

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)**

CLAIM NO. BVIHC (COM) 83 of 2017

BETWEEN:

JHAVERI DARSAN JITENDRA

Claimant

and

**[1] LAKSHMI ANIL SALGAOCAR
(As Administratrix of the Estate of
ANIL VASSUDEVA SALGAOCAR, deceased)
[2] MILLION DRAGON WEALTH LTD**

Defendants

AND CLAIM NO BVIHC (COM) 213 of 2017

BETWEEN:

**[1] JHAVERI DARSAN JITENDRA
[2] PD HOLDINGS LTD**

Claimants

and

**[1] LAKSHMI ANIL SALGAOCAR
(As Administratrix of the Estate of
ANIL VASSUDEVA SALGAOCAR, deceased)
[2] WINTER MEADOW CAPITAL INC**

Defendants

Appearances:

Mr. Stuart Cullen of Harney, Westwood and Riegel LP as officer of the Court
(having earlier represented the claimants)

Mr. Timothy Collingwood QC, with him Mr. Matthew Brown and Dr. Alicia Johns of
Conyers Dill and Pearman for the defendants

2020: June 23,
July 2

JUDGMENT

- [1] **JACK, J [Ag.]:** This is an application for the determination of the incidence of costs after (a) the claimants served notices of discontinuance in respect of two claims brought in this Court and (b) the defendants served a notice of discontinuance in respect of an appeal to the Court of Appeal.

The facts

- [2] The first claimant (“Mr. Jitendra”) and the deceased (“Mr. Salgaocar”) were once friends and business partners. Both were of Indian heritage. Mr. Jitendra was a businessman living in Hong Kong with a particular interest in the diamond trade. Mr. Salgaocar had mining interests in India. In 2015 Mr. Salgaocar issued proceedings against his erstwhile friend in Singapore claiming that Mr. Jitendra held extensive assets on trust for him and had failed to account to him for them. This has been known in the proceedings as “Suit 821”, from the Singapore action number HC/S821/2015.
- [3] Mr. Salgaocar died intestate on 1st January 2016 before Suit 821 reached trial. There was then a dispute between his widow (“Mrs. Salgaocar”), who is the first defendant in each of the actions before this Court, and his daughter, Chandana, as to who should administer his estate. There was extensive litigation, but ultimately Mrs. Salgaocar was appointed as administratrix. In the meantime no progress was made with Suit 821.
- [4] PD Holdings Ltd is a single purpose vehicle held by Mr. Jitendra. It is incorporated in the United Arab Emirates. Million Dragon Wealth Ltd and Winter Meadow Capital Ltd are both BVI companies held on the Salgaocar side.
- [5] On 16th May 2017 Mr. Jitendra issued the first action which is before me (“BVI 83”). Very shortly afterwards on 7th June 2017, Mrs. Salgaocar issued an application for an anti-suit injunction in Singapore (“OS 627”), the full action number of which is HC/OS627/2017. That matter came to a hearing before

Ramesh J, who on 1st December 2017 gave judgment¹ dismissing the application for an anti-suit injunction on the basis that Singapore was not shown to be “the clearly more appropriate forum for the resolution of BVI 83.”

- [6] Mrs. Salgaocar sought to appeal to the Singapore Court of Appeal. In the meantime, however, four applications issued by Mrs. Salgaocar and the two defendant companies came before Adderley J. Two of the applications were to set aside the grant of permission to serve the claims out of the jurisdiction on Mrs. Salgaocar. Two were applications by the companies for a stay. In all four applications the essential issue was whether the BVI were the *forum conveniens*.
- [7] Adderley J held² that an issue estoppel arose from the judgment of Ramesh J, so that the BVI were the *forum conveniens*. He refused to set aside the orders for service out of the proceedings and refused to stay the proceedings brought against the Salgaocar BVI companies. That was sufficient to determine the matter, but he then went on to reach the same conclusion on the merits.
- [8] The learned judge made orders in accordance with his findings and ordered that the defendants paid the claimants’ costs. Importantly, those orders were never sealed. The drafts appear never to have been approved by the judge.
- [9] Notwithstanding the absence of any sealed orders, the defendants appealed. On 17th July 2019 our Court of Appeal granted leave to appeal.
- [10] Shortly after that, on 26th July 2019, the Court of Appeal of Singapore handed down its judgment.³ The Court allowed the appeal from the judgment of Ramesh J and granted an anti-suit injunction against Mr. Jitendra restraining him from “maintaining continuing and/or taking any steps in [BVI 83].”

¹ [2018] SGHC 90.

² Judgment delivered 1st April 2019 at paras [26] to [36].

³ [2019] SGCA 42.

- [11] On 19th August 2019 the claimants served notices of discontinuance under CPR Part 37 in respect of both BVI 83 and BVI 213. On 19th September 2019 the defendants served a notice of discontinuance under CPR 62.25 in respect of the appeal to our Court of Appeal. It is the consequences of these notices of discontinuance which I need to consider.

Costs in the Court of Appeal

- [12] I can deal with the costs consequences of the discontinuance of the appeal to the Court of Appeal quite simply. CPR 62.26(1) provides:

“Unless the—
 (a) parties agree; or
 (b) the court orders otherwise;
an appellant who discontinues is liable for the costs incurred by the respondent against whom the claim is discontinued, on or before the date on which notice of discontinuance was served.”

- [13] Thus, on its face, the defendants must pay the claimants’ costs of the appeal, notwithstanding that (as a result of the Singapore victory on appeal and the claimants’ notice of discontinuance of the first instance proceedings) they are the “winners”. In my judgment, I have no jurisdiction to vary this result. The reference to “the court” in CPR 62.26(1)(b) is to the Court of Appeal: see the definition of “court” in CPR 62.1(2). Any relief to which the defendants might be entitled (and there is a body of law about academic appeals) must be sought from the Court of Appeal, not from me.

Costs at first instance

- [14] So far as the costs at first instance are concerned, CPR 37.6 provides:

“(1) Unless the—
 (a) parties agree; or
 (b) court orders otherwise;
a claimant who discontinues 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.

- (2) If a claim is only partly discontinued—
 (a) the claimant is only liable for the costs relating to that part of the claim which is discontinued; and
 (b) unless the court orders otherwise,
the costs which the claimant is liable to pay are not to be quantified until the conclusion of the rest of the claim.”

- [15] Mr. Collingwood QC submitted that the effect of discontinuing the actions was that earlier interlocutory costs orders, such as those made by Adderley J (but never sealed), were automatically reversed. He relied on the judgment of Pill LJ in **Safeway Stores Ltd v Twigger**.⁴ The view of Pill LJ that there was automatic reversal, except where the defendant’s behaviour was vexatious or abusive, was clearly *obiter*. It was not subsequently followed by Andrew Smith J in **Dar Al Arkan Real Estate Co v Al Refai**.⁵ The English Court of Appeal in **Michael Wilson & Partners Ltd v Sinclair**⁶ expressed (albeit again *obiter*) doubts about Pill LJ’s view. The weight of English authority is in my judgment against a notice of discontinuance leading to an automatic reversal of earlier costs orders in favour of the discontinuing claimant.
- [16] This does, however, result in an obvious injustice on the facts of the current case. The decision of the Singapore Court of Appeal meant that Adderley J’s judgment stood to be reversed. The consequence of that would be that the claimants would pay the defendants’ costs, rather than *vice versa*. Indeed Mr. Cullen’s position as officer of the Court was that Adderley J’s orders could not be reversed, so that the Salgaocar parties would be liable for the Jitendra parties’ costs.
- [17] Now the Court has always had the power to recall its orders up to the point at which the order is sealed. The leading authority, after which the jurisdiction has been named (although it is very much more ancient than 1972), was **Re Barrell Enterprises**.⁷ The Court of Appeal in that case held that the jurisdiction to recall

⁴ [2010] EWCA Civ 1472, [2011] 2 All ER 841 at para [58].

⁵ [2015] EWHC 1793 (Comm), [2016] 6 Costs LO 865.

⁶ [2017] EWCA Civ 3, [2017] 1 WLR 2646 at paras [103] to [109].

⁷ [1973] 1 WLR 19.

unsealed orders was a narrow one, confined to “exceptional circumstances”. In **Re L (Children) (Preliminary Finding: Power to Reverse)**⁸ the UK Supreme Court held that there were no such restrictions. Baroness Hale, giving the judgment of the Court held:

“27. Thus one can see the Court of Appeal struggling to reconcile the apparent statement of principle in **Barrell** coupled with the very proper desire to discourage the parties from applying for the judge to reconsider, with the desire to do justice in the particular circumstances of the case. This court is not bound by **Barrell** or by any of the previous cases to hold that there is any such limitation upon the acknowledged jurisdiction of the judge to revisit his own decision at any time up until his resulting order is perfected. I would agree with Clarke LJ in **Stewart v Engel**⁹ that his overriding objective must be to deal with the case justly. A relevant factor must be whether any party has acted upon the decision to his detriment, especially in a case where it is expected that they may do so before the order is formally drawn up. On the other hand, in **Re Blenheim Leisure (Restaurants) Ltd**,¹⁰ Neuberger J gave some examples of cases where it might be just to revisit the earlier decision. But these are only examples. A carefully considered change of mind can be sufficient. Every case is going to depend upon its particular circumstances.”

[18] In the current case, Adderley J has retired, so he is not able to consider any **Barrell** application (assuming that is how an application to recall an order should still be called). This does not in my judgment affect the power of the Court to recall his orders. Orders are always formally made by the Court in the exercise of the Court’s powers, not by the judge who approves the order. In the current case, if the judge were still sitting, then it would be for him to consider any **Barrell** application. However, since he is unavailable, the jurisdiction can in my judgment be exercised by another judge of the Court. This can be seen from the English practice in relation to the exercise of the very similar power under the slip rule to correct judgments and orders: CPR 40.10 in both our and England’s CPR. An opposed application under the slip rule “should, if practicable, be listed for hearing

⁸ [2013] UKSC , [2013] 1 WLR 634.

⁹ [2000] 1 WLR 2268 at p 2282.

¹⁰ [1999] *The Times* 9th November. Neuberger J’s examples included: “a plain mistake by the court, the parties’ failure to draw to the court’s attention a plainly relevant fact or point of law and the discovery of new facts after judgment was given.”

before the judge who gave the judgment or made the order.”¹¹ It follows that if such listing is impracticable a different judge can hear the matter.

[19] In my judgment, this is an appropriate case to recall the orders of Adderley J. I will hear the parties on the best form of order. My preliminary view is that in place of each of Adderley J’s draft orders, I should substitute “no order save that the claimants pay the defendants’ costs.” The orders would be dated 1st April 2019 and expressed to be made by Adderley J, as varied by Jack J on the date of this judgment. However, I will hear the parties on the form of the order, if it cannot be agreed. As to the order to be made on this judgment, it may be that a declaration would be appropriate. Again, I will hear the parties.

A final matter

[20] I should mention one matter. The claimants and Mr. Cullen are understandably concerned not to breach the terms of the anti-suit injunction made by the Singapore Court of Appeal. The costs claimed by Mrs Salgaocar and her companies amount to some US\$1.3 million. This is on any view a high figure, both absolutely and in terms of the comparatively limited steps taken in the actions in this Territory. I have not seen the detailed statement of costs, but there may be scope for that figure to be reduced. It is of course entirely a matter for the courts of Singapore to interpret the terms of their injunction, but they may wish to clarify that Mr. Jitendra and his company should not be inhibited in their defence of the detailed assessment of the costs by the anti-suit injunction.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar

¹¹ English CPR Practice Direction 40B para 4.4.