



Neutral Citation Number: [2019] EWHC 670 (Ch)

Case No's: HC-2016-001224
and BL-2018-001875

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES

Rolls Building, Fetter Lane,
London EC4A 1NL

Date: 26/03/2019

Before:

CHIEF MASTER MARSH

Between
(in claim HC-2016-001224):

(1) MARIA GALAZI
(2) IPHEGENIA GALAZIS

Claimants

- and -

(1) CHRISTOPHER CHRISTOFOROU
(2) CHRISTO & CO LIMITED
(3) YVA SOLICITORS (a firm)
(4) ANGLO PROPERTIES LIMITED
(5) NORTHWEST ENTERPRISES LIMITED
(6) CHRISTODOULOS GALAZIS

Defendants

-and-

WELLSFORD SECURITIES LIMITED

Third Party

and Between
(in claim BL-2018-001875):

(1) WELLSFORD SECURITIES LIMITED
(2) ABBEE LIMITED

Claimants

-and-

(1) CHRISTOPHER CHRISTOFODOU
(2) C CHRISTO & CO LIMITED
(3) ANGLO PROPERTIES LIMITED

Andrew Hunter QC and Shane Sibbel (instructed by Keystone Law) for the Claimants in both claims

Thomas Grant QC and Maxim Cardew (instructed by Pinsent Masons LLP) for the 1st, 2nd, 4th and 5th Defendants in claim HC-2016-001224 and 1st to 3rd Defendants in claim BL-2018-001875

Amanda Savage (instructed by DAC Beachcroft LLP) for **Yva Solicitors** (appearing only on 12 October 2018)

Edward Hewitt (instructed by Wilsons LLP) for Christodoulos Galazis (appearing only on 12 October 2018)

Hearing dates: 12 October 2018 and 21 January 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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CHIEF MASTER MARSH

Chief Master Marsh:

1. This judgment arises in two related claims with claim numbers HC-2016-001224 and BL-2018-001875. I will adopt the descriptions given to them by the parties; “the Galazi Proceedings” and “the Companies Proceedings”. They involve a bitter dispute between siblings, Maria Galazi (“Mrs Galazi”), who is the first claimant in the Galazi Proceedings and Christopher Christoforou (“Mr Christo”), who is the first defendant in both claims. The principal issue for the court is the costs consequences arising from an order made on 12 October 2018 which gave permission to make substantial amendments to particulars of claim in the Galazi Proceedings. As part of that decision, it is necessary to determine whether the claimants in the Galazi Proceedings have discontinued the whole or part(s) of that claim. There are in addition four previous occasions when the court has reserved costs and the court is asked to determine those costs as between the parties.

2. It is necessary to explain who the parties are and the chronology of the claims in some detail.

The Galazi Proceedings

3. Mrs Galazi is resident in Cyprus. The second claimant is her daughter. Mr Christo is Mrs Galazi’s brother and Christo & Co Limited is a property management agency owned by Mr Christo. He is said to be a very successful property developer. I will refer to the first and second defendants as the “Christo Defendants”.

4. YVA is a firm of solicitors which regularly acted for the Christo Defendants.

5. The 6th defendant is Mrs Galazi’s son. He was until 6 August 2018 the 3rd claimant and, along with his mother and sister, represented by Keystone Law. However, on that date the court made an order of its own volition taking the unusual step of removing him as a claimant. I will refer to the current claimants in the Galazi Proceedings as the “Galazi Claimants”. I will refer throughout to Mr Christodoulos Galazis as the 6th defendant.

6. At an earlier stage of the claim, Mr Christo questioned the 6th defendant’s capacity to be a party to the claim. The issue of capacity was the subject of a contested hearing before Mr Spearman QC, sitting as a Deputy High Court Judge, on 5 April 2017. He gave directions for the 6th defendant to be examined and a certificate of his capacity provided. The matter came back before Mr Moss QC sitting as a Deputy High Court Judge on 25 July 2017 on the hearing of an application for a declaration that the 6th defendant lacked capacity. The application was successful and the Deputy Judge was highly critical of the conduct of the claimants’ solicitors. Directions were given for the appointment of a litigation friend. The claimants were ordered to pay the costs of the application on the indemnity basis. Ms Nicola Bushby of Wilsons Solicitors LLP was appointed as the 6th defendant’s litigation friend and for some time she continued to instruct Keystone Law on his behalf. Ultimately, it became impossible for joint representation to continue and this led to the order dated 6 August 2018. The current position is that the 6th defendant does not make any positive claims himself, but he is a defendant to a counterclaim made by Mr Christo.

7. The dispute has its origins in three matters: (i) monies entrusted by Mrs Galazi to Mr Christo to invest in three properties in London; (ii) an arrangement for Mr Christo and/or his firm to manage 238 Camden High Street, which is owned by Mrs Galazi; and (iii) a dispute about the proceeds of sale of 26 Armitage Road London NW11. The three investment properties are:
 - (1) 230-234 Kentish Town Road London NW5 which is registered in the name of Wellsford Securities Limited (“Wellsford”), a BVI company set up by Mr Christo. At the time the claim was issued, the shares in Wellsford were held by Mrs Galazi and her daughter.
 - (2) 208 West End Lane London NW5 which was also registered in the name of Wellsford.
 - (3) 59-61 Camden High Street London NW1 which was registered in the name of another BVI company set up by Mr Christo, Abbee Limited (“Abbee”). The two issued shares in Abbee were held by the 5th defendant (“Northwest”).
8. The claim was issued on 19 April 2016. At that time both Wellsford and Abbee had been struck off the register of companies in the BVI for failure to comply with filing requirements or the payment of fees. Under BVI law the companies remained legal entities despite the striking off but were incapacitated from taking steps such as dealing with their assets or bringing claims. The claimants say that the commencement of proceedings was urgent. The 4th defendant (“Anglo”), which is owned and controlled by Mr Christo, had discharged bank loans that were secured against the two properties held by Wellsford, and Anglo had become the holder of the registered charges. Anglo was threatening to enforce its loans. The claimants say the claim could not wait until Wellsford (and Abbee) had been restored to the register and, as a consequence, it was necessary for the claims that would otherwise have been made by Wellsford and Abbee to be formulated in an indirect way and brought by the Galazi Claimants and the 6th defendant.
9. The Galazi Proceedings included the following claims:
 - (1) Claims against Mr Christo and Northwest about the beneficial ownership of Wellsford and Abbee.
 - (2) Claims against Mr Christo and Christo & Co for an account in respect of rental income and development profits.
 - (3) Claims against Anglo for rectification of the Land Register to remove Anglo’s charges from the registered titles of the properties held in Wellsford’s name, or for declarations that the charges were held in trust.
 - (4) Claims for damages or compensation for breach of fiduciary duty against Mr Christo and Christo & Co, knowing assistance or knowing receipt against Christo & Co, YVA and Northwest and/or conspiracy against Mr Christo and YVA.

10. Mr Christo brought a counterclaim against the claimants for a declaration that he has a 50% beneficial interest in Wellsford and against Mrs Galazi for a sum of about £150,000. Christo & Co counterclaimed against Mrs Galazi for management fees.
11. The particulars of claim ran to 283 paragraphs and 56 pages. By the time the statements of case were complete, the pleadings extended to 382 pages. It is deeply unsatisfactory that a claim such as this one, which is not inherently complex, should produce pleadings that are of completely disproportionate length and density. The claim became impenetrable and unnecessarily expensive to deal with.
12. The original particulars of claim, which were not settled by the Galazi Claimants' current counsel team, have come in for a good deal of criticism and Mr Hunter, who now appears for the Galazi Claimants, acknowledges that the manner in which the claim was pleaded is less than ideal. The particulars of claim set out far too much detail. The word 'concise', the relevance of which does not need to be articulated, was ignored. However, it is significant that the defendants took no step to apply to strike out the particulars of claim, in whole or in part, or for summary judgment. The defendants responded enthusiastically in a defence and counterclaim that runs to 104 pages. Mr Grant, who appeared for the Christo Defendants, and who was not involved in its drafting, described it as a 'behemoth'. However, it is not open to the Christo Defendants to say with any conviction that the production of a behemoth was justified by the claimants' pleading. The requirement for concision applies equally to a defence (and counterclaim). It is hard to avoid the conclusion that the Galazi Claimants and the Christo Defendants took up arms against each other in a consciously overblown and aggressive manner that is typical of a claim between siblings. Both sides entirely lost sight of the requirement for concision in the statements of case. The indulgent way they have both approached the claim colours the approach adopted by the court and, inevitably, has adverse consequences for both sides.

The Companies Proceedings

13. The Companies Proceedings were issued on 17 August 2018 after both Wellsford and Abbee had been restored to the register. Four claims are made:
 - (1) Wellsford and Abbee seek declarations that Christo & Co's authority to act as agent over the management of their properties has terminated, an order for the return of their assets and for an account of the rental and other income derived from those properties;
 - (2) Wellsford brings proprietary and personal claims against Mr Christo in relation to the proceeds of Flat 5, 208 West End Lane;
 - (3) Wellsford brings claims against Mr Christo and Anglo in relation to the charges registered in Anglo's name and payments to Anglo made out of income from properties held by Wellsford;
 - (4) Wellsford brings claims against YVA for breaches of duty in relation to the proceeds of sale of Flat 5, 208 West End Lane and the transfer of the Anglo charges.

14. Wellsford was restored to the register in the BVI on 6 September 2016 some 6 months after the Galazi Proceedings were issued and two years before the date of issue of Companies Proceedings. It is notable that the bulk of the claims are made by Wellsford. The Christo Defendants say that the Galazi Claimants and the 6th defendant could, and should, have brought the Wellsford claims far earlier.
15. The position concerning Abbee is more involved and there are substantial issues of fact that the court will not be able to resolve at this stage. In bare outline, Abbee was restored to the register by the Galazi Claimants on 31 May 2017. To achieve this outcome the Galazi Claimants used a Fiduciary Agent, Totalserve, and BVI lawyers, Samuels Richardson & Co. However, Abbee was struck off again on 17 November 2017 and it was not finally reinstated until July 2018. The failure by the Galazi Claimants to ensure the good standing of Abbee from May 2017 onwards is hard to understand. By then they knew there was no issue about beneficial ownership because beneficial ownership of Abbee's shares by the Galazi Claimants and the 6th defendant was admitted in the defences.

Procedural Chronology

16. The Galazi Claimants' first step in the claim was to make a without notice application for a freezing order. The application came before HH Judge Cooke (sitting as a High Court judge) on 19 April 2016. It is clear that the judge was not satisfied there was need for urgent relief on the scale that was sought and he was only willing to make an order which was limited to preventing Anglo from taking steps to enforce its claims against the properties held in Wellsford's name. It is notable that the witness statement of Mr Nicholas Charles¹ in support of the application was an early indicator of the manner in which the Galazi Claimants and the 6th defendant intended to pursue the claim. The statement runs to 90 pages and includes 174 paragraphs. It is lacking in focus and is prolix.
17. The freezing order was not disposed of until after very lengthy negotiations between the parties were concluded on 25 October 2016 (after defences had been served). The order contains an extensive and complex consensual regime for dealing with Wellsford and Abbee. By the date of the order, Wellsford had been restored and the principal elements of the claim could have been recalibrated at that stage. Indeed, the wisdom of requiring the defendants to plead to a claim which was intended to be some sort of 'placeholder' (my term, not theirs) is hard to understand.
18. On 1 February 2017, the Galazi Claimants issued an application seeking relief that included summary judgment in relation to the beneficial ownership of Abbee. On 30 March 2017, the first and second defendants and Northwest issued an application seeking directions for an investigation into the third claimant's capacity. Those two applications came before Mr Spearman QC, sitting as a Deputy High Court judge, on 6 April 2017. The defendants had conceded in their defence that Abbee was beneficially owned by the Galazi claimants and the 6th Defendant (as to 50% by Mrs Galazi and 25% by each of her children). It appears the Deputy Judge had some initial reservations about the need for judgment on that issue but was persuaded that the declaration the claimants were seeking should be granted. He did not make the wider orders that were sought. One of the issues for the court in this judgment is what order

¹ Mr Charles is a Chartered Certified Accountant acting under a power of attorney from Mrs Galazi.

should be made in relation to the reserved costs of that hearing. It is, of course, deeply unsatisfactory that this issue has been left over for such a long period of time.

19. On 1 June 2017, the Christo Defendants issued an application seeking a declaration about the third claimant's capacity and orders for specific disclosure and inspection.
20. On 24 June 2017, an application was issued seeking an order that Mrs Galazi be appointed as her son's litigation friend.
21. On 25 July 2017, there was a hearing before Mr Gabriel Moss QC, sitting as a Deputy High Court judge, which principally dealt with the issue of the 6th defendant's capacity. An order was made retrospectively validating steps taken on his behalf and adjourning the remainder of the claimants' application and adjourning the defendants' application issued on 1 June 2017. The Deputy Judge was highly critical of Mrs Galazi, her daughter and the solicitor who had conduct of the claim on their behalf. He said they:

“... behaved in an extraordinarily bad and reprehensible way ... and have consistently put forward statements which are misleading and inaccurate and must have been known to be so, at least by the First Claimant.”
22. As a consequence of this severe criticism, Mrs Galazi and her daughter were ordered to pay the defendants' costs on the indemnity basis. Ultimately, after a medical examination, it was established that the 6th defendant lacked capacity. On 13 October 2017, an order was made for the appointment of a litigation friend.
23. The parties made efforts to resolve the dispute over a period of months in the Autumn of 2017. A mediation took place on 19 October 2017 and the court made orders staying the claim up to 8 December 2017. Regrettably, the parties were unable to resolve their differences. It appears that during the period of the stay, the parties lost sight of the need to ensure that Abbee remained in good standing with the result that it was struck off the register on 17 November 2017.
24. The Galazi Proceedings finally came before the court for a CCMC on 23 March 2018, nearly two years after the claim was issued. The order records in a recital the belief that new shares in Abbee would be issued and transferred within 14 days. This statement, no doubt given in good faith, proved to be optimistic because Abbee had not even been restored to the register by the date of the hearing. In order to achieve registration of the shares in accordance with beneficial ownership, two new shares needed to be issued, so that there were four shares; two to be allocated to Mrs Galazi and one each to her children to reflect the ratio 50:25:25.
25. It was clear at the CCMC held on 23 March 2018 that Wellsford and Abbee were likely to wish to pursue their own claims either by being joined to the Galazi Proceedings or by the issue of a fresh claim. There was some discussion about the excessive length of the statements of case and strong encouragement was given to the Galazi Claimants and the 6th Defendant to consider pruning the claim if there were to be amendments. A timetable was provided for them to notify the defendants how they wished to proceed and for the defendants to have an opportunity to object. It was inevitable that there would be substantial changes to the Galazi Proceedings and the

Galazi Claimants and the 6th defendant were directed to serve a position paper and draft amended claim by 11 July 2018 (the date was extended by agreement).

26. There remained substantial delay in restoring Abbee to the register and the issuing of shares. The claimants made an application on 4 May 2018 seeking orders requiring Northwest to take the necessary steps. The order made by the court on 4 June 2018 records undertakings given by Northwest to take all reasonable steps to procure Abbee's restoration and issue of the shares. The application was adjourned with costs reserved.
27. On 6 August 2018, the court made an order of its own volition removing the 6th defendant as a claimant and reconstituting him as 6th defendant in the Galazi Proceedings. The order was made having received communications from Ms Bushby, who had been appointed as the third claimant's litigation friend. None of that correspondence has been shared with the other parties and the order was made by the court under its inherent jurisdiction to control proceedings that involve parties who are minors or who otherwise lack capacity. I need only say it appeared to the court that it was no longer in the interests of the 3rd defendant to remain a claimant as the extent his litigation friend felt able to make a positive claim in common cause with the other claimants was in doubt. There has been no challenge to the order.
28. On 28 August 2018, Wellsford and Abbee, the claimants in the Companies Proceedings, issued an application seeking a declaration that Christo & Co's authority to act had been terminated and other related relief. The application was heard by Deputy Master Linwood on 10 September 2018 when orders were made by consent including an order reserving the costs of the application to the CCMC.
29. On 12 September 2018, the Galazi Claimants served a 'Pleadings Review' document and draft amended particulars of claim. The Review Document indicated the elements of the Galazi Proceedings that were to be removed. The scope of the changes and the reasons for them will need to be examined. The Pleadings Review document did not elicit a response from the defendants and, no doubt in view of the proximity of the hearing on 12 October 2018 (the date had been set at the hearing in March 2018), the Galazi Claimants issued on 8 October 2018 the principal application that is now under consideration. It rapidly became plain on 12 October 2018 that there would be insufficient time to resolve it and it was adjourned part heard to 21 January 2019. Orders were made on 12 October 2018 directing that the Galazi Proceedings and the Companies Proceedings should be case managed and tried together. A further CCMC is due to take place on 4 April 2019 and the combined claims are in a trial window that opens on 9 March 2020 with a time estimate of 11 days. Importantly for present purposes, an order was made giving the Galazi Claimants permission to amend their claim, without prejudice to consequential disputes, in particular about the costs flowing from the amendment.
30. The terms of the application dated 8 October 2018 are of some significance. The Galazi Claimants sought orders that:
 - “1. Pursuant to CPR 17.1(b) the Claimants be granted permission to amend the Particulars of Claim and the Replies to Defence on the terms indicated by the Claimants in writing on 12 September pursuant to paragraph 9 of the Order dated 23 March 2018; and

2. Pursuant to CPR 44.2 the costs of and occasioned by the amendments be reserved to the Trial Judge; and
 3. Pursuant to CPR 38.2(2) the Claimants be granted permission to discontinue partially the original action on the terms indicated in the said document dated 12 September 2018;
 4. Pursuant to CPR 38.6(b) the costs of and occasioned by the partial discontinuance be reserved to the Trial Judge.”
31. The Christo Defendants rely on the Galazi Claimants’ apparent acceptance that they were intending partially to discontinue the Galazi Proceedings albeit that a notice of discontinuance had not been served. However, at the hearing the Galazi Claimants submitted that “claim” in rule 38 means the entire action and, therefore, there was no discontinuance. Mr Hunter, who appeared for the Galazi Claimants, submitted that the costs of the amendment fell to be decided in accordance with the court’s discretion in dealing with amendments and having regard to what he described as the unusual circumstances of the case. He proposed an alternative form of order on the basis that the court should disregard the request in the application for permission to discontinue. His revised form of order is that:
- “The Galazi Claimants shall pay the First, Second and Fourth Galazi Defendants’ costs thrown away by reason of the Galazi Claimants’ amendments to their Particulars of Claim so as to withdraw causes of action other than those now set out in the Galazi Claimants’ Amended Particulars of Claim, to be the subject of detailed assessment. PROVIDED THAT:
- A. The First, Second and Fourth Defendants shall not be entitled to recover a sum greater than 33% of the incurred costs relating to the Statements of Case as shown on page 3 of their original costs budget dated 24 February 2017;
- OR
- B. Such costs exclude the Christo Defendants’ costs of preparing their factual case as set out in particular in paragraphs 3 to 68 of their Original Defence, which shall be costs in the case.”

The amendments

32. The particulars of claim in the Galazi Proceedings have already been commented upon. The manner of their drafting was indulgent and the scope of the claim was far wider than could be justified by the need for urgent relief preventing enforcement action by Anglo or the preservation of limitation. It would have been possible to tailor a claim that was no wider than was necessary to preserve the position until Wellsford had been restored to the register. None of the claims relating to Abbee were urgent.
33. The amended particulars of claim now only comprise claims that are made by Mrs Galazi and her daughter against the Christo Defendants in relation to the investment properties held in Mrs Galazi’s name (26 Armitage Road and 238 Camden High Street) and against Mr Christo in relation to the management of Mrs Galazi’s personal finances. The claims that were made on behalf of Wellsford and Abbee, and the claim

made against YVA Solicitors for knowing assistance and knowing receipt, have been removed. Mr Grant colourfully described the particulars of claim as having been “eviscerated”. True it is that the particulars of claim have been much reduced in length (the document is reduced from 56 to 14 pages) and important claims have been removed. However, the amendment is rather more in the nature of careful, albeit radical, surgery rather than disembowelling.

34. The rationale for the changes put forward on behalf of Mrs Galazi and her daughter falls into three categories:

- (1) It is now possible to pursue the Wellsford and Abbee claims directly in the Companies Proceedings.
- (2) There was no basis for leaving claims in the Galazi Proceedings that were duplicative of claims in the Companies Proceedings.
- (3) Matters of evidence that had been included in the particulars of claim were removed to find their rightful place in the documents forming disclosure and witness statements.

35. This, however, is not the complete story. It is plain that an opportunity as been taken to recalibrate the claims and to excise the more extreme elements. The prime example of this can be seen in relation to the claim made against YVA which is no longer a defendant to the Galazi Proceedings. YVA has been joined as party to the Companies Proceedings but instead of claims that involve an allegation of dishonesty, the claims are formulated on the basis of a breach of duty in contract and/or in tort. It is unnecessary for the court to determine the incidence of costs as they relate to YVA because terms have been agreed on the basis that Mrs Galazi and her daughter will pay YVA’s cost of the Galazi Proceedings on the indemnity basis.

36. The Christo Defendants submit that the court should undertake an evaluation of the particulars of claim in the Galazi Proceedings and conclude that the claim was weak and in part should not have been brought. This is an unattractive proposal and one which benefits from hindsight. If the claim in the Galazi Proceedings was “based on a wholesale misunderstanding of English law” as Mr Grant now submits, it could have been subjected to an application to strike it out in whole or in part. I am not willing to consider what is, in effect, a retrospective strike out application when dealing with the costs of the amendment and/or discontinuance.

37. The principal observations made by Mr Grant are:

- (1) The prayers in the particulars of claim have been deleted altogether.
- (2) The claimants have abandoned their claims against Anglo and Northwest (and YVA). Northwest remains a party to the claim solely for the purposes of costs. The order dated 5 April 2017 reserves to the trial judge the costs of that part of the claim.
- (3) The claimants have abandoned many allegations against the Christo Defendants none of which have been migrated to the Companies Proceedings. The abandoned claims comprise allegations of:

- Fraudulent misrepresentations in relation to the Anglo transaction (as it is described).
 - An unlawful means conspiracy relating to the Anglo transaction.
 - Breach of fiduciary duties said to have been owed by Mr Christo to the Galazi Claimants and the 6th Defendant that were found in paragraphs 35, 37, 45, 127, 135, 149, 150 and 166 of the particulars of claim.
38. Mr Hunter described the amendments in various way including that the claim has been “streamlined” and that claims have been “transferred” to the Companies Proceedings. The notion of transfer of a claim from one action to another is said by Mr Grant to be a misuse of language because causes of action are not ambulatory. The claimants say, however, that they were entitled to bring the Galazi Proceedings and were justified in doing so given that their efforts to take control of Abbee and Wellsford had been met by obstruction and Anglo was threatening to enforce its charges over Wellsford’s properties. It was therefore necessary to formulate the claim in relation to the treatment of the properties held by Abbee and Wellsford by reference to causes of action which were necessarily less direct and more complex (legally and factually) than the causes of action that would have been available to the companies had they been maintained in good standing.
39. The claimants particularly rely on the degree to which the work undertaken in relation to the Galazi proceedings has been used and is of benefit in the Companies Proceedings. They point out that paragraphs 13 to 68 of the defence in the Galazi Proceedings has been cut and pasted into the defence in the Companies Proceedings. This is said to be illustrative of both the ‘transfer’ of claims from one claim to the other and the value of the factual investigation undertaken by the defendants in the Galazi Proceedings. They say it would be wrong for the Galazi Claimants to pay for that investigation which would have been needed had the claims been made in the first instance by Abbee and Wellsford.

Discontinuance

40. CPR 38 gives a claimant a unilateral right to discontinue all or part of a claim upon filing and service of a notice of discontinuance. The right is unrestricted save that the permission of the court is required in the circumstances that are described in rule 38.2(2)(a), (b) and (c). Rule 38.2(2)(a)(ii) applies in this case because undertakings were provided to the court as set out in the order dated 25 October 2016. It not entirely clear from rules 38.3(1) and 38.5(1) whether a notice of discontinuance is required where the court’s permission to discontinue must to be obtained. One might ask why a notice has to be served if the approval of the court is mandatory. However, on its face rule 38.3 requires the filing and service of a notice for a discontinuance to take place, whatever the circumstances may be. This is reinforced by rule 38.5 which specifies that discontinuance takes effect on service of the notice on the relevant defendant or defendants. The terms of the rule are explicit and it is hard to avoid the conclusion that the filing and service of a notice of discontinuance is required in every case. Obtaining the court’s permission, where it is required, is a preliminary step to discontinuance which takes place by filing and service of the notice. Unless and until notice has been filed and service there has not been a discontinuance. However, it

may well be, in practice, that the court often implicitly waives the requirement for a notice and deals with costs and any other issues that arise on the permission hearing. Plainly that is a sensible pragmatic approach albeit it is not one that can be found in the rule. No point has been taken in this case about the absence of a notice of discontinuance.

41. The core issue in this case is whether, properly analysed, the Galazi Claimants have discontinued, or are to be treated as having discontinued, the whole or part of the “claim” by having amended the claim form and the particulars of claim. The point is one of significance because the default position under rule 38.6(1) is that the discontinuing party is liable to pay the costs of the other party.
42. The following points can be extracted from the rule that are of application in this case:
 - (1) A claimant may discontinue the whole or part of a “claim” – rules 38.1(1) and 38.2(1).
 - (2) A “claim” for the purposes of this rule is not defined but it is clear that a claim is to be distinguished from a remedy. If the claimant abandons a remedy, but continues the claim for other remedies, it is not treated as discontinuing all or part of the claim – rule 38.1(2).
 - (3) Rule 38.2(1) provides that a claimant may discontinue all or part of a claim at any time. Rule 38.2(3) deals with claims with more than one defendant and provides that “... the claimant may discontinue all or part of a claim against any or all of the defendants.” It follows that, read literally, a claimant may discontinue part of a claim against one defendant.
 - (4) After rule 38.4, the rule abandons use of the term ‘claim’ (apart from in rule 38.7) and refers instead to ‘proceedings’. This is puzzling, particularly in rule 38.5(2), which provides that the ‘proceedings’ are brought to an end against the defendant served with notice of discontinuance on the date of service of the notice.
 - (5) Rule 38.5(3) uses ‘proceedings’ in a different way to rule 38.5(2) where it says that service of notice of discontinuance and the consequential ending of the proceedings “... does not affect proceedings to deal with any question of costs.” Used in that context, ‘proceedings’ means ‘steps’ or something similar.
 - (6) Rule 38.6 deals with the liability for costs where there is a discontinuance. It provides:
 - “(1) Unless the court orders otherwise, a claimant who discontinues is liable for the costs which a defendant against whom the claimant discontinues incurred on or before the date on which the notice of discontinuance was served on the defendant.
 - (2) If the proceedings are only partly discontinued –

(a) the claimant is liable under paragraph (1) for costs relating only to the part of the proceedings which he is discontinuing; and

(b) unless the court orders otherwise, the costs which the claimant is liable to pay must not be assessed until the conclusion of the rest of the proceedings.”

(6) Rule 38.7 requires a claimant to obtain permission to make “another claim” against the same defendant in two circumstances. The first is where the defendant filed a defence. The second is where “... the other claim arises out of facts which are the same or substantially the same as those relating to the discontinued claim.”

(7) The rule appears to use “claim” in rules 38.1, 38.3 and 38.3 and “proceedings” as a synonym for claim in rule 38.5(2). Rule 38.5(3) then goes on to use “proceedings” in a different way, meaning future steps in the claim (or the proceedings). This is unhelpful.

43. Part 38 was subject to an obiter analysis by Leggatt J (as he then was) in *Kazakhstan Kagazy Plc v Zhunus* [2016] EWHC 2363 (Comm). In that case the claimants wished to remove claims for breach of fiduciary duties that arose under the laws of the Isle of Man. They served notice of discontinuance in respect of that element of the claim along with a draft amended claim believing that the court’s permission to discontinue was needed. They then attempted to agree an order with the defendants, but agreement proved to be impossible. The claimants then had a change of heart and decided that they did not wish to discontinue the breach of fiduciary duty claim. The issue for the court was whether permission was needed and, if not, whether the notice of discontinuance had taken effect. In the course of reviewing Rule 38, Leggatt J expressed views about the meaning of the word “claim”.

“23. The first question which arises in relation to the meaning of this rule is what is meant by the word “claim”. That word is sometimes used to refer to the entire action begun by issuing a claim form. At other times the word is used in a much narrower sense to refer to a cause of action. There is also an intermediate sense in which the word may refer to all the causes of action asserted by a particular claimant against a particular defendant. As Mr Howe QC observed, the CPR are not consistent in their use of the term and examples of all three uses can be found in the rules.

24. In the context of Part 38 I do not think that the word “claim” can mean a cause of action because of the repeated references (including in r.38.2) to “all or part of a claim”. It does not make sense to provide for the discontinuance of part of a cause of action. Causes of action are not susceptible to partition or not in a way that would make discontinuance an appropriate procedure. If, for example, a claimant no longer wishes to maintain a case that an alleged breach of duty by the defendant gave rise certain pleaded losses while continuing to seek damages for other alleged losses, the appropriate procedure is simply to amend the statement of case. Thus, it seems to me that the word “claim” in r.38.2 must refer either to the entire action or, at its narrowest, to all causes of action asserted by a particular claimant against a particular defendant. It is not necessary for present purposes to decide which of these is the correct meaning. That is because on either

interpretation C1 was only seeking to discontinue part of the claim. In addition to the Manx law claims, C1 has asserted claims (in the sense of causes of action) under Kazakh law which it has never sought to discontinue.” [my emphasis]

44. It seems to me, and with respect to Leggatt J, that this approach construes rule 38 in a way which is not in accordance with its terms. It is entirely clear that abandoning one remedy where there are other remedies will not amount to a discontinuance. However, as it seems to me, the abandonment of an entire cause of action may amount to a partial discontinuance. Pursuant to rule 38.2(1) a claimant may discontinue part of a claim. That rule obviously may apply where there is a single defendant. If there can be a partial discontinuance against a single defendant, and that partial discontinuance cannot be the abandonment of one remedy, ‘claim’ must mean one or more causes of action. The position is clearer still under rule 38.2(3) which permits a claimant, where there is more than one defendant, to discontinue part of a claim against “all or any of the defendants”. In other words, a claimant may discontinue a cause of action against one defendant, but not against another.
45. I have already observed that there is no obvious reasons for the switch from using ‘claim’ to using ‘proceedings’ in later parts of the rule. Read literally, rule 38.5(2), which provides that “the proceedings” are brought to an end on service of the notice of discontinuance, would support the notion that it is only possible to discontinue the entire claim/proceedings. However, the provision has to be understood in light of the earlier part of the rule which contemplates a partial discontinuance of a claim against one of several defendants.
46. The Christo Defendants submit (ignoring for the moment the absence of a notice of discontinuance):
 - (1) The Galazi Claimant have discontinued all their claim against the fourth and fifth defendants, Anglo and Northwest.
 - (2) The Galazi Claimants have also discontinued a large part of their claims against Mr Christo and Christo & Co.
 - (3) The 6th defendant has discontinued all his claims against all the defendants. However, they are not seeking an order for costs against him.
47. It is convenient briefly to deal with the 6th defendant’s position. The effect of the order dated 6 August 2018 was to remove the 6th defendant as a claimant and to direct that he became a defendant. The order gave all the parties permission to apply to set it aside because it had been made without a hearing and of the court’s own volition. No such application has been made by any party. The order was an unusual one because it had the effect of preventing the third claimant pursuing causes of action that had been made in his name and in respect of which there had been retrospective validation. It was only open to him after the order dated 6 August 2018 to pursue claims by way of a Part 20 claim or in separate proceedings. However, the order made by the court did not effect a discontinuance, which is a unilateral step taken by a party by its choice. The order was made without the consent of the third claimant and does not arise from the application made by the Galazi Claimants.

48. It is unnecessary to decide the position in relation to YVA because terms had been agreed. However, bearing in mind that the effect of the amendments was to remove all claims against YVA from the Galazi Proceedings, there is no doubt that the entire claim against YVA was discontinued.
49. At the hearing neither Mr Hunter nor Mr Grant took any point about the absence of a notice or notices of discontinuance. Either the application notice itself can be treated as notice or, and I consider this is the better approach, the requirement for serving notice has been waived. The order dated 12 October 2018 can be treated as implicitly approving that waiver so that a discontinuance that arises from the permission to amend took effect on the date of that order. There is a residual difficulty, however, because the notice of discontinuance serves the very important function of describing what the claimant is seeking to do and needs to do so with clarity. A defendant is entitled to know precisely what is being discontinued. Equally, the parties and the Costs Judge must be able to work out what costs consequences flow from the discontinuance.
50. I am satisfied that the Galazi claimants have discontinued their entire claims against Anglo and Northwest. The fact that Northwest remains a party solely for the purposes of an order reserving costs does not affect this conclusion.
51. The position concerning the Christo Defendants is less straightforward. With great respect to Leggatt J, it seems to me that the analysis in *Kazakhstan Kagazy Plc v Zhunus* does not consider rule 38 as a whole and does not give sufficient weight to rules 38.2(1) and (3). Part 38 is explicit in saying that a claimant may discontinue part of a claim against one defendant. The later use of the word “proceedings” in rule 38.5(2) must be treated as a synonym for claim. The rule does not otherwise make sense. A claim is more than particular relief but may be less than the entire claim against a party.
52. It follows that discontinuance can operate in a variety of different circumstances. For example, a claimant which brings proceedings against A and B for two separate causes of action could serve notice of discontinuance:
- (1) Discontinuing the entire proceedings (or claim) against A and B; or
 - (2) Discontinuing the entire claim against A or B; or
 - (3) Discontinuing one cause of action against A or against B, or against both of them
53. It is necessary, however, for the notice of discontinuance to specify its scope with precision. If the claimant is merely ceasing to allege certain facts, that do not amount on their own to a cause of action, or facts that are part of the case in respect of that cause of action, the claimant is not discontinuing part of a claim and must seek permission to amend. It is likely that a partial discontinuance will require an amendment to the claim but if that is merely a consequence of the discontinuance, the costs assumption in Part 38 still applies.

54. The Christo Defendants remain parties to the Galazi Proceedings in relation to the causes of action I have identified. It seems to me that the Galazi Claimants have, in addition to the discontinuance of the entire claim against Anglo and Northwest:

(1) Partly discontinued claims made against the Christo Defendants, namely the claims that are identified in paragraph 37(3) above.

(2) Amended the claim by the removal of unnecessary factual assertions and unnecessary verbiage.

It follows that both Part 38 and the court's discretion in relation to costs on an amendment are engaged.

Costs consequences of discontinuance and amendment

55. Rule 38.6 deals with costs where there has been a discontinuance. The default position, unless the court orders otherwise, is that the claimant is liable for the costs of the defendant. The only difference between discontinuance and partial discontinuance is that in the case of the latter, the costs will not, unless the court orders otherwise, be assessed until the end of the proceedings. The Galazi Claimants say that the default rule should not apply in the circumstances of this case. Their primary position is that the incidence of costs should be left over to the trial judge. They identify five relative advantages to postponing the decision:

(1) The trial judge will have the time to familiarise themselves, on a granular level, with the existing issues in both sets of proceedings.

(2) The trial judge will have the benefit of understanding the nature and scope of those issues in the light of the evidence at trial.

(3) The trial judge will necessarily have a better understanding of what work, and in particular what factual investigations, and legal research, is properly attributable to those issues, as compared with aspects of the original Galazi pleadings which are no longer pursued (at least in their original form).

(4) The trial judge will have the benefit of considering the issues as they may have developed, in the interim, during the Claimants' ongoing investigations into the conduct of the Christo Defendants.

(5) The trial judge will be able to apportion responsibility for the circumstances which gave rise to the Galazi Pleadings Review in the light of the Court's conclusions as to the substantive merit of each side's position overall.

56. At one level it is attractive to leave thorny and contentious issues about costs to the trial judge; and I accept there are circumstances in which it is the right order to make. However, I am not persuaded that postponement of the decision is appropriate in this case. The premise upon which the submissions set out above are based is that the trial judge will necessarily become familiar with both claims, including the Galazi Proceedings in their original form. This is obviously wrong. The trial judge will only

wish to consider the claims in the form in which they reach trial. There will be no need at all for the trial judge to consider the enormously lengthy pleadings in the Galazi Proceedings before most of the claims were stripped out on the amendment. It would be very unattractive for the trial judge to be required to undertake an archeological excavation of the pleadings to examine their state in a different era with a view to analysing the issues that were dealt with at the trial and, importantly, not dealt with at the trial because they had been discontinued.

57. Furthermore, it seems to me that wherever possible the court should when dealing with the management of a claim avoid adding to the burdens of the trial judge and decisions about the case, including costs, should be made as the case proceeds. This enables the parties to assess their respective positions with greater accuracy and facilitates settlement.
58. I will now consider what order for costs should be made arising from the discontinuance.
59. In *Brookes v HSBC Bank plc* [2011] EWCA Civ 354 at [6] Moore-Bick LJ summarised the principles that apply on an application to displace the default rule about costs on a discontinuance:
- “(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.”
60. In *Nelson’s Yard Management Co v Eziefula* [2013] EWCA Civ 235; [2013] CP Rep 29 at [30], Beatson LJ emphasised that the requirement at (6): a discontinuing claimant “*must... generally show some form of unreasonable conduct on the part of the defendant which provides a good reason for departing from the rule.*” This was described as a “high” hurdle for such a claimant to overcome.
61. The claimants say there has been a change of circumstances and unreasonable conduct on the part of the Christo Defendants.
62. The claimants say that regaining control of Abbee and Wellsford was a material change of circumstances. At the time the Galazi Proceedings were issued, both companies had been struck off. The fault for that lapse plainly cannot be directed

towards the claimants. There is a good deal of evidence that is disputed concerning the reinstatement of Abbee, particularly after it was struck off the register for the second time. There are, however, two points that do not depend upon disputed evidence.

(1) The claimants in the Galazi Proceedings chose to bring a claim that was wide ranging and based, in part, on what are described as indirect claims. The pressing need for litigation related to the threat by Anglo to take steps to enforce its charges secured on properties registered in the name of Wellsford. There was no similar pressing need to issue claims that related to Abbee.

(2) Wellsford was reinstated to the register on 6 September 2016, less than 6 months after the claim was issued. This event needs to be seen in the context of the initial (limited) order made by HH Judge David Cooke on 21 April 2016 being followed by protracted negotiations over the terms of a freezing order. Terms were finally agreed and approved by the court on 14 November 2016. By the date of the order little progress had been made with the claim other service of defences (and a counterclaim by the Christo Defendants) in September 2016.

63. The order dated 14 November 2016 provides agreed terms of a freezing order in a schedule. Paragraph 8 of the schedule says:

“8. Neither the Claimants nor any Respondent may give instructions to any company formation or administration agent, or person or entity offering similar services, anywhere in the world concerning the shareholding of [Wellsford or Abbee], ... except pursuant to further order of the court, save that the Claimants or their duly appointed company formation or administration agent ... solely for the purpose of:

- (1) Restoring [Wellsford and Abbee] to the Register of Companies of the British Virgin Islands;
- (2) Maintaining those companies in good standing.”

64. The terms agreed between the parties point unequivocally to the claimants having the responsibility for restoring and maintaining the companies (Wellsford had already been restored). Furthermore, the defendants were expressly prohibited from giving instructions to maintain the companies when restored. The underlying point, however, is that by the date of this order, there was nothing to stop the claimants recalibrating the claim by Wellsford bringing claims for relief itself.

65. So far as Abbee is concerned, it appears to me that the claimants in the Galazi Proceedings could have done much more to ensure that Abbee was restored to the register far earlier than was the case and maintained. There was a distinct lack of focus on their part with it seems more effort concentrated upon the dispute rather than agreement and practical problem solving.

Conclusions on the application of Part 38

66. In my judgment, the Galazi Claimants are some distance from showing there is a good reason for departing from the general rule. It is right that the blame for Wellsford and Abbee having been struck off the register of companies in the BVI before proceedings commenced must lie with the Christo Defendants. However, it was the Galazi Claimants' choice to bring the claim in the form it took. There was no need to bring the Abbee claim in 2016 as a claim seeking urgent relief. It would have been possible for the Galazi Claimants to have focussed on the entitlement to control Abbee and to have sought relief directed to reinstatement. Beneficial ownership of Abbee was admitted in the defences and a more measured and proportionate approach would have achieved the initial objective of getting Abbee reinstated and under the control of the Galazi Claimants.
67. The position in relation to Wellsford is similar. Seeking urgent relief was warranted but the claim could have been simplified and focussed. It was relatively easy to reinstate Wellsford and any further claims should have left over until it was able to bring claims in its own name. That would have led to a limited delay but one that should have been acceptable.
68. The overarching point, however, is that the Galazi Proceedings should not have been brought in in the form of the particulars of claim. It is artificial to see the reinstatement of the companies as a change of circumstances to which the Galazi Claimants did not contribute. Had the Galazi Claimants acted in a more proportionate manner, the claim could have awaited Abbee's restoration. Even if the Galazi Claimants were able to show good reasons to depart from the general rule, they are unable to point to unreasonable conduct on the part of the Christo Defendants that is directly related to the need to discontinue.
69. In the case of partial discontinuance, the default position under rule 38.6(2) is that the costs of the discontinuance must not be assessed until the conclusion of the rest of the proceedings. I have determined that the claims against Anglo and Northwest have been wholly discontinued and the assessment of those costs may be as of right the subject of a detailed assessment straight away. In my judgment it would be highly unsatisfactory for the remaining costs of the discontinuance to be dealt with at a later date. This would undoubtedly add to the expense of the process of assessment. I will order that all the costs of the claims that have been discontinued should be assessed at this stage.

Costs of amendment

71. There are two elements that arise under this heading. First there remains a residual element of costs that relates not to the claims or parts of the claim that have been discontinued by the amendment. Secondly, if Mr Hunter were to be right and no element of the costs falls to be dealt with under Part 38, would the outcome be different? I will take them in turn
72. I have had regard to Mr Hunter's submission that the factual investigation that was required by the Christo defendants in dealing with the Galazi Proceedings has been carried over to the Companies Proceedings. Mr Hunter submits it would be wrong for the Galazi Claimants to pay for work that has been undertaken that may be of overall

benefit, albeit in a different claim. It seems to me that the dissection of the claims in this manner is both impractical and wrong in principle. I return to the fundamental point that the Galazi Claimants chose to issue the claim in the form it took and they have now decided to discontinue large parts of it and to seek permission to amend. There is no entitlement to carry over the cost of work undertaken from one claim to another. It is true that the Galazi Claimants are potentially prejudiced if Wellsford and Abbee are successful in the Companies Claim, and obtain orders for costs, because there will be elements of the work of the defendants for which they will have been already paid and those costs cannot be recovered despite the fact that they relate to a successful claim. They can however recover their own work. If the companies are unsuccessful, the point does not arise.

73. It seems to me that the potential unfairness to the Galazi Claimants has to be balanced against the fact that the two claims are separate with different claimants. Such unfairness as there may be was not directly caused by the Christo Defendants but a consequence of the manner in which the Galazi Claimants chose to bring the claim.
74. The second issue can be dealt with briefly. It seems to me that even if the court were not applying the default position under Part 38 the court should exercise its discretion to require the Galazi Claimants to pay the costs of and occasioned by the amendments. I do not accept that either of the orders formulated by Mr Hunter in the course of the hearing are appropriate.

Standard or indemnity costs

75. The court has power to order that costs should be paid on the indemnity basis where there is something in the conduct of the claim or the circumstances of the claim which takes the case out of the the norm: *Excelsior Commercial and Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson (a firm)* [2002] EWCA Civ 879 at [39] per Waller LJ. It is not necessary for there to have been some sort of lack of moral probity or conduct deserving moral condemnation on the part of the paying party: *Reid Minty (a firm) v Taylor* [2011] EWCA Civ 1723 at [27] per May LJ.
76. I need only say that in light of the observations I have made about the claim in Galazi Proceedings, I am satisfied that the conduct of the claim and its circumstances take the position outside the norm and that it is appropriate for the court to exercise its discretion to order that the costs arising under Part 38, and the costs of the amendment, should be paid on the indemnity basis.

Reserved costs

(1) 1 February 2017 application seeking summary judgment

77. As I have already remarked, it is deeply unsatisfactory that the court should be asked to determine costs that were reserved two years ago at a hearing of which the court determining the issue has no first-hand knowledge. I do not consider it is proportionate for the court to engage in a lengthy analysis of disputed issues.
78. The application was resisted until part way through the hearing when an indication was given by the Deputy Judge. At that point resistance was withdrawn. It is right that ownership of the shares in Abbee was conceded in the defence. However, that is some

distance from judgment being entered providing a final resolution of the issue and enabling the Galazi Claimants to assert title to the shares. I consider the outcome of the application justified the application being made even though it was not entirely successful. I consider the issue and pursuit of the application was justified. The Christo Defendants should pay the Galazi Claimants' costs of the application on the standard basis.

(2) 24 July 2017 application seeking the appointment of a litigation friend

79. The application was issued the day before the hearing on 25 July 2017 when it was adjourned. The application sought an order appointing Mrs Galazi as litigation friend to her son and retrospective validation of all steps taken on his behalf. Subsequently Ms Bushby was appointed as litigation friend of the 6th defendant and the application was not pursued. Normally that would lead to no order being made.
80. However, the application was necessary because Mrs Galazi had not addressed the issue of capacity at the outset of the claim. Had she done so the application would not have been needed. It follows that the Galazi Claimants should pay the costs of the Christo Defendants. I am not persuaded that the order should provide for indemnity costs to match the order made by Mr Moss QC.

(3) 4 May 2018 application relating the transfer of shares in Abbee

81. The application was made by the Galazi Claimants for orders in relation to the restoration of Abbee and the issue and transfer of shares. The Christo Defendants submit that the application was unnecessary, not reasonably brought and, in any event, premature. However, it is notable that at the hearing, undertakings were given in terms that were not far from the relief sought.
82. As is standard fare in this case, both sides protest bitterly about the other party and spend a great deal of time in witness statements and at hearings justifying their actions, or the lack of them. It is plain, however, that steps were required to enable Abbee to be restored and further shares issued. Had the Christo Defendants focused more on the resolution of the problem rather than finding areas of dispute, the application, and certainly the hearing, would not have been required. I will order that the Christo Defendants pay the Galazi Claimants' costs of the application on the standard basis.

(4) 28 August 2018 application for summary judgment in the Companies Proceedings

83. The application concerned control over the assets of Abbee and Wellsford. The outcome at a hearing before Deputy Master Linwood was orders made by consent with the costs reserved to the case management hearing listed for 12 October 2018. It is unsatisfactory that parties who are able to reach agreement about the disposal of an application agree to reserve the costs of the application to be heard before a different court on a different occasion. Leaving over costs to another occasion has the inevitable outcome that the parties make detailed submissions about an application in relation to which they have by their agreement deprived the court of jurisdiction to resolve.

84. The parties have set out their contentions on costs in witness statements and the skeleton arguments. However, the disposal was by consent and in those circumstances the appropriate order will normally be costs in the case or no order for costs. One of those orders is likely to be the outcome where the parties agree to defer the issue of costs save in the clearest cases. In this instance, I can see no reason why the agreed disposal of the application should lead to a costs order in one direction or the other at this stage of the claim and I consider the right order is costs in the case.

Conclusion

85. I will hear counsel at the hearing listed on 4 April 2019 concerning consequential issues that arise from this judgment.