCV2023/0011 (formerly MNIHCV2023/0025), MNIHCV2013/0026 and MNIHCV2013/0027 respectively in accordance with the draft orders…Those being on the basis that there be no order as to payment of costs by the 2nd Claimant of any of the Defendant's costs.
>
> (ii) In the alternative to that primary relief sought, that the assessment of any such costs ordered against the 2nd Claimant shall not take place until after the conclusion of the proceedings herein.
>
> ("the Discontinuance Application")

[9] The learned trial judge heard the preliminary issue on 7th July 2023 and delivered judgment on 9th August 2023. The learned trial judge made the following orders inter alia:

> (i) PEL has the necessary standing by which to bring proceedings as against individuals for recovery of land and/or damages (as applicable) for inter alia fraud and/or misfeasance.
>
> (ii) Leave is granted to PEL for the stamping late (if needed).
>
> (iii) Leave is granted for derivative claims to be brought by PEL (if needed).
>
> (iv) The decision of Mr. Rooney in 2013 as to PEL's issuance of the instant claims were valid decisions by or on behalf of PE..
>
> ;
>
> (v) Leave is granted to Mr. Rooney to discontinue the instant claims and all other claims as remain live and in which he is a claimant as

are referenced in the court's written ruling of 9th August 2023 with no order as to costs.

[10] Following the grant of leave, the appellants filed notices of appeal challenging the learned judge's orders.

The costs appeals

[11] The appellants in both appeals seek to set aside the judge's ruling in which he granted leave to Mr. Rooney to discontinue the instant claims and all other claims referenced in the court's written ruling of 9th August 2023 with no order as to costs. Their submissions are summarised below.

Appellants' submissions

[12] Counsel for Mr. Brandt advanced that:

(1) The learned judge erred in declaring that no costs were to be awarded upon a discontinuance that has not (or perhaps may not happen) happened.

(2) The learned judge erred in declaring that there should be no order as to costs should there be a discontinuance as there was no evidence before the court showing or tending to show that the presumption, by reason of CPR 37.6, that the defendant should cover his costs, was displaced.

[13] In written submissions filed with the Court, counsel for Mr. Brandt submitted that the learned judge did two things in delivering his costs order: (1) he granted permission to Mr. Rooney to discontinue his claims and (2) he ordered that there be no order as to costs on such discontinuance. Accordingly, counsel submitted that the issues which arise in this appeal are as follows:

(1) Was it proper that there be a commingling of the decisions to (a) grant permission to discontinue and (b) that there be no order as to costs upon the discontinuance?

(2) Did the learned judge exercise his discretion judicially and in accordance with established legal principles when he made no order as to costs following the discontinuance?

[14] After pointing to the way in which Mr. Rooney's application was couched, counsel submitted that it is evident that Mr. Rooney sought to extract a bargain or favour from the court. He described the nature of the bargain in the following terms: 'I would like you to allow me to discontinue my claim against the various defendants provided that you assure me that there is no downside for me in terms of costs.'

[15] Counsel submitted that courts exist to decide disputes between parties, not to make bargains for them or with them. He argued that an application should only be made (and granted) if it is properly grounded in fact and law, not on the basis of the applicant negotiating and bargaining with the court.

[16] Counsel further submitted that while the making of an order granting permission to discontinue a claim is one matter, the costs orders that may follow when there is an actual discontinuance are a completely different matter and there must be no conflating of the two as the considerations that impact the determination of one decision may not aid in the determination of the other. The appellant argued that there was no discontinuance as it stood on 9th August 2023 when the learned judge made an order as to costs on a discontinuance which had not yet occurred. There can be no discontinuance unless a notice has been filed and the notice contains details of the order granting permission to discontinue in accordance with CPR 37.3(1) and (4). In those circumstances Mr. Brandt contends that the learned judge was wrong to order simultaneously that the respondent be granted permission to discontinue his claim and that there be no order as to costs.

[17] Counsel for Mr. Brandt posited that once a claim is discontinued (and not before), a defendant may seek a variety of orders with respect to costs to include: (i) a third-

party costs order if, for example, the claimant is impecunious,[4] and (ii) an order for payment on account by the remaining claimant.[5] Counsel further pointed out that it is always open to a defendant to consent to an order that there be no order as to costs, or for the discontinuing claimant and the defendant to agree that only a portion of the defendant's costs be made payable.

[18] Although not expressly foreshadowed in the parties' written submissions, during the course of oral submissions before the Court, it became clear that there was no hearing date inserted in the Discontinuance Application. It is common ground between the parties that there was no case management conducted in which evidence and/or legal submissions would have been ordered to be filed. Moreover, the parties would not have had advance notice that the judge intended to dispose of the application at or following the hearing of the preliminary issue.

[19] In recounting the chronology of events, counsel for the appellants submitted that there was no notice that 9th August 2023 was the date on which the learned trial judge would hear that application. Counsel for Mr. Brandt pointed out that while he was present during the course of arguments on the preliminary issue, he was not present at what he termed the 'truncated' hearing on 9th August 2023. According to counsel, he was operating on the understanding that on 9th August 2023, the judge would only be delivering his ruling on the preliminary point and he had no notice that the learned judge intended to also consider and dispose of the Discontinuance Application. This was confirmed by counsel for Mr. Weekes who pointed the Court to the transcript of the proceedings of 9th August 2023 when he attempted to bring this issue to the attention of the judge.[6]

[20] Counsel for Mr. Brandt therefore concluded that the Discontinuance Application was not properly heard by the learned judge as the appellants would not have received

---

[4] Thomson v Berkhamsted Collegiate School [2009] EWHC 2374 (QB).
[5] Todary v W1 Cars Ltd (trading as Westone Cars Ltd) and another [2017] EWHC 195 (QB).
[6] See para. 46 herein.

the relevant advance notice of the hearing of the application and would not have been afforded an opportunity to make material representations. Instead, the judge disposed of the Discontinuance Application as a mere afterthought. In support of this submission, counsel cited paragraph 68 of the judgment in the court below where the learned judge made the following critical finding:

> "Finally, as a postscript to reading this ruling, on hearing limited argument after from attending counsel, the court rules Rooney can discontinue his myriad actions in his own name, as in his application dated 26.06.23 [sic], with no order as to costs, as his withdrawal in person makes no difference to the body of litigation, he has never claimed in his name alone, always with PEL, meaning there have been no evident separately incurred costs."

[21] Counsel submitted that this demonstrated that the judge, in the absence of counsel for the appellant, dealt with the Discontinuance Application in an abridged fashion after delivering his judgment on the preliminary issue.

[22] Concerning the rule on liability for costs on a discontinuance, the appellants submitted that rule 37.6 of the CPR clearly states that unless the parties agree or the court orders otherwise, a party who discontinues a claim is liable for the costs incurred by the party against whom the claim has been discontinued, on or before the date on which the notice of discontinuance was served. He argued that although it is accepted that the issue of liability for costs upon a discontinuance is a matter that remains within the jurisdiction of the court, there is a presumption that upon a discontinuance, at whatever stage of the proceedings, that the defendant will recover its costs, with the burden being on the discontinuing party to displace that presumption.

[23] Such party must provide cogent reasons coupled with unusual circumstances to displace that presumption as it is normally unjust to make the defendant bear the costs of proceedings which were forced upon him and which the claimant is unable or unwilling to carry through to judgment. The appellant cited in support the case of **Brookes v HSBC Bank plc; Jemitus v Bank of Scotland plc**,[7] where the relevant

[7] [2011] EWCA Civ 354.

principles guiding the discretion of the court under CPR 37.6 are summarised by the English Court of Appeal in the following terms:

> "(1) when a claimant discontinues the proceedings, there is a presumption by reason of CPR 38.6 that the defendant should recover his costs; the burden is on the claimant to show a good reason for departing from that position;
>
> (2) the fact that the claimant would or might well have succeeded at trial is not itself a sufficient reason for doing so;
>
> (3) however, if it is plain that the claim would have failed, that is an additional factor in favour of applying the presumption;
>
> (4) the mere fact that the claimant's decision to discontinue may have been motivated by practical, pragmatic or financial reasons as opposed to a lack of confidence in the merits of the case will not suffice to displace the presumption;
>
> (5) if the claimant is to succeed in displacing the presumption he will usually need to show a change of circumstances to which he has not himself contributed;
>
> (6) however, no change in circumstances is likely to suffice unless it has been brought about by some form of unreasonable conduct on the part of the defendant which in all the circumstances provides a good reason for departing from the rule."

[24] Counsel for Mr. Brandt further cited **Nelson's Yard Management Co v Eziefula**,[8] a case that adopted and approved the principles in **Brookes**. It said:

> "[30] **The hurdle to displace the default rule in CPR Pt 38.6(1) is also a high one** [emphasis supplied]. A Claimant who discontinues must (see Moore-Bick LJ's sixth principle in **Brookes v HSBC Bank**) generally show some form of unreasonable conduct on the part of the Defendant which provides a good reason for departing from the rule. The height of this hurdle can be illustrated by two examples.
>
> [31] First, the mere fact that a Claimant has got all or almost all he could reasonably hope to achieve from the proceedings has been said not to justify a Claimant from relying on the avoidance of a trial which would be solely about liability to recover costs as justifying a departure from the default rule: see Patten LJ in **Messih v MacMillan Williams** [2010] EWCA

[8] [2013] EWCA Civ 235.

Civ 844 at 28, 30 and 31. In **Brookes v HSBC Bank**, after referring to what Patten LJ stated, Moore-Bick LJ observed (at 10) that a Claimant who seeks to persuade the court to depart from the default rule must provide cogent reasons and is unlikely to be able to satisfy the court that there is good reason to do so save in unusual circumstances [emphasis supplied]. In **Messih's** case the achievement by the Claimant of what he had sought from the proceedings by a settlement with one of a number of Defendants did not justify disapplying the rule when he discontinued against other Defendants.

[32] The second example concerns the position of disputed material. It is clear that once there is to be no trial, it is not the function of the court considering costs to decide whether or not the claim would have succeeded: see **Re Walker Wingsail Systems plc** [2005] EWCA Civ 247, [2006] 1 All ER 272, [2006] 1 WLR 2194, per Chadwick LJ at 12, and HHJ Waksman's second principle in **Teasdale v HSBC Bank plc**, [2010] EWHC 612 (QB) at 7(2), [2010] 4 All ER 630, [2010] NLJR 878. But it is also clear (see Moore-Bick LJ's sixth principle in **Brookes v HSBC Bank**)) that it is the function of the court to consider whether the unreasonableness of a Defendant's conduct provides a good reason for departing from the default rule."

[25] Finally, the appellant submitted that the reasoning of the learned judge is flawed because it implies that if multiple claimants bring a claim against a defendant and some of them choose to discontinue, there should be no costs ordered as there would have been no separately incurred costs. Relying on the Privy Council decision of **Bertrand and others v Elias**,[9] counsel for Mr. Brandt submitted that the quantum of costs payable is a matter to be determined in accordance with the rules of court on whether or not there have been no evident separately incurred costs.

[26] Counsel pointed out that Mr. Brandt was named as a defendant in eight suits brought by Mr. Rooney as a co-claimant. After 10 years of contentious litigation, Mr. Rooney applied for leave to discontinue his actions on the ground that no order for costs be made against him. Counsel submitted that such an order is an unjustifiable departure from the general rule and that there is no circumstance, consistent with the principles in **Brookes** requiring a departure from the default position.

[9] [2023] UKPC 34.

[27] Counsel for Mr. Weekes, fully endorsed and adopted the submissions advanced on behalf of Mr. Brandt and further submitted that the difficulty in the learned trial judge's analysis was that the whole thrust of Mr. Rooney's personal claim was that he was entitled to sue because he not only had an interest in PEL but that he himself was entitled to sue. According to counsel for Mr. Weekes, it was Mr. Rooney's involvement which directly led to the filing of over 42 actions in the High Court in Montserrat and in those actions Mr. Rooney's personal entitlement and his entitlement to sue in those matters remained at the heart of those actions. Mr. Rooney did not adduce any evidence of a change in circumstances to which he himself did not contribute, but instead he chose to sue in over 42 actions when he knew he had no right to sue.

[28] According to counsel it is irrelevant that Mr. Rooney would have acted as a litigant in person or that he may or may not have the means to pay the costs. Mr. Rooney sued Mr. Weekes for $300,000.00 USD and therefore should be ordered to pay the relevant prescribed costs.

Respondents' submissions

[29] Counsel for Mr. Rooney trenchantly submitted that the learned judge did not err in exercising his discretion to grant leave to discontinue the proceedings without a costs order. Counsel discounted the appellants' reliance on **Brookes v HSBC Bank plc** and **Nelson's Yard Management Co v Eziefula**, maintaining that there is already case law from Montserrat that considered this line of authorities, and underscored the court's discretion in ordering costs on a discontinuance. Counsel commended to the Court the decision of Morley J in **Office of The Premier of Montserrat v Bertrand Burke et al**[10] where the judge granted leave to discontinue without costs, rejecting arguments by defence counsel that the court's discretion to not order costs on a discontinuance is limited and the process is not governed by rule 64.6. The learned judge observed:

[10] MNIHCV2021/0011 (delivered 29th November 2021, unreported).

> "I do not agree, recalling **Conrad Morris v Troy Campbell** 2021 JMCA Civ 30 at para 42 our sister Jamaican Court of Appeal opined (concerning identical rules):
>
>> It is clear, taking into account the provisions of rule 64.6 and the tenets stated in the authorities of…Nelson's Yard Management…and Doshi, that a judge is given a wide margin when exercising a discretion in relation to costs following discontinuance. Those authorities all establish that the court is allowed to consider the general factors set out in rule 64.6, rather than being slavishly bound by the "constraints imposed by" the default principle in rule 37.6(1)."

[30] Nevertheless, counsel quoted from the judgment of Moore-Bick LJ where he noted:

> "It is clear, therefore, from the terms of the rule itself and from the authorities that a claimant who seeks to persuade the court to depart from the normal position must provide cogent reasons for doing so and is unlikely to satisfy that requirement save in unusual circumstances. The reason was well expressed by Proudman J in **Maini v Maini** 2009 EWHC 3036 (Ch): a claimant who commences proceedings takes upon himself the risk of the litigation. If he succeeds, he can expect to recover his costs, but if he fails or abandons the claim at whatever stage in the process, it is normally unjust to make the defendant bear the costs of proceedings which were forced upon him and which the claimant is unable or unwilling to carry through to judgment."

[31] Counsel submitted that the circumstances in which the learned judge granted leave to the respondent to discontinue without costs would certainly qualify as '*unusual*'. According to counsel, the judge's determination was based on the evidence of the circumstances before him. There was clear and cogent evidence on which the learned judge could – and did – properly exercise his discretion to order that no costs be awarded on the discontinuance.

[32] Addressing Mr. Brandt's contention that the judge could not grant leave to discontinue and purport to make a costs order at the same time, counsel for Mr. Rooney submitted that this premise ignores the precise wording of rule 37.6(1)(b). Counsel submitted that the appellants' interpretation suggests that the court cannot make a costs order until discontinuance has come into effect seemingly because costs do not crystallise until discontinuance takes effect. However, this interpretation does not bear scrutiny. Counsel suggested that the proper construction of the

provision makes clear that the claimant who discontinues is liable for the costs incurred by the defendant in respect of the claim up to the date on which the discontinuance comes into effect.

[33] In responding to Mr. Weekes' appeal, counsel for Mr. Rooney submitted that there is nothing before the Court to show that the judge exercised his discretion improperly. To the contrary, the rationale for the learned judge's decision is reasonable when considered in light of **Crowther v Crowther and others**[11] as it is clear that the judge considered that the costs incurred by Mr. Weekes would not have been different had Mr. Rooney not been in the matter in the first place. According to counsel for Mr. Rooney, the judge declined to order costs against Mr. Rooney, on account of the marginal difference in time expended by the defendants in defending Mr. Rooney's claim relative to that of PEL which still remained negligible. This qualifies as an unusual circumstance justifying not ordering costs because Mr. Weekes loses little if PEL is unsuccessful at trial and costs are awarded in his favour.

[34] Finally, responding to the Court's concerns about whether there had been proper and fair hearing of the Discontinuance Application, counsel for the respondent pointed the Court to the recitals of the judge's order which states:

> "**AND HAVING HEARD ORAL ARGUMENT FOLLOWING READING OF THE COURT'S WRITTEN RULING OF 8 AUGUST 2023 AND BEFORE ADDITION OF PARAGRAPH 68 THERETO TO THE FOLLOWING EXTENT**:
> 1. …
> 2. Counsel for Dion Weekes reminding the Court of the position of Mr. David Dorsett (not appearing, though on notice) for Mr. David Brandt to the effect that costs should follow the discontinuance."[12]

[35] Although counsel expressed concern that this issue was not foreshadowed in the appellants' submissions, counsel for Mr. Rooney, agreed with their accounts of the events that took place on 9th August 2023. Moreover, counsel for Mr. Rooney, did not suggest that the hearing of 9th August 2023 was understood as anything more

[11] [2021] 1 WLR 2705 at paragraph 28
[12] P. 45 of the Record of Appeal.

than the date on which the judge would deliver his judgment on the preliminary issue.

Analysis and conclusion

[36] It is undisputed that a judge has a wide discretion in relation to costs. Since the judge has a wide discretion, it is well-settled that an appeal court should not interfere simply because it considers that it would have exercised the discretion differently. The following extract from **Edy Gay Addari v Enzo Addari**[13] is gratefully adopted:

> "The first condition was explained by Viscount Simon LC in **Charles Osenton & Co v Johnson** [1941] 2 ALL ER 245 page 250. There, the Lord Chancellor said:
>
> > "The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. If, however, the appellate tribunal reaches the clear conclusion that there had been a wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified."

The second condition was explained by Asquith LJ in Bellenden (formerly **Satterthwaite) v Satterthwaite** [1948] 1 ALL ER 343 in language which was approved and adopted by the House of Lords in **G v G** [1985] 2 ALL ER 225 and which I have gratefully adopted in this judgment. Asquith LJ said (**Satterthwaite** at page 345):

> "...We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact plainly wrong, that an appellate body is entitled to interfere.""

[13] BVI Civil Appeal No. 2 of 2005 (delivered 27th June 2005, unreported) per Gordon JA at para. 10.

[37] In **DuFour v Helenair Corporation Ltd**,[14] Sir Vincent Floissac CJ further explained the basis on which an appellate court would interfere with the exercise of a judicial discretion by a trial judge in the following terms:

> "We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."

[38] This statement of principle echoes the English appellate approach explained by Chadwick LJ in **Johnsey Estates (1990) Ltd v Secretary of State for the Environment**,[15] in the following terms:

> "…requires an appellate court to exercise a degree of self-restraint. It must recognise the advantage which the trial judge enjoys as a result of his "feel" for the case which he has tried. Indeed, as it seems to me, it is not for an appellate court even to consider whether it would have exercised the discretion differently unless it has first reached the conclusion that the judge's exercise of his discretion is flawed. That is to say, that he has erred in principle, taken into account matters which should have been left out [of] account, left out of account matters which should have been taken into account; or reached a conclusion which is so plainly wrong that it can be described as perverse."

[39] In written legal submissions counsel for Mr. Rooney commended to the Court the judgment of the learned judge in **Office of the Prime Minister of Montserrat v Bertrand Burke et al** noting that the judge rejected arguments that suggested that a court's discretion not to order costs on discontinuance is limited. Counsel maintained that a court's discretion remains broad and that a court 'is allowed to consider the general factors set out in rule 64.6 rather than being slavishly bound by the 'constraints imposed by' the default principle in rule 37.6 (1)'.

---

[14] (1996) 52 WIR 188.
[15] [2001] L & TR 32.

[40] A court clearly has discretion whether or not to order costs. There is however a general rule or presumption which applies where a claim is discontinued. Rule 37.6(1) states that a claimant who discontinues a claim is liable for the costs incurred by the defendant against whom the claim is discontinued, on or before the date on which notice of discontinuance was served. Costs are to be quantified in accordance with the scale of prescribed costs in Part 65 of the CPR, Appendices B and C. The rationale for this presumption or general rule was most clearly explained by Proudman J in **Maini v Maini**[16] who remarked that where a claimant commenced proceedings, he/she took on the risk of the litigation. If successful, a claimant can expect to recover their costs, but if unsuccessful or the claim is abandoned at whatever stage of the proceedings, 'it is normally unjust to allow the defendant to bear the costs of proceedings that were forced upon him and which the claimant is unwilling to carry through to judgment'.

[41] In **Brookes**, a decision of the English Court of Appeal, Moore-Bick LJ, who delivered the judgment of the court, approved the principles that were formulated by HHJ Waksman QC in **Teasdale v HSBC Bank PLC**,[17] as being the correct approach for the court to take when dealing with the issue of costs on discontinuance as provided by rule 38.6(1) of the Civil Procedure Rules of the United Kingdom ('UK CPR'), which is similar in terms to the ECSC CPR rule 37.6(1).

[42] However, courts have repeatedly made it clear that the power to depart from the general rule is to be exercised applying the factors which would normally inform the general discretion in regard to costs. It follows that Part 64 of the CPR, and in particular, rule 64.6 is applicable to the exercise of the judicial discretion to apply or depart from the general rule. In **Nelson's Yard Management Company,** Beatson LJ, confirmed that rules 44.3(4) and 44.3(5) of the English CPR, which are similar in terms to rule 64.6(4) of the CPR, apply to the determination of whether there is

[16] [2009] EWHC 3036 (Ch).

[17] [2010] EWHC 612 (QB).

good reason to depart from the standard rule. At paragraphs 15 to 17 of the judgment, he observed:

> "15. It is also necessary to refer to CPR Part 44.3 which sets out the circumstances the court is to consider when making an order about costs, and the relationship between it and CPR 38.6. **Moore-Bick LJ's summary of the principles [in Brookes] does not expressly refer to CPR Part 44.3 but his approval of HHJ Waksman's formulation must have encompassed the Deputy Judge's eighth principle [those eight principles were reduced to six by Moore-Bick LJ]. That is, that 'the context for the Court's mandatory consideration of all the circumstances under CPR 44.3 is the determination of whether there is a good reason to depart from the presumption imposed by CPR 38.6'**.
> 16. CPR Part 44.3(4) provides that 'in deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including (a) the conduct of all the parties … (c) any admissible offer to settle made by a party which is drawn to the court's attention'.
>
> 17. CPR Part 44.3(5) provides that 'conduct' includes '(a) conduct before, as well as during, the proceedings, and in particular the extent to which the parties followed the Practice Direction (Pre-Action Conduct) or any relevant pre-action protocol; (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; (c) the manner in which a party has pursued or defended his case or a particular allegation or issue'." (emphasis added)

[43] Having considered the relevant authorities I am satisfied that the approach prescribed by Harris JA (Jamaican Court of Appeal) in **Conrad Morris v Troy Campbell**[18] is commendable. At paragraphs 43 – 44 the learned appellate judge held:

> "[43] Obviously, when the court is considering an application under rule 37.6(1), the starting point has to be the recognition that the default principle or presumption embodied in that rule is that the party who discontinues should ordinarily pay the defendant's costs up to the date of discontinuance. From the authorities cited and discussed, certain other broad principles can also be discerned. These are that:
>
> (1) it is for the party discontinuing to justify some other order;

[18] [2021] JMCA Civ 30.

(2) the party who is seeking to convince the court to depart from the presumption is required to provide cogent reasons for doing so;

(3) the court must consider if the reasons advanced, justify departing from the default principle;

(4) the court has to be persuaded that, in all the circumstances, it is fair and just to depart from "the normal consequences of discontinuance" having regard to the overriding objective to deal with the case justly in accordance with rules 1.1(1) and 1.2 of the CPR;

(5) the presumption should only be displaced in limited or exceptional circumstances; and

(6) in the exercise of its discretion, in the context of discontinuance, the court is entitled to take into account the general factors set out in rule 64.6 of the CPR.

[44] Furthermore, to inform its decision to apply or depart from the standard rule or presumption, the court may consider:

(i) whether it was reasonable for the claimant to have pursued the case against the defendant. That is, the court is to determine whether the claim was a serious one deserving of argument at trial and it could not be dealt with on a summary basis or struck out as having no real prospect of success. However, it was not the function of the court to attempt to decide whether the claim would succeed and neither was this fact, if it existed, relevant; and

(ii) whether there had been a substantial or material change in the circumstances between the date when the proceedings commenced and the date when the notice of discontinuance was served."

[44] However, I am also satisfied that a further component - perhaps too obvious to be stated is that a judge who is minded to depart from the general rule should afford a defendant an opportunity to make representations. While the burden of displacing the general rule rests with the party who asserts it should be displaced, whether the general rule should be displaced is determined by reference to the facts of the particular

case and the factors which are prescribed in CPR Part 64. This includes the conduct of the parties leading to, and in the course of the prosecution of the proceedings.

[45] CPR rule 1.2 obliges a court to seek to give effect to the overriding objective when it purports to exercise any discretion given to it by the rules. That overriding objective mandates that a court deal with cases justly. In this appeal the undisputed version of events reveals that without any forewarning to the parties, the judge proceeded to deal with the Discontinuance Application on 9th August 2023 at the conclusion of the delivery of his judgment on the preliminary issue. This would have come as a surprise to the parties and counsel including counsel for Mr. Brandt who was not present.[19]

[46] It could be gleaned from the transcript of the proceedings below that the learned judge dealt with the Discontinuance Application as an ancillary to his recently delivered decision on locus when in fact that Application and consequential costs orders was separate and distinct and should have been the subject of a discrete hearing with submissions on the issues raised. The relevant parts of the transcript are as follows:

> "**THE COURT**: Now, fair enough. Now, that's the ruling. And what I would like to do now is, I would like to make a decision on Mr. Rooney discontinuing in his own name and the cost implication. I would like to do that. Get that out of the way…..
>
> So, first question. Can we deal with the point in respect of Rooney cost if he discontinues in his own name? Can we deal with that now, please?
>
> **MR. PRUDHOE**: Your Lordship, on that point you will continue to remember that I don't appear for Mr. Rooney, but it would assist the Court to know and perhaps to be reminded that at the back of the application to discontinue made by Mr. Rooney in person, there are a number of grounds for that application which could fairly be summarised to say that there is no marginal cost difference between Mr. Rooney being in these proceedings as well as PEL, and PEL bringing the proceedings on their own…Either that there are no marginal costs or that it will be a question of taxation upon which to decide whether there are marginal costs. It's not my submission to make,

[19] See Transcript p. 84 lines 17 – 20.

but that's really a distilled version of what someone in Mr. Rooney's position, if he was following those points in his application, would make.

THE COURT: Of course. And -- and I have that point very much in mind. Makes no difference to cost in all of this.

Now, does anybody have any submissions on cost we are in?

MR. CARROTT: My Lord, can I say that Dr. Dorsett felt very strongly about (inaudible) and he is not here.

…

MR. CARROTT: Yes. And I think he should be given the opportunity, My Lord, to make submissions.

…

MR. CARROTT: But I think – I think he would have something to say and maybe the best approach would be to allow the parties to make written submissions in relation to cost.

THE COURT: I really don't want to do that if I could avoid it. I share Mr. Prudhoe's sense of disturbing tale with ansilliation. I am—I am trying to get—bring all this to a point. And if I can distill it. What we are looking at now is – is litigation for fraud against identifying the individuals and we need clarity about these we see and misfeasance… And as part of clarity as to how we are dealing with things Rooney is dropping out and I want that to happen now, if I can, so that the clarity is there.

Now, I take your point that Mr. Dorsett may have something to say about costs. I am aware of that, but additionally everybody has got something to say about everything. In this case I … I – U want to try and keep focus on upon the point. It—it seems to me unanswerable to say, well, if Rooney drops out and PEL stays in, it has no effect on the cost question."[20]

[47] There followed an attempt by Mr. Carrott, counsel for Mr. Weekes and Mr. Rooney to identify 'off the cuff' as it were, factors which would have some bearing on the exercise of his discretion leading the judge to make the following compressed ruling at page 91 of the Transcript:

"**THE COURT**: All right. So if there is nobody else who is going to make any costs submissions, I am going to say that Mr. Rooney can discontinue these proceedings and withdraw, but with no cost implications; or no order as to cost because the PEL litigation continues which is the same; it's the same litigation. And I thank Mr. Prudhoe for his help in having [assisted] Mr.

[20] Pp. 85-86 of the Transcript of 9th August 2023.

Rooney to understand the legal niceties. And the fact that Mr. Dorsett isn't here is he is not here and there we are. He is happy. So there we are."

[48] Noting the transcript, I do not think that it could be said, that either appellant was afforded an opportunity to be heard. In that regard, I have applied the judgment of the Trinidad and Tobago Court of Appeal in **Gajadhar v Public Service Commission**.[21] In that case, having determined the substantive judicial review proceedings in favour of the appellant, the trial judge decided the issue of costs without hearing the parties on either what was an appropriate order to make, or on the assessment of costs payable.

[49] The court held that the judge's approach to the issue of costs was erroneous and at paragraph 7 of the judgment, Jamadar JA (as he then was) stated:

> "First, having determined the matter in circumstances where neither party addressed the issue of costs**, the correct approach to be taken, as is the consistent practice in these Courts, was to invite the parties to make submissions on both aspects of costs: the appropriate order to make and the reasonable quantum to be awarded. Rule 66. 6 CPR, 1998 contemplates an exercise of judicial discretion in determining who should pay costs. Further, the factors to be considered and weighed are contextually bound and are capable of producing different outcomes depending on the circumstances of each case. As such, parties should generally be given the opportunity to make representations – fairness and justice demand no less and the decision making process can only benefit from such an approach**." (emphasis added)

[50] I am therefore satisfied that the procedure adopted by the learned trial judge was inadequate and his decision to deal with the application (1) without appropriate notice having been given to the parties of an intention to dispose of the Discontinuance Application (particularly its costs consequences) on 9th August 2023; (2) in the absence of counsel for Mr. Brandt who would have had no prior notice of the hearing of the Discontinuance Application (particularly its costs consequences); and (3) without the benefit of considered (written or oral)

[21] TT 2014 CA 3.

submissions from the parties despite the urging of counsel for Mr. Weekes, resulted in the appellants not being afforded the adequate opportunity to be heard contrary to the principle of fairness and justice integrated into the overriding objective prescribed in the CPR.

[51] Moreover, it is apparent that the reasons advanced by the judge in his eagerness to dispose of the Discontinuance Application disclose that the sole factor which was taken into account and weighed was as reflected in his written ruling:

> "Finally, as a postscript to reading this ruling, on hearing limited argument after from attending counsel, the court rules Rooney can discontinue his myriad actions in his own name, as in his application dated 26.06.23, with no order as to costs, **as his withdrawal in person makes no difference to the body of litigation, he has never claimed in his name alone, always with PEL, meaning there have been no evident separately incurred costs**." (emphasis added)

[52] The judge's position was clear. He was looking at 'what additional cost might have arisen as a result of Rooney's name being tied... I just can't see it.'[22] It seems to me that to the extent that Mr. Rooney's personal standing to bring these proceedings would have been specifically challenged by the appellants, *a fortiori,* it could not be said that there would be no additional costs arising from his joinder. In my judgment this is where fulsome and considered representations from the parties would have benefitted the learned judge. Certainly, the appellants should have been afforded an opportunity to explain that notwithstanding the continuation of the proceedings by PEL, there may have been costs which may have been separately incurred.

[53] The appellants would have had an opportunity to put before the learned judge the full spectrum of factors which should have been applied in departing from the general rule as it is clear that he either did not consider, or gave little weight to the same despite citing legal authorities which would have made it clear that he was obliged to do so. The fact that Mr. Rooney maintained his claims notwithstanding

[22] P. 89, lines 2-4 of the Transcript of 9th August 2023.

that they were obviously ill-founded as he had no legal interest in the subject matter of the claim is clearly a matter which ought to have been weighed.

[54] In that regard, I note with considerable interest the Privy Council's 2023 judgment in **Bertrand v Elias** which clarified the discretion to order that costs be quantified other than on a prescribed basis on discontinuance of a claim. In that case, the Board allowed the appeal from a decision of the Court of Appeal of the Republic of Trinidad and Tobago in which it held that the first instance judge had erred in quantifying the appellant's costs following the discontinuance of a libel action against him on an assessment basis under CPR 67.1 and 67.12 rather than in accordance with prescribed costs as set out in r. 67.5.

[55] The Board reasoned that the '… discretion to order costs to be assessed is that it should not be exercised to undermine the purposes of prescribed costs which includes providing a measure of certainty to the public through having a costs regime where the amount of prescribed costs directly correlates with, and is proportionate to, the value of the claim'.[23] Accordingly, the Board determined that the discretion should only be exercised for good reasons and in exceptional cases. The Board determined that there were several cumulative reasons, in the circumstances of that case which warranted a departure from the general rule. Critical among these was the fact that 'in addition to discontinuing the proceedings they [the claimants] expressly acknowledge that the proceedings which they brought against the defendant were "ill founded" and accordingly that the proceedings should never have been brought'.

[56] At paragraph 65 and 66 of the judgment the Board observed:

> "[65] …The Board considers that the prescribed costs regime is for genuine claims, and, although it generally applies in cases of discontinuance, it should not be used to protect TCL and CCL from the consequence of reimbursing the defendant in relation to the reasonable costs he actually incurred in defending ill-founded proceedings that should never have been brought by TCL and CCL.

[23] See para 63 of the judgment.

> [66] Second, Mr Bertrand could have continued with his action against the defendant even though TCL and CCL had informed him that they were to discontinue their proceedings. However, Mr Bertrand abandoned his claim by serving his own notice of discontinuance a day before the trial began. In the circumstances of this case, particularly where TCL and CCL acknowledged the proceedings were "ill founded", the Board infers that by doing so Mr Bertrand effectively also acknowledged that his claim was ill founded and should not have been brought. Again, the Board considers that the prescribed costs regime is for genuine claims, and it should not be used to protect Mr Bertrand from the consequence of reimbursing the defendant in relation to the reasonable costs he actually incurred in defending ill-founded proceedings that should never have been brought by Mr Bertrand."

[57] Although the issue in **Bertrand v Elias** concerned the exercise of discretion to depart from the general rule (that where proceedings have been discontinued, the costs shall be quantified in accordance with the prescribed costs regime) and to order costs to be assessed, in my judgment there are general principles which can be extrapolated and applied by a court exercising its discretion to depart from the general rule which prescribes costs liability on a discontinuance. [24]

[58] I remind myself that an appellate court should be chary in interfering with the exercise of discretion by first instance judges on costs matters and should only interfere if the conclusion of the costs judge was not open to him.[25] However, having reviewed the authorities and the judgment of the learned judge, I am not satisfied that he adopted the proper approach in arriving at his decision. It is clear that he did not correctly apply the relevant legal principles to the facts of the case. His discretion, in all the circumstances, was not 'exercised judicially' and warrants the interference of this Court.

[59] Accordingly, Mr. Brandt's appeal, as well as ground 6 of Mr. Weekes' appeal is allowed and the learned judge's order on costs on the discontinuance is set aside.

[24] See paras. 64 – 72 of the judgment.
[25] R (Parveen) v Redbridge LB [2020] EWCA Civ. 194.

I am further satisfied that the question of costs should be remitted to the High Court for determination in accordance with the guidance of this Court.

Mr. Weekes' appeal

[60] Although Mr. Weekes' notice of appeal filed on 22nd November 2023 sets out 6 discrete grounds of appeal, it is apparent that consequent upon Mr. Rooney's discontinuance, grounds 1 – 3 no longer hold any relevance.

[61] In his written submissions, counsel for Mr. Weekes crystallised his appeal into the following discrete issues:

(1) Whether the application by the GoM on the determination of the preliminary issue amounted to an abuse of process.

(2) Whether the learned judge erred in law in admitting the documents relied upon by Mr. Rooney as grounding his right to entitlement to PEL and giving leave to stamp those documents late, no stamp duty had been paid ('the Stamp Duty Issue").

(3) Whether the learned judge erred in law in holding that the actions of Mr. Rooney in issuing the various claims were ratified by PE.

(4) Whether the learned judge erred in law in granting leave to Mr. Rooney to discontinue his claims with no payment of costs.[26]

[62] During the course of the hearing of his appeal, counsel for Mr. Weekes, agreed that the Stamp Duty Issue was inconsequential to the outcome of the proceedings since the share transfer (which would have attracted the stamp duty) spoke only to Mr. Rooney's status as a shareholder in PEL and not his status as a director of PEL. As was made clear at paragraph 65 the judgment of Combie-Martyr J,[27] it is the latter

[26] This issue was addressed in paras. 36 to 59 herein.
[27] Paragraph 65: "The claims by the 1st claimant are not instituted by the 2nd claimant as shareholder, but by the 2nd claimant as Director of the 1st claimant on its behalf, inter alia, for restitution of its property allegedly

designation which is relevant in determining whether Mr. Rooney has the capacity to cause PEL to commence the litigation and not whether he was a shareholder of PEL.

[63] During the course of his oral submissions, counsel for Mr. Weekes agreed that the central issue in his appeal is whether the learned judge erred in finding that the preliminary issue (in which it questioned the locus standi of Mr. Rooney to instruct PEL to bring the claims) amounted to an abuse of the court's process.

Appellant's submissions

[64] The fulcrum of the judgment with which Mr. Weekes takes issue commences at paragraph 60 where the judge carefully summarised the myriad of what he termed 'technical arguments' which arose in the preliminary issue.

[65] Mr. Weekes takes issue with judge's reasoning and determination at paragraphs 63:

> "By way of further observation:
>
> a. While Counsel Morgan gingerly cross-examined Rooney for an hour on 07.07.23 to show inconsistency in who were the PEL directors between 2007 and 2017, and in fairness made good points showing the evidence to an extent incoherent, the reality is the point is overtaken by PEL having been a litigant at the direction of Rooney since at least 2008, 15 years now, so that her efforts fail to unseat standing established by such longevity.
>
> b. The decision of Combie-Martyr J of 13.08.15, though concerning strike out, is highly relevant as it specifically contemplated arguments on PEL locus (though none on the Stamp Act) offered by Brandt, Allen and Markham, the Weekes, and the Farrells, while it appears no arguments were offered by Daley, Silcott or Lynch (as individually named defendants); **this reinforces it abuses court's process to be raising such arguments again, while it is just too late to be raising the Stamp Act, when it should have been at least eight years ago, if only by Daley who as previously High Court Registrar would know all about the Act**.

fraudulently transferred by the Defendant Warren Cassell to certain defendants as established by the criminal convictions."

c. Moreover, concerning whether Rooney has ever produced a formal company resolution to litigate, therefore barring locus, inter alia, where arguably he was acting alone as a director bringing PEL action in breach of article 71 of the company articles of association requiring two directors to decide:

i. Counsel Prudhoe in his submissions [on] 17.05.23 pointed to the indoor management rule at s19 Companies Act which baldly states, curing the issue, unanswered by Counsel Morgan in her reply of 09.06.23: For the avoidance of doubt, it is declared that no act of a company…is invalid by reason only that the act…is contrary to its articles;

ii. Moreover, Counsel Prudhoe went on to point out it is settled law a company may ratify the prior acts of its directors with retrospective effect, per **New Falmouth Resorts v International Hotels Jamaica** 2013 UKPC 11, and such ratification has been offered by PEL concerning the instant cases (claims 17, 18, and 19) in a resolution dated 09.05.23 signed by directors Rooney and Honculada, again unanswered by Counsel Morgan, while in any event there was the purported resolution of 17.10.13, which show at least an attempt to get the paperwork right, if inconsistently."

[66] Counsel for Mr. Weekes submitted that there was no abuse of process in this case because the trial of the preliminary issue was a natural consequence of a previous order made by Combie-Martyr J. Counsel submitted that in order to understand the GoM application, it is first necessary to have regard to the complete factual and chronological context which included the several applications which came up for hearing before Combie-Martyr J in 2015. One of the key issues which arose in those applications to strike out was whether Mr. Rooney lacked the requisite locus standi to bring the proceedings and that Mr. Rooney had not provided evidence in support of his alleged entitlement in law.

[67] Ultimately, Combie-Martyr J declined to strike out the claims and at paragraph 67 of the judgment determined that 'in order to justify striking out the claims taking into consideration the issues raised in the applications, as to (i) ownership of the subject property, (ii) the capacity and (iii) authority in law of the 2nd claimant to bring the claim on behalf of the 1st claimant, [it] would require findings of facts and law by the court at this stage of the proceedings. The court is fortified in its position that to do

so [strike out the claims] would require holding a mini trial of the claims which a court is not required to do at this stage of proceedings'.

[68] It is common ground that there was no appeal against that judgment by PEL, Mr. Rooney or the defendant applicants. The issues which arose out of the strike out applications therefore remained live issues and both PEL and Mr. Rooney were very aware of this fact.

[69] Another critical component of the factual context collateral litigation which culminated in the judgment in **Philip Brelsford and others v Providence Estate Ltd and another**[28] in which the Judicial Committee of the Privy Council was asked by the appellants to set aside the orders of this Court in relation to, inter alia, its determination that each appellant's ownership of the relevant property was subject to an equity in favour of PEL and, relatedly, that each appellant should execute transfer instruments in favour of PEL.

[70] Following this judgment, the learned judge quite properly listed the remaining cases for case management. The GoM thereafter filed its application for determination of a preliminary issue. Mr. Weekes' matter was among those cases where this issue remained live.

[71] Relying on the decision in **Henley v Bloom**,[29] counsel for Mr. Weekes submitted that the learned trial judge misdirected himself in law in determining that mere delay in requesting a determination of a preliminary issue could on its own constitute an abuse of process. Counsel further submitted that the learned judge failed to identify properly or at all why raising a live triable issue as a preliminary issue of determination amounted to an abuse of process when it was clear to all parties that it was going to be raised and dealt with either at a full trial or the trial of a preliminary issue. Counsel concluded that the judge was obliged to hear argument from the

[28] [2022] UKPC 46.
[29] [2010] EWCA Civ 202.

parties including from Mr. Weekes who, as an interested party to the application, was entitled to be heard.

[72] Counsel further submitted that the contention that the preliminary issue amounted to **Henderson v Henderson**[30] abuse simply does not arise in respect of an issue which has never been fully litigated or determined. As for the judge's finding that the GoM (and by implication the other parties) were estopped from raising the point, there is simply no foundation in law for such an assertion. He argued that it is difficult to understand how estoppel could have arisen where there has been no contrary representation and no detriment.

Respondents' submissions

[73] In response, counsel for Mr. Rooney pointed out that the 'preliminary' issue was raised a decade after the underlying proceedings (several of them) had been issued. That issue being - whether Mr. Rooney had legal standing to issue these proceedings in his own name and to direct PEL to issue proceedings. Counsel for Mr. Rooney submitted that it was open to the learned judge to decide that the appellants, who joined in GoM's application concerning PEL's locus, should have raised this same challenge in the previous strike out application where the issue was also the locus standi of PEL, albeit in a different form. Counsel relied on the decision in **Levi Maximea v The Chief of Police et al**[31] where this Court held that any issue or matter that could have been dealt with in earlier proceedings is subject to the abuse of process rule.

[74] Counsel further submitted that even if the judge's decision was in respect of GoM's application, GoM has not appealed that finding; Mr. Weekes is not able to challenge the judge's observations in respect of GoM.

[30] [1843] UKPC 6.
[31] DOMHCVAP2020/0009 (delivered 7th December 2023, unreported) at paras. 29 - 33.

[75] Pointing to the comments made by Combie-Martyr J at paragraph 67 of her judgment in **Providence Estate Limited et al v Walter Wood III et al**[32] relative to hearing further evidence concerning Rooney's shareholding in PEL and whether it entitled him to bring derivative proceedings, counsel argued that that issue has been resolved by Mr. Rooney applying to discontinue his proceedings. It therefore no longer concerns the Court and the judge's decision does not impact it at all.

Analysis and Conclusion

[76] In this part of Mr. Weekes' appeal, the central issue which arises is whether the learned judge could essentially dismiss the matters arising for determination by way of preliminary issue and estop the appellants from advancing the same on the basis that it amounted to an abuse of the court's process because - in the case of PEL's locus standi, this is an issue which has been, or should have been, argued before, and, in regard to the Stamp Act issue, that it is just too late to be raising this issue.

[77] The learned judge's judgment therefore discloses a finding of abuse of process on the basis of res judicata and delay. It is clear from the judgment that the learned judge was at pains to set out the extensive litigation history (involving numerous parties and traversing all levels of the court system) spawned from PEL's attempt to right the wrongs suffered as a result of the now proved fraudulent acts of Mr. Cassell and Cassell and Lewis Inc. At paragraph 11 of his judgment the judge noted that counsel for the GoM identified a common theme running through all the suits, asserting that neither Mr. Rooney nor PEL have locus standi. However, at paragraph 12 he noted that consequent upon Mr. Rooney's discontinuance, the issue in this ruling had narrowed to whether PEL lacks locus. At paragraph 13, the judge set the stage for the argument before him, to wit; that PEL has not been authorised by a quorum of directors or a majority shareholding to bring the claim. The judge noted that this formed part of the GoM's defence and he termed this 'the paperwork point'.

[32] MNIHCV2013/0020 (delivered 13th August 2015, unreported).

[78] At paragraphs 24 – 32, the judge continues his analysis recounting several facts which he stated was evidenced from the paperwork. These facts (which need not be recounted here) detail significant corporate intrigue involving the directorship of PEL and led the judge to observe:

> "What all this means is it is unclear who were the directors of PEL in 2012-2017 when the most significant claims 4-36 during 2012-2017 were filed."

[79] It is clear that the position has not since been clarified. At paragraph 33 the Judge noted:

> "Finally, on 01.05.23, attempt was made by Counsel Prudhoe for PEL to file amended returns for 2001-2016, as the November 2017 filings were said [to be] inaccurate, but the returns were not accepted by the Companies Registrar (now Fabian Singh) by letter of 15.06.23, Counsel Morgan suggesting they amounted to an attempt 'to revise wholesale the corporate history of PEL', (which has given rise to claim 42)."

[80] Contrary to what is contended by Mr. Weekes, the judge's reasoning on this issue commences at page 22 where he noted:

> "As analysis here begins, a curious feature of the argument offered by Counsel Morgan, now in 2023, is it may unseat the 2022 PC decision, as it could mean PEL never had standing to argue for the return of the subject lands in claims filed as long ago as 2012, rendering the litigation over many years with many thousands of pages and hundreds of filings entirely moot."

[81] The "PC" decision referenced is that of **Philip Brelsford and others v Providence Estate Ltd and another** in which PEL and Mr. Rooney successfully defended the appeal. The Board determined that the registration of the appellants therein as the proprietors of the parcels of land in issue was obtained by mistake, and found that that the respondents were entitled to have the register rectified in their favour.

[82] At paragraph 59, the learned judge makes clear that the 'paperwork point' arises 'from the Stamp Act, and from arguable failing in the management of PEL and in keeping and filing its paperwork to show proper resolutions by the directors led to a permissible company decision being made to bring action'.

[83] At paragraph 60, the judge then identified the technical arguments raised in support of this issue, observing that:

> "Broadly, Counsel Morgan makes technical arguments, namely:
>
> a. Documents showing the existence of PEL have not been stamped under s22 Stamp Act and are therefore inadmissible in civil proceedings, meaning there can be no evidence admitted PEL exists nor Rooney ever a director, such that neither can appear before the court; failing which –
>
> b. If leave can be granted to allow later stamping, permitted under s21 Stamp Act, it should be denied owing to the age of the proceedings, and how interest at 8% on the stampings now exceeds 100% the original stamping value, which is reason to refuse late stamping; failing which –
>
> c. To launch action, whenever, including the instant actions from 2013, PEL company article 71 of association said there needs to be a resolution by two directors, none ever being reliably shown, there being uncertainly as to who were the directors, with the reality only Rooney has decided, as one director alone, so the decision to litigate is nullified as inquorate, meaning so too is the litigation; failing which –
>
> d. Wood as the second director, (if he was, as inconsistently suggested in returns filed in November 2017), can be inferred to be against litigation as it was his original idea in 2007 to support Cassell, so the mind of the company cannot ever be shown in 2013 via the two directors Rooney and Wood together to favour litigation against the activity of Cassell where Wood, being also the majority shareholder, must be against litigating against his own actions in 2007, meaning the litigation would never have been approved by both, as required, and is therefore wrongful (being a point strongly made by Counsel Carrott); failing which –
>
> e. If the correct approach is for PEL to issue a derivative claim under s238 Companies Act, it requires leave under s 239(1), which was not sought and should not be granted now as so late, and because Rooney is not strictly acting 'in good faith' toward the company but in his own interests as it seems he thinks he is the company, that he and PEL are essentially the same."

[84] What is clear, is that rather than merely dismissing the issue involving PEL's locus standi to commence legal proceedings (the paperwork issue) on the basis of abuse

of process and/or estoppel, the learned judge made a series of distinct factual findings at paragraph 62 (underlined) which were not addressed in legal submissions before the court. At paragraph 62 the judge determined:

> "62. While the many technical arguments are dazzling in their intellect, creating a knot of logic exceedingly vexing to unravel, like the gordion knot I will simply cut it. I declare PEL has locus, meaning:
>
> a. Leave is given for the stamping late;
> b. Leave is given for derivative claim, if needed to be so called;
> c. The decision led by Rooney in 2013 in the instant proceedings (and earlier) as either a lone director, or with Wood (not engaging), or with his wife Janice and Susan Edgcombe as directors from 2009, or with his wife Janice by resolution 17.10.13, or as derivative claim led by him for the benefit of the company by reason of Wood impermissibly selling shares to Cassell, are all accepted, variously, as needed, to give grounding for action; so that
> d. I declare PEL locus to litigate is accepted as valid."

[85] The matters which informed the judge's reasoning are myriad. I have chosen to underline relevant portions which have not been substantively addressed in this appeal:

> "61. To all of this, Counsel Prudhoe argues it has been, or should have been, argued before, and is 'an attempt to put lipstick on a pig'. I agree. PEL has been a party for years, since 2007, in 39 actions from 2012 at the direction of Rooney, (40 if including the 2008 action), on Montserrat, also in Virginia US, and finally before the PC in London; it is just clever sophistry to argue at this late stage it cannot seek redress from Cassell's fraud, proven at criminal trial. Ingenious as Counsel Morgan often is, I will simply estop argument PEL has no locus owing to imperfect paperwork, deploying my inherent jurisdiction to determine who will be heard before the court, and r1 CPR requiring the overriding objective is to deal with cases justly, where there is no doubt PEL was the subject of a fraud and should be allowed to seek relief.
>
> 63. By way of further observation:
>
> a. While Counsel Morgan gingerly cross-examined Rooney for an hour on 07.07.23 to show inconsistency in who were the PEL directors between 2007 and 2017, and in fairness made good points showing the evidence to an extent incoherent, the reality is the point is overtaken by PEL having been a litigant at the direction of Rooney since at least 2008, 15 years now, so that her efforts fail to unseat standing established by such longevity.
>
> -----

c. Moreover, concerning whether Rooney has ever produced a formal company resolution to litigate, therefore barring locus, inter alia where arguably he was acting alone as a director bringing PEL action in breach of article 71 of the company articles of association requiring two directors to decide:

i. Counsel Prudhoe in his submissions [on] 17.05.23 pointed to the indoor management rule at s19 Companies Act which baldly states, curing the issue, unanswered by Counsel Morgan in her reply of 09.06.23: For the avoidance of doubt, it is declared that no act of a company…is invalid by reason only that the act…is contrary to its articles;

ii. Moreover, Counsel Prudhoe went on to point out it is settled law a company may ratify the prior acts of its directors with retrospective effect, per **New Falmouth Resorts v International Hotels Jamaica** 2013 UKPC 11, and such ratification has been offered by PEL concerning the instant cases (claims 17, 18, and 19) in a resolution dated 09.05.23 signed by directors Rooney and Honculada, again unanswered by Counsel Morgan, while in any event there was the purported resolution of 17.10.13, which show at least an attempt to get the paperwork right, if inconsistently."

[86] Instead, Mr. Weekes has pegged his appeal on what can only be described as the judge's secondary finding at paragraph 63 (b) -

> "b. The decision of Combie-Martyr J of 13.08.15, though concerning strike out, is highly relevant as it specifically contemplated arguments on PEL locus (though none on the Stamp Act) offered by Brandt, Allen and Markham, the Weekes, and the Farrells, while it appears no arguments were offered by Daley, Silcott or Lynch (as individually named defendants); this reinforces it abuses court's process to be raising such arguments again, while it is just too late to be raising the Stamp Act, when it should have been at least eight years ago, if only by Daley who as previously High Court Registrar would know all about the Act."

[87] There can be no doubt that courts retain a general jurisdiction to control abuses arising out of proceedings that come before them. Often however, (as it is in this appeal) the real question is the extent of that jurisdiction. The starting point for these purposes is the decision of the House of Lords in **Hunter v Chief Constable of the West Midlands Police**.[33] In that case, Lord Diplock articulated the following proposition (at 536):

[33] [1982] AC 529.

> "[abuse of process] concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people. The circumstances in which abuse of process can arise are very varied…It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."

[88] In **Levi Maximea v The Chief of Police et al** the alleged abuse of process arose in the context of an argument alleging res judicata. Webster JA writing for the Court noted that:

> "In its simplest form the principle of res judicata provides that where a decision is pronounced by a court or tribunal with jurisdiction over a particular matter, that same matter cannot be reopened by the parties who are bound by the decision, except on appeal. The principle applies not only to the decisions of the earlier court or tribunal but to any issue or matter that could have been dealt with in earlier proceedings. This latter aspect of the principle is known as the rule in **Henderson v Henderson.** The rule is encapsulated in the dictum of Sir James Wigram VC in the following terms –
>
>> "[W]here a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of [a] matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.""

[89] Webster JA went on to observe:

> "It is apparent from these cases that one of the fundamental differences between res judicata in the narrow sense and the rule in **Henderson** is that a decision on the merits in the first claim is required for res judicata to

operate, while a decision of the first court is not required for the rule in **Henderson** to apply. The rule applies as a matter of public policy to prevent abuse of the court's process whether or not there is a decision on the issue that is sought to be re-litigated."

[90] From all accounts, the GoM parties did not join in the strike out application concerning the locus standi of PEL. I am satisfied that at paragraph 63(b) of his judgment the judge is merely citing that fact and reinforcing that the objections regarding PEL's standing ought to have been raised by the GoM parties (including Daley, Silcott or Lynch (as individually named defendants)) much earlier than occurred. In the premises, I am not satisfied that the judge's comment could not ground a substantive finding of *res judicata* as it relates to the GoM. However, even if it could not, what is clear is that the GoM has not appealed that finding and I have some difficulty in discerning the basis upon which Mr. Weekes would choose in his appeal to challenge observations made in respect of the GoM parties.

[91] This is especially so when in more critical findings, the judge has disposed of the objections to PEL's locus standi ('the paperwork point") preventing any further argument on the issue and declaring that PEL has locus standi on the basis that:

(a) He is entitled to exercise his inherent jurisdiction to determine who will be heard before the court and to apply the overriding objective to deal with cases justly because:

i. PEL has been a party for years, since 2007, in 39 actions from 2012 at the direction of Rooney, (40 if including the 2008 action), on Montserrat, also in Virginia US, and finally before the PC in London; it is just clever sophistry to argue at this late stage it cannot seek redress from Cassell's fraud, proven at criminal trial.

ii. It may unseat the 2022 Privy Council decision in **Philip Brelsford and others v Providence Estate Ltd and another**, as it could mean PEL never had standing to argue for the return of the subject lands in claims filed as long ago as 2012, rendering the litigation over many years with many thousands of pages and hundreds of filings entirely moot.

iii. The point is overtaken by PEL having been a litigant at the direction of Mr. Rooney since at least 2008, 15 years now, so that PEL has standing established by such longevity.

iv. There is no doubt PEL was the subject of a fraud and should be allowed to seek relief.

(b) He accepted (as curing the issue, unanswered by Counsel for the GoM in her reply of 09.06.23) Counsel for PEL's arguments regarding the indoor management rule at s19 Companies Act which baldly states: "For the avoidance of doubt, it is declared that no act of a company…is invalid by reason only that the act…is contrary to its articles."

(c) He accepted Counsel for PEL's argument (again unanswered by Counsel for the GoM) that it is settled law that a company may ratify the prior acts of its directors with retrospective effect, *per* **New Falmouth Resorts v International Hotels Jamaica** 2013 UKPC 11**,** and such ratification has been offered by PEL concerning the instant cases (claims 17, 18, and 19) in a resolution dated 09.05.23 signed by directors Rooney and Honculada.

(d) Accepting variously, as needed, the decision led by Rooney in 2013 in the instant proceedings (and earlier) as either a lone director, or with Wood (not engaging), or with his wife Janice and Susan Edgcombe as directors from 2009, or with his wife Janice by resolution 17.10.13, or as derivative claim led by him for the benefit of the company by reason of Wood impermissibly selling shares to Cassell, to give grounding for action by PEL.

[92] In his appeal, Mr. Weekes did not (save for the question of ratification which is addressed briefly below) address these findings and so for the reasons indicated, I am satisfied that this part of his appeal must fail.

Ratification by PEL

[93] In very brief submissions (which were not supplemented orally) counsel for Mr. Weekes submitted that, the learned trial judge failed to appreciate that integral to the argument concerning ratification was the issue of Mr. Rooney's entitlement to direct PEL and the continuing non-compliance of PEL under the Companies Act. Counsel reiterated earlier arguments advanced by the GoM and relied on the judgment in **Smith v Henniker-Major & Co**[34] noting that even if there was true ratification, it would not be effective where to permit it would unfairly prejudice a third party. Counsel noted that PEL is relying on a resolution dated 9th May 2023 some 10 years after filing the claims and after the issue was raised by the GoM.

[94] In response, counsel for Mr. Rooney submitted that it was accepted that PEL can ratify past decisions of its shareholders. He submitted that there was no prejudice caused by the ratification in May 2023 because whether or not Mr. Rooney improperly caused PEL to initiate proceedings, PEL would have always been bound by Mr. Rooney's improper decision. Moreover, if PEL were to complain, its remedy would be against Mr. Rooney and not the appellant. Counsel pointed out that PEL has always supported the litigation and that the ratification in 2023 has simply put PEL's standing beyond doubt. Counsel concluded that the ratification of Mr. Rooney's decision to cause PEL to issue proceedings was an internal process and not a basis upon which the appellant can purport to avoid these proceedings.

Analysis and conclusion

[95] Having reviewed the parties' submissions and the relevant case law I am not satisfied that the judgment in **Smith v Henniker-Major** in any way assists the appellant. At paragraphs 63 and 66-70 of the judgment, the English Court of Appeal

[34] [2002] EWCA Civ 762.

closely examined and applied the decision in **Presentaciones Musicales SA v Secunda** ultimately determining that it was binding precedent as to the proposition that ratification of proceedings is not automatically barred after the expiry of the limitation period. That case was concerned with a writ (claiming relief for breaches of an agency contract and copyright infringement) which had been issued in April 1988 in the name of a Panamanian company (Presentaciones) by solicitors who mistakenly believed that they had authority to do so. The alleged breaches went back to November 1981. In fact, the company had been put into dissolution and liquidators had been appointed in June 1987. In March 1991 the defendants applied to have the proceedings stayed or struck out. In May 1991 the liquidators purported to ratify the commencement of the action, outside a three-year limit prescribed by Panamanian company law (the report omits that part of the judgment of Dillon LJ but the three-year limit was held not to be an obstacle to ratification).

[96] The defendants relied on the old case of **Bird v Brown**[35] for the proposition— 'that the act of ratification must be taken at a time, and under circumstances, when the ratifying party might himself have lawfully done the act which he ratifies' and sought to apply the same principle to ratification of an action after the cause of action was wholly or partly statute-barred. However, Dillon LJ (with whom Nolan LJ and Roch LJ agreed) took the following approach to the question of ratification in these circumstances:

> "Where a writ is issued without authority, the cases show that the writ is not a nullity. For the nominal plaintiff to adopt the writ, or ratify its issue, does not require any application to the court. Accordingly, on the same general principle that justifies **Pontin v Wood** ([1962] 1 All ER 294, [1962] 1 QB 594), the plaintiff, in the simple example of an action raising a single cause of action which has been begun by solicitors without authority, must be entitled to adopt the action notwithstanding the expiration of the limitation period applicable to that cause of action."

[35] (1850) 4 Exch 786 at 799, 154 ER 1433 at 1439.

[97] Going further, Roch LJ observed:

> "I would suggest that that exception ought to be stated in these terms: that the putative principal will not be allowed to ratify the acts of his assumed agent, if such ratification will affect adversely rights of property in either real or personal property, including intellectual property, which have arisen in favour of the third party or others claiming through him since the unauthorised act of the assumed agent. The expiry of the limitation period in the present case does not create any such right in the defendants; if applicable it would merely bar the plaintiffs' remedies. **I would not extend this exception to cases such as the present where a defendant would receive a windfall defence in a case where the vice against which the Limitation Acts are designed to protect defendants, namely the bringing of claims at a time so far after the occurrence of the cause of action that a defendant is put at a disadvantage in defending the claim, does not exist**." (emphasis added)

[98] I completely agree and adopt the ratio in that case, and I further find much force in counsel for PEL's argument that Mr. Weekes has not demonstrated any real or substantial prejudice. The cause of action against the appellant remains the same and it has not been made out that ratification would cause any prejudice or embarrassment to the appellant. Accordingly, I am satisfied that this ground of appeal must fail.

Costs

[99] Given my reasoning herein, it is apparent that Mr. Brandt has been completely successful in his appeal and is entitled to his costs to be assessed if not agreed within 21 days. On the other hand, Mr. Weekes has been only partially successful in prosecuting his appeal. Given the partial success of Mr. Weekes in these proceedings, I am satisfied that the result should be costs neutral. Accordingly, the appropriate order as to costs would be that there is no order as to costs.

Disposition

[100] I would accordingly make the following orders:

(1) Appeal MNIHCVAP2023/0008 and Ground 6 of the Appeal in MNIHCVAP2023/0007 is allowed.

(2) The costs order of the learned judge is set aside.

(3) The issue of costs on the discontinuance is remitted for determination by judge of the High Court other than the learned trial judge in both MNIHCVAP2023/0008 and MNIHCVAP2023/0007.

(4) The remaining grounds of appeal in MNIHCVAP2023/0007 are dismissed.

(5) The order pertaining to the locus standi of PEL is affirmed.

(6) Mr. Brandt will have his costs of the appeal MNIHCVAP2023/0008, such costs to be assessed by a judge or master of the High Court if not agreed with 21 days.

(7) There is no order as to costs in appeal MNIHCVAP2023/0007.

I concur.
Margaret Price Findlay
Justice of Appeal

I concur.
Trevor Ward
Justice of Appeal

By the Court

Deputy Chief Registrar