Case No: 2012-834

Neutral Citation Number: [2015] EWHC 1793 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/06/2015

Before:

MR JUSTICE ANDREW SMITH

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Between:

(1) Dar Al Arkan Real Estate Company	**First Claimant**
(2) Bank Alkhair B.S.C.(c) (formally Unicorn Investment Bank B.S.C.(c)) (a company incorporated in the Kingdom of Bahrain)	**Second Claimant**
and	
(1) Mr Majid Al-Sayed Bader Hashim Al Refai	**Defendant**

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David Foxton QC and Paul Casey
(instructed by **Addleshaw Goddard LLP**) for the **Claimants**

Stuart Ritchie QC, Neil Mendoza and Harriet Ter-Berg
(instructed by **PCB Litigation LLP**) for the **Defendant**

Hearing date: 5 June 2015

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Judgment

Mr Justice Andrew Smith:

Introduction

1. In this judgment I adopt the same expressions as I have in previous judgments in this case.

2. On 15 May 2015, the claimants, having agreed terms of settlement with Kroll, Mr Richardson and FTI in the course of the trial of the iniquity issues, applied for permission to discontinue their claims against Mr Al Refai. Mr David Foxton QC, who represented them with Mr Paul Casey, observed that the claimants might not need permission of the court to do so, but they made the application to avoid any dispute about that. The claimants agreed to pay Mr Al Refai's costs on an indemnity basis, the amount to be assessed if not agreed, and on 19 May 2015 I gave them permission to discontinue with immediate effect, and made an order by consent that the claimants shall pay Mr Al Refai's costs of the action on the indemnity basis (the "discontinuance costs order"). I gave directions for a hearing to resolve outstanding differences. The parties have resolved some of them by agreement, but two questions about costs remained outstanding (as well as a difference about a payment on account of costs, on which I ruled orally that the claimants should pay £1.45 million). Having heard argument about them on 5 June 2015, this is my judgment on the two questions, which are:

   i) The "stay" question: whether the court should stay enforcement of the discontinuance costs order; and

   ii) The "previous orders" question: whether orders previously made in the case that Mr Al Refai pay the costs of the claimants should be overridden by the discontinuance costs order.

The stay question

3. The claimants apply for a stay of execution of the discontinuance costs order (both as regards the £1.45 million ordered on account and the sum finally awarded). They rely on CPR83.7(4), which provides (so far as is material) that, "If the court is satisfied that (a) there are special circumstances which render it inexpedient to enforce the judgment or order … then … the court may by order stay the execution of the judgment or order, either absolutely or for such period as the court thinks fit". They say that fairness demands that enforcement of the discontinuance costs order be stayed pending the determination of the so-called "enforcement action", which the claimants have brought in this court, [2015] folio 93. They accept that, if a stay is granted, they should pay into court an appropriate sum by way of security.

4. In the enforcement action the claimants seek relief in respect of judgments that BA obtained against Mr Al Refai in the Bahrain Chamber for Dispute Resolution ("BCDR") in two civil cases - (i) a judgment of 18 November 2012 (the "November 2012 judgment") for US$1.709 million and BD13,136/600 (in total the equivalent of some £1,149 million), and (ii) a judgment of 7 October 2013 (the "October 2013 judgment") for US$2 million and BD15,806/500 (in total the equivalent of some £1,335 million): BA seeks orders that Mr Al Refai pay the judgment debts (or their sterling equivalent), and both claimants seek to set off these judgment debts against

the discontinuance costs. In his acknowledgment of service, Mr Al Refai accepts the court's jurisdiction.

5. Until his employment was terminated on 1 August 2010 Mr Al Refai was employed by BA as its Chief Executive Officer and Managing Director. He was also a director of Daar until 23 June 2010. The judgments of the BCDR arise from Mr Al Refai's employment by BA:

   i) The November 2012 judgment is in respect of an allegation that, while so employed, he (and another employee, Mr Falah Al Falah) unlawfully appropriated money belonging to BA. Mr Al Refai says that the relevant payments to Mr Al Falah or his company (or both) were made in BA's best interests and were properly incurred.

   ii) The October 2013 judgment is in respect of loans apparently made to Mr Al Refai before he was dismissed. Mr Al Refai's case is that the loans were to be set off against an end-of-service payment to which he was entitled under Bahraini employment law on the termination of his employment and which BA denied him on the basis of trumped-up allegations of misconduct.

   Neither judgment has been satisfied in whole or in part.

6. Mr Al Refai's solicitor, Mr Trevor Mascarenhas, a partner in PCB Litigation LLP ("PCB"), explained in a witness statement of 26 May 2015 that Mr Al Refai maintains that the judgments were obtained by fraud and intends to defend the claims in the enforcement action on that basis. (He also said that consideration is still being given to whether other defences might be available). In summary, Mr Al Refai contends that:

   i) The November 2012 judgment was based wholly on findings made by the Bahraini Criminal Court in a judgment of 26 June 2012 (the "June 2012 judgment").

   ii) The June 2012 judgment resulted from fraud on the part of BA, who had brought a criminal complaint as part of a campaign against Mr Al Refai designed to avoid liabilities arising from his employment contract and made allegations without genuinely believing them. BA is said to have given fraudulently misleading witness statements to Deloittes, who were responsible for investigating the complaints.

   iii) The fraud that brought about the June 2012 judgment also vitiates the November 2012 judgment.

   iv) The October 2013 judgment was based on BA's false and fraudulent assertion, accepted by the Court, that Mr Al Refai had legitimately been dismissed for gross misconduct.

7. There is no dispute about the principles that govern a decision whether to stay enforcement of a judgment or order under CPR 83.7 (or its materially identical predecessor, RSC Ord 47 r.1). The wording of the rule requires that before a stay is granted the court concludes that there are "special circumstances" and that it is

"inexpedient" that the judgment be enforced, meaning that enforcement would be unjust: Canada Enterprises Corp Ltd v MacNab Distilleries Ltd, (23 March 1976) [1987] 1 WLR 813, 818C. Ordinarily that conclusion is not justified simply because there is a cross-claim: Burnet v Francis Industries plc, [1987] 1 WLR 802, in which Bingham LJ described an order for a stay as "unusual" and said that the requirement of special circumstances is strictly insisted upon (at p.811C). Nor ordinarily is a stay justified simply because the fruits of the judgment or order will be removed from the jurisdiction: Rowland v Gulfpac, (unrep. 12 May 1997) per Rix J. However, Mr Foxton submitted, and I agree, that it is implicit in the Burnet case that a cross-claim coupled with foreseeable difficulties in enforcing judgment on it if it succeeds, *can* amount to special circumstances within the meaning of the rule. Indeed, in the Canada Enterprises case Cairns LJ said (loc cit at 816H) that the "very fact of the probability of the money going abroad" was sufficient, the applicant having shown that "there might be some difficulty in recovering the fruits of their judgment".

8. In this case I have already granted two applications by the claimants to stay enforcement of orders against Mr Al Refai in view of the November 2012 judgment. On 18 July 2014 I stayed enforcement of damages awarded under a cross-undertaking given to support a freezing order: I observed that, although I knew nothing of the merits of the November 2012 judgment or the dispute behind it, it was on the face of it a judgment of a court of competent jurisdiction. That stay was until 31 July 2015 (by which time I anticipated that I would have heard and determined the iniquity issues) or, if earlier, the November 2012 judgment was satisfied. On 31 January 2015 I stayed costs orders in Mr Al Refai's favour until 31 July 2015. Mr Al Refai has accepted that these dates of 31 July 2015 should be extended to January 2016, and Mr Foxton suggested that it is inconsistent to oppose a stay of the payment of the costs ordered on 19 May 2015. I do not accept that: I should be reluctant to discourage sensible co-operation in case management by treating every concession as a precedent. But, even if Mr Al Refai's position be inconsistent, that would not justify the stay that the claimants seek.

9. In the Burnet case Bingham LJ set out (at p.811D-H) eight considerations that should be considered when a stay is sought on the basis of a cross-claim:

   i) The nature of the claim (so that, for example, there will seldom be a stay on enforcement of a judgment on a dishonoured bill of exchange).

   ii) In cases where the judgment debtor does not himself have a cross-claim against the judgment creditor, but a person associated with the judgment debtor does, how close that association is. In Orri v Moundreas, [1981] Comm LR 168 Mustill J, whose judgment was cited with approval by Ralph Gibson LJ in the Burnet case at p.809B, referred to cases "where the court will look behind the corporate structure at one or both parties to find the persons truly at interest, and then exercise its power to grant a stay, as the justice of their mutual relations may demand".

   iii) The relationship (if any) between the claim giving rise to the judgment and the cross-claim.

   iv) The strength of the cross-claim.

v) The size of the cross-claim, a consideration that Bingham LJ thought to be rarely, if ever, decisive.

vi) The likely delay before the cross-claim will be determined.

vii) The prejudice to the judgment creditor if a stay is granted.

viii) The risk of prejudice to the party making the cross-claim if a stay is refused.

Bingham LJ made clear that these are not the only relevant considerations and that the importance of each depends on the circumstances of the particular case. But I use them as a convenient framework.

10. The nature of the claim: here the claimants seek to stay an order for the payment of costs: that is to say, an order whose purpose is to compensate Mr Al Refai for his legal expenses incurred in this litigation, and so, as Mr Al Refai's counsel, Mr Stuart Ritchie QC put it, the "asset" arises only through the litigation. He submitted that for good reasons orders for costs should be enforced and not stayed: this policy supports that courts' authority over parties before them. He cited Aldous LJ's judgment in Perotti v Watson, (4 April 2001), [2001] WL 415585: Mr Perotti sought to have stayed a costs order against him and in favour of Mr Watson so as to enable him to pursue other litigation against Mr Watson. Referring to a submission that Mr Watson should not be kept out of "the fruits of the costs order in his favour", Aldous LJ commented (at para 12), "I pause because costs orders are not really fruits at all. They are recompense for costs to be paid or which have been paid"; and he added (at para 15) that the costs orders were "recompense for Mr Watson for the money which has been expended by him in rebutting the flow of litigation instigated by Mr Perotti. In my view he is entitled to be paid the sums ordered by the court …". I accept that, in refusing to stay the order, Aldous LJ apparently gave some weight to the fact that it was a costs order, but this was only one consideration in the court's assessment.

11. Mr Ritchie sought to rely on other features of the discontinuance costs order:

i) It followed the claimants discontinuing the claims against Mr Al Refai. He cited the judgment of Pill LJ in Safeway Stores Ltd v Twigger, [2010] EWCA Civ 1472, in which he said at para 58 that by discontinuing their claim against a defendant, the claimants "accepted that it is not a valid claim against" him. Pill LJ did not, I think, mean that this is always the implication of discontinuance: certainly, it is not unusual (to give just one of many possible examples) for a claim to be discontinued when it is learned that a defendant is uninsured or otherwise not worth suing. In this case I can well understand that, settlement having been reached with the other defendants (on terms of which I am unaware), the claimants did not wish to pursue this expensive litigation against Mr Al Refai alone. I do not infer that they accepted that they had no valid claims against him.

ii) The discontinuance costs order followed discontinuance at a late stage in the proceedings, during the first trial in litigation that was being managed in stages, after the claimants had cross-examined Mr Al Refai and after they had decided not to call any witnesses of fact. I can, I think, safely infer that the timing was connected with the settlements with other defendants, and of

course I know nothing of the negotiations that led to them. It was suggested that the claimants faced questions about their case on the iniquity issues to which they had no answer, and there might be something in that, but there is no sufficient basis to find that they suddenly saw difficulties that they had not previously recognised and considered.

iii) Thirdly, I was invited to take it into account that the claimants agreed to pay costs assessed on the indemnity basis. Mr Ritchie, citing the judgment of Tomlinson J in Three Rivers District Council v The Governor and Company of the Bank of England, [2006] EWHC 816 (Comm), submitted that thereby the claimants recognised that the case and their conduct of it was "out of the norm", and in particular suggested that this was the sort of case that Tomlinson J described at para 25: a case in which weak and opportunistic claims, inconsistent with the documents, involving allegations of dishonesty and other impropriety over a long period, were aggressively pursued inter alia in cross-examination, and were maintained to the "bitter end". I shall revert to how the claim was pursued, but the fact that the claimants agreed to pay indemnity costs does not seem to me in itself a significant consideration that weighs against the stay. I add only that, because the costs order went by consent, I have not myself heard argument about the appropriate basis for assessment, and, as things stand, I regard that as an open question.

12. I therefore accept that it is a relevant consideration to take into account against the application that the order is for costs, but I do not attach great weight to Mr Ritchie's other points about the nature of the discontinuance costs order and the circumstances in which it was made.

13. What is the relevance of the relationship between Daar and BA? Daar as well as BA seek a stay of enforcement against them, and Mr Foxton says that there is sufficient connection between Daar and BA to justify this. I see three relevant aspects to their relationship:

i) The corporate connection: the nature of the relationship between Daar and BA was an issue in the litigation. The case advanced by the defendants (other than FTI) was that both were controlled by Sheikh Yousef, but I am not in a position to adjudicate upon it. However, there is not, and never was, any dispute that Daar and BA were (and are) related parties: this was stated in their annual reports and accounts.

ii) Their relationship in the litigation: the claimants together brought these proceedings, and, at the risk of over-generalisation and while BA alone brought claims against Mr Al Refai for breach his employment contract, otherwise the claims brought by the two claimants were largely similar and arose from largely similar facts.

iii) The relationship in the discontinuance costs order: it was against both claimants, and created a joint and several liability. This is therefore not simply a case of one party seeking a stay in reliance on a third party's claim against the judgment creditor.

14. The relationship between the liability under the discontinuance costs order and the claims in the enforcement action: there is a distinct overlap between issues in this litigation and those likely to arise in the enforcement action. The claimants contended in this litigation (and this has always been pleaded in the first two paragraphs of the particulars of claim) that Mr Al Refai was dismissed by BA for gross misconduct and since then has borne a grudge against the claimants and waged a campaign to injure them. Mr Al Refai's contention, on the other hand, is that the claimants sought to discredit him after his relationship with Sheikh Yousef broke down and in order to avoid BA's substantial liabilities under his employment contract. I take three points in Mr Ritchie's skeleton argument to illustrate more specific overlaps between the issues in the Bahraini proceedings and these:

    i) First, the claimants allege that Mr Al Refai embezzled from BA $1 million that had been paid by Al Arkan into the so-called Rubicon account to create a bonus pool for employees of BA. Mr Al Refai refutes this in paras 42 to 48 of his rejoinder, and will apparently contend in the enforcement action that this allegation was made dishonestly and tainted the Bahraini judgments.

    ii) Secondly, the claimants allege that Mr Al Refai improperly shredded documents of BA before his employment ended. Mr Al Refai refutes this in paras 5 to 12 of his rejoinder, and alleges Sheikh Yousef's statement about this in the Bahraini proceedings was dishonest.

    iii) Thirdly, the evidence for the Bahraini proceedings apparently included allegations about a cash-flow spreadsheet said to have concealed a payment of $11.25. Mr Al Refai says that the allegation was made dishonestly, and his case about that is set out in this litigation at paras 18 to 21 of his rejoinder.

    The reality is that this litigation and the Bahraini proceedings are about different aspects of the same dispute.

15. The strength of the claim in the enforcement action: it is common ground that both the claims in the enforcement action and the defence to them are arguable. It is not said that there is no real prospect of the claims succeeding or no real prospect of them being successfully defended. It is also rightly accepted that I cannot go further to assess the merits in the enforcement action. I shall say no more about this consideration.

16. The size of the claims in the enforcement action: I need only say that Mr Al Refai's statements of costs are for something approaching, but no more than, £2.5 million, and that they are, for practical purposes, matched in amount by the claims in the enforcement action.

17. The timing of the enforcement action: the action was brought on 28 January 2015, which was, as Mr Al Refai observed, more than two years after the first Bahraini judgment. On 18 July 2014, when ordering a stay on enforcement of damages awarded under the cross-undertaking, I said that, if the claimants sought an extension of the stay beyond 31 July 2015 without having taken steps to enforce the November 2012 judgment, they would need a good explanation for not doing so. Against this background, Mr Al Refai relies on delay in bringing the enforcement proceedings as

demonstrating a lack of urgency on the part of the claimants, and so a reason not to stay enforcement of the discontinuance costs order.

18. However, Mr Al Refai is not in a position to complain of more recent delay. Initially he did not instruct PCB to accept service of the enforcement action. Then on 24 February 2015 PCB indicated that they would accept service if specified conditions were met. In the event, terms for accepting service were agreed only in May 2015, and by a consent order on 14 May 2015 the claim form was deemed served on 1 May 2015. I see no reason that the claims in the enforcement action should not be tried in the first half of 2016.

19. I am not persuaded that the claimants are to be criticised for not bringing the enforcement action earlier. After all, until recently the parties were fully engaged in these demanding proceedings, which no doubt and understandably will have been given priority. More importantly, because of the overlapping issues to which I have referred, even if the enforcement action had been brought earlier, as a matter of case management it would probably have been tried with the second stage of this litigation. In reality, I do not think that the enforcement action should reasonably have been pursued more urgently.

20. Will Mr Al Refai be prejudiced if a stay is ordered? The evidence about this is that Mr Al Refai intends to use any recovery under the discontinuance costs order to pay for "continuing legal representation in England, including the payment of outstanding legal bills, and in other jurisdictions in which the Claimants have brought claims against him". Mr Mascarenhas refers in his statement to the resources that the claimants have deployed in this litigation, and states that "Mr Al Refai simply cannot compete with [them] and the recovery of legal costs in these proceedings would be important in being able to deal effectively with the Enforcement Proceedings".

21. There is no evidence, and Mr Mascarenhas does not state, that Mr Al Refai cannot defend the enforcement action or otherwise he could not fund litigation if the claimants' application is granted. I do not consider that there is an appreciable risk of such prejudice, not least because, according to the claim that Mr Al Refai made against the claimants under a cross-undertaking in damages, he or his company, Oliver Property Limited, apparently recovered some £4 million in about 2013 from the sale of a London property. In any case, if Mr Al Refai relies on more than the inconvenience indicated in Mr Mascarenhas' evidence, he should have given evidence about it.

22. What is the potential prejudice to the claimants if Mr Al Refai enforces the discontinuance costs order? The claimants do not rely on prejudice to Daar but on prejudice to BA's prospects of enforcing the Bahraini judgments. They are understandably concerned that Mr Al Refai will resist and indeed obstruct attempts to enforce them. In this litigation, in a judgment of Cooke J the court concluded that Mr Al Refai had not complied with a freezing order then in force against him. He is an international businessman and in a position to arrange his affairs to make it difficult to enforce against his assets. He has no assets of any significance in this jurisdiction other than the benefit of the discontinuance costs order. (It was suggested by Mr Foxton that he has in the past avoided holding assets here in his own name: the London property was owned by a Guernsey company, whose shares were held by another Guernsey company. On their face, I accept, the arrangements seem to have

been rather convoluted, but I do not think the evidence sufficient to draw any inference about the reason for them. I disregard this point.) He is a Kuwaiti national, and is now resident in Kuwait, having moved there from Bahrain in order to escape the jurisdiction of the Bahraini court, who he thought might be influenced by Sheikh Yousef and Sheikh Abdullatif and before whom he feared he would not receive a fair trial. The claimants brought enforcement proceedings in Kuwait in September 2013 and obtained judgment. However, Mr Al Refai has appealed against it, and I am not in a position to assess the prospects of him successfully avoiding enforcement there.

23. On 12 April 2015 the Bahraini Labour Court of First Instance gave judgment for Mr Al Refai against BA in the sum of $1.9 million, but I understand it is under appeal. (Mr Al Refai is apparently also considering an appeal or other redress in respect of the balance of his claim that was rejected.) Moreover, BA obtained a further judgment against Mr Al Refai in the BCDR of 2 February 2015 (the "February 2015 judgment") for some $12.2 million. This is not the subject of the enforcement action or other proceedings in this jurisdiction, but Mr Foxton submitted that the claimants cannot find comfort in Mr Al Refai's judgment in that, assuming it survives the appeal, it might well be set off against the February 2015 judgment. I accept that submission.

24. The only other asset of Mr Al Refai, as far as the evidence goes, against which BA might seek to enforce the Bahraini judgments is a holding of 382,564 shares in Daar, which Mr Al Refai acquired for $2 million on 8 November 2007 and which Sheikh Yousef holds on his behalf. There is no evidence of their present value, and more importantly the evidence of Mr Kambiz Larizadeh, a partner in Addleshaw Goddard, who represent the claimants, is that "enforcing foreign judgments in Saudi Arabia can be challenging", a key requirement being that the court would have to be satisfied that the judgment is Sharia-complaint and it being a matter of judicial discretion whether this requirement is satisfied. (I have been informed since preparing this judgment and sending a draft of it to the parties that Mr Al Refai has recently instructed Sheikh Yousef to sell the shares and to remit the sale proceeding and any dividends paid on them to PCB's client account. Apparently no response has been received. This development does not affect my assessment as things now stand, and I do not pre-judge whether, in light of any response from Sheikh Yousef, it might found an application to set aside or vary the stay.)

25. On the evidence before me, I conclude that, if no stay is granted, at best it will be expensive and time-consuming for the claimants to enforce the Bahraini judgments, and there is a real prospect that their efforts will be unsuccessful.

26. As I have mentioned, Mr Ritchie also submitted that the stay application should be refused because of the way in which the claimants have conducted this dispute and these proceedings. I have set out my conclusions about their conduct before the proceedings were brought and when they were launched in a judgment delivered on 12 December 2012 ([2012] EWHC 3539 (Comm)), and I shall not repeat what I said in it. It suffices to say that when they launched the proceedings the claimants deployed material obtained by hacking into Mr Al Refai's email accounts, that they obtained ex parte orders, including a freezing order against Mr Al Refai, without making proper disclosure and through misrepresentations, and that they presented dishonest evidence to defend the orders when they were (successfully) challenged. In the litigation itself, the claimants made allegations of dishonesty and other

impropriety against Mr Al Refai and others, and then, having cross-examined him, they adduced no evidence to support them but discontinued their claims.

27. There is certainly force in the complaint about how the proceedings were launched. As a result of it I discharged the freezing order against Mr Al Refai, and in so far as the claimants' difficulties in enforcing the Bahraini judgments result, they have only themselves to blame. Thereafter, the litigation has been hard-fought, and in the end the claimants' decision to discontinue has prevented their serious allegations from being tested. However, as I have said, I know nothing of the terms of the settlements with the other defendants, and do not infer that thereby the claimants accepted that their claims against Mr Al Refai were not valid.

28. Mr Al Refai submits, however, that "the case being advanced by the Claimants was demonstrably false". Certainly, Mr Ritchie was able to identify specific issues in the iniquity trial on which it is difficult to see, from the material available to me, how the claimants' case could be right. But that is very different from demonstrating that, if the claimants had lost on all the so-called "iniquity issues", therefore their claims against the defendants, and in particular Mr Al Refai, would necessarily fail. I do not accept that Mr Al Refai has come close to showing that they would.

29. These seem to me the considerations that I must assess, and in my judgment, the claimants have made out their case for a stay. The most important considerations seem to me (i) the real risk that otherwise they will not be able to enforce the Bahraini judgments; (ii) that there is at least a real chance that the court will hold that they are enforceable here; (iii) the absence of evidence that Mr Al Refai will suffer significant prejudice if enforcement is stayed; and (iv) the relationship between this litigation and the Bahraini judgments. I weigh against them the arguments advanced on behalf of Mr Al Refai, including in particular the fact that the application is to stay enforcement of a costs order and the complaints about the claimants' conduct. I conclude that there are in this case "special circumstances" within CPR83.7 and that justice requires a stay.

The previous orders question

30. My order of 19 May 2015 expressly provided that the costs that the claimants were to pay to Mr Al Refai should include "costs previously ordered against [him]". I included this to avoid uncertainty about whether the order impinged on costs orders previously made in the litigation, in particular orders that Mr Al Refai should pay the claimants' costs. I do not need to list the occasions when such orders have been made: an example, according to Mr Ritchie the most significant example in terms of quantum, is the order of Cooke J made when he refused to vary the freezing order against Mr Al Refai. However, I made clear that I included the provision about such costs so that my order reflected what would be the prima facie position under an order for discontinuance made without permission under CPR38.6(1) as that rule was interpreted by Pill LJ in the Twigger case (cit sup), which is cited in the White Book guidance at 44.9.3. I also made clear, and the parties accepted, that this was ordered without prejudice to the claimants being entitled (without showing a change of circumstance after 19 May 2015) to dispute what Pill LJ had said, and to argue that, even if he is right about the interpretation of CPR38.6(1), I should direct that the interim orders in their favour previously in force should so remain.

31. Pill LJ expressed his view in the Twigger case (loc cit) at para 58 of his judgment, and said "The position should be, and … the wording of [CPR 38.6] provides, that [upon discontinuance] the claimant is on the face of it liable for [a] defendant's costs. That would have the effect of reversing the order for costs below. The claimant should not normally have the luxury of bringing a claim now accepted as invalid and not meeting costs incurred along the way". The other members of the Court of Appeal, Longmore and Lloyd LJJ, expressly left the question open: Longmore LJ observed at para 33 that generally "the formal position must … in my view be that orders for costs in favour of a claimant before discontinuance remain in effect. They will not be unwound merely because the claimant discontinues". But he acknowledged that discontinuance *might* have the effect that Pill LJ suggested.

32. Nothing either in CPR38.6 or elsewhere in the CPR states in terms that prima facie discontinuance reverses (or otherwise affects) previous costs orders, nor is it obvious that this is their necessary implication. I have already questioned Pill LJ's apparent starting point that discontinuance typically indicates acceptance that the claim (or, presumably by parity of reasoning, a part of a claim) was not valid. Mr Foxton advances other arguments to challenge Pill LJ's view: they seem to me powerful and persuade me respectfully to disagree with it. I draw heavily on the skeleton argument of Mr Foxton and Mr Paul Casey in explaining my reasons.

33. The general position is that interlocutory costs orders are not affected by other costs orders in the proceedings. The table at CPRPD44.2 provides that the effect of an interlocutory order for costs is that "The party in whose favour the order is made is entitled to that party's costs in respect of the part of the proceedings to which the order relates, whatever other costs orders are made in the proceedings". Of course, a practice direction cannot amend the rules themselves, but on the face of it it would be surprising if the rule and directions under them are not harmonious.

34. This point is vividly illustrated by the order of Cooke J. He rejected Mr Al Refai's application to vary the freezing order so as to allow him to raise funds against the security of a property, notwithstanding that he was in breach of the freezing order. He ordered Mr Al Refai to pay the claimants' costs, which he assessed at £25,000. When I discharged the freezing order, having concluded that the claimants had obtained and defended it dishonestly, it was never suggested that this should affect Cooke J's order, or that it should be revisited. Why then should the notice and order to discontinue the claims?

35. The courts' approach is not to revisit interlocutory orders for costs. After all, often the costs are assessed summarily and paid accordingly, and it is not easy to identify a legal mechanism to require a recipient to disgorge costs already paid, there being good consideration for the payment at the time that it was made: the recipient might have altered his position on the basis of the payment. In Koshy v Deg-Deutsche Investition, [2003] EWCA Civ 1718 Mummery LJ said (at para 19): "I start from the position that this is in substance an attempt, after the trial is over and in light of the results of the trial and the findings made at it, to re-litigate an interlocutory costs order. No court, whether on an application to set aside at first instance or by way of appeal, is receptive to such an application. It is bound to be a difficult exercise for the court to review the exercise of a discretion made at an early stage where not all the evidence is available or all the facts known or even the issues identified". Similarly, in Business Environment Bow Lane Ltd v Deanwater Estates Ltd, [2009] EWHC

2014 (Ch) Mann J observed at para 31 (surely correctly) that, "The modern practice is to be much more willing to make adverse orders for costs in interim matters as the case progresses rather than to leave them to be made later. The purpose of this is to fix liabilities and to allocate costs. … It is consistent with this that such orders for assessment should be dealt with on a self-contained basis. Otherwise part of the purpose of the orders is lost".

36. Further, Mann J's judgment (at para 38) implicitly rejects Pill LJ's characterisation of interlocutory costs as being "incurred along the way" in the course of proceedings. In a case concerning the costs of the trial of a preliminary issue, he considered it "entirely logical" that costs orders should remain unaffected by subsequent events in the litigation, and saw this as "consistent with a scheme of litigation in which the costs of applications are dealt with according to the fate of the application. It does not produce unfairness to the paying party, It was the defendant's choice in this case to take the collateral contract point, and it accepted that it should be dealt with as a preliminary issue".

37. As a matter of policy it would be surprising if the CPR provides for harsher consequences on a litigant who discontinues a claim or part of a claim than are typically visited on one who pursues an invalid claim or arid litigation to the bitter end. Surely a litigant who comes to appreciate that there is no point in pursuing a claim or part of one is to be encouraged to discontinue it promptly.

38. In practical terms Pill LJ's interpretation seems to me to produce inconvenient results. How often, having heard a potpourri of applications at a hearing, does the court direct that each party bears his own costs because overall the spoils are divided more or less equally? This avoids spending time on assessing the costs of each application and is justified if it would make little or no practical difference to make separate orders for one party on some applications and for the other on others. However, if favourable orders would routinely be undone on discontinuance, the two approaches would have different consequences in these circumstances, and legitimate objection could be taken to the convenient course that I have described.

39. I therefore conclude that prima facie under the rules discontinuance does not affect costs orders already made. I see no justification for a contrary order in this case. Even if I took a different view about the prima facie position, I would make orders to depart from it, and uphold orders already made. I do not propose to go through each such order: I have not, while case managing this litigation, made them in respect of applications and hearings that I considered a natural incident of the proceedings and for costs that were incurred "along the way". They were made because a position adopted by a party was unreasonable and obstructed the management of difficult litigation. The claimants' decision to discontinue against Mr Al Refai does not impinge on those assessments.

Conclusion

40. I therefore conclude (i) that the claimants' application for a stay be granted, and (ii) the costs order of 19 May 2015 should be adjusted so that it does not affect previous orders for costs. I should be grateful if counsel could draft an order to give effect to these conclusions.