Neutral Citation Number: [2005] EWHC 994 (Ch)

Case No: HC02C1186

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/05/2005

Before :

THE HONOURABLE MR JUSTICE LIGHTMAN

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Between :

RBG RESOURCES PLC (IN LIQUIDATION)	**Claimant**
- and -	
(1) VIREN KUMAR RASTOGI	
(3) ANAND KUMAR JAIN	
(4) JAY PATEL	**Defendants**

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- -

Mr Stephen Smith QC & Mr Clive Jones (instructed by **Lovells, 65 Holborn Viaduct, London EC1A 2DY**) for the Claimant
Mr John McDonnell QC & Mr Timothy Sisley (instructed by **Magwells, 6 Angel Gate, City Road, London EC1V 2PB** for the Fourth Defendant

Hearing dates: 6th – 10th May 2005

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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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THE HONOURABLE MR JUSTICE LIGHTMAN

Mr Justice Lightman:

INTRODUCTION

1. I have before me an application by the claimant RBG Resources Plc ("the Claimant") for permission to discontinue with no order as to costs this action against the fourth defendant Mr Jay Patel ("Mr Patel") in which the Claimant alleges dishonesty against him. Mr Patel reluctantly consents to the discontinuance. His preference is that the action proceeds to trial so that he may have the opportunity to clear his name of the highly publicised allegations against him. But since he cannot force the Claimant to proceed with the action he submits that the discontinuance should be on terms that the Claimant pays his costs of the action on an indemnity basis.

2. This action arises out of a substantial fraud perpetrated on the Claimant which led to its insolvent liquidation. It would appear that two thirds of the recorded $1.7 billion turnover of the Claimant in the fourteen months to the 30th September 2001 were bogus transactions conducted with controlled counterparties, that the frauds had been occurring since 1996 and had involved over 250 overseas companies secretly controlled by directors and others, and that upon liquidation the controlled companies owed the Claimant over $450 million of which (despite the best efforts of the liquidators) the Claimant has secured nothing by way of recovery. In this action the Claimant has obtained summary judgment against two directors, but no part of the judgment has been satisfied. The Claimant does not have the funds to pursue further the claim made in the action against Mr Patel that he was involved in the wrongdoing. It is for this reason that it is obliged to discontinue the claim.

3. The primary question to be determined in this action is the terms as to costs on which such discontinuance should be permitted. Two secondary questions are to be determined. One is regarding Mr Patel's costs in respect of a restraint order and the other is regarding his entitlement under a cross-undertaking in damages given by the Claimant on the grant of a freezing order.

BACKGROUND FACTS

4. In respect of this account of events I must acknowledge my gratitude to the detailed chronology prepared by Mr McDonnell, counsel for Mr Patel.

5. The Claimant was a company which traded in metals. The first three defendants Mr Viren Rastogi ("Mr Rastogi"), Mr Gautan Majumdar ("Mr Majumdar") and Mr Anand Jain ("Mr Jain") were its directors. Mr Patel, a chartered accountant, was from July 1997 the financial controller and from October 2002 the senior vice president in charge of structured finance devising packages for long term finance. The Claimant had substantial facilities with a number of banks. On the 30th January 2002 PriceWaterhouse Coopers resigned as the Claimant's auditors giving as its reason for so doing its identification of six of its trades as questionable. The resignation of the auditors and the reasons which they gave for resigning led to investigations which revealed that bogus trades were used to raise money. On the 2nd May 2002 Westdeutsche Landesbank ("West LB"), one of the Claimant's bankers to whom there was £234 million outstanding, presented a petition for the winding up of the Claimant based on an unsatisfied demand for US$17,174,193.

6. On the same day on application by West LB without notice Laddie J appointed two provisional liquidators of the Claimant, one of whom was Mr Shierson. At 10.15 p.m. the same day: (1) on an application by the provisional liquidators without notice for an order under section 236 of the Insolvency Act 1986 ("the Insolvency Proceedings") Laddie J made an order ("the Restraint Order") requiring the three directors and Mr Patel forthwith to disclose to the provisional liquidators' solicitors, Lovells, all information which they possessed concerning the assets of the Claimant to be verified by affidavit by 2 p.m. on the 8th May 2002, to deliver up their passports to Lovells and to inform them if they intended to stay anywhere other than at their usual residences; and (2) on an application without notice by the Claimant (acting by the provisional liquidators) in an intended action (namely this action) Laddie J granted an order ("the Freezing Order") against the same four persons, (the proposed defendants in the action), freezing world-wide their assets up to $190 million and ordering disclosure of their assets to Lovells forthwith (to be verified by affidavit within seven days of service of the order) and delivery to Lovells within three days of all their bank statements. In the case of both orders West LB gave the necessary cross-undertaking in damages. In support of the Freezing Order the provisional liquidators on behalf of the Claimant gave an undertaking to issue a Claim Form in the form of the draft produced to Laddie J. The detail of the claim, as it appears in the Claim Form, was that the four defendants had engaged in a scheme whereby artificial transactions were created with controlled counterparties to procure finance from third parties including West LB.

7. At 6 a.m. on the 3rd May 2002 the City of London Fraud Squad (to whom complaints had been made by West LB and other financiers of the Claimant) armed with search warrants raided the homes of Mr Patel and the other three defendants and removed documents and personal computers. At 6.45 a.m. the provisional liquidators accompanied by members of the City of London Fraud Squad and the Serious Fraud Office armed with a search warrant entered the Claimant's offices.

8. On the 7th May 2002 Mr Shierson and a solicitor interviewed Mr Patel at the Claimant's offices. On the same day the Claim Form (in the form of the draft) was issued and Mr Shierson swore an affidavit in support of the intended application for continuation of the Freezing Order.

9. On the 8th May 2002 Lovells confirmed by telephone to Mr Patel's solicitors ("Magwells") that they did not presently require any further information from Mr Patel under the Restraint Order because he had already been cooperating with the provisional liquidators. The same day Magwells wrote to Lovells disclosing Mr Patel's assets. The net aggregate value was £192,000, of which £100,000 was represented by the equity in his home. His assets have remained unchanged since that date save for their partial depletion by reason of the payment of legal costs.

10. The 10th May 2002 was the return date for the Freezing Order which Laddie J continued until trial or further order. The order allowed various items of expenditure, including a reasonable amount for legal advice and representation. West LB attended the hearing to continue its cross-undertaking in damages until the 31st May 2002. The costs of Mr Patel and West LB were reserved. The judge directed the Claimant to state in writing whether it contended that Mr Patel was

involved in the six trades identified by the auditors and referred to (together with some 93 other allegedly fictitious trades) in the Particulars of Claim. The Claimant subsequently answered in the negative, but maintained that Mr Patel was involved in others (together with trades with some 93 other allegedly controlled counterparties).

11. The 15th May 2002 was the return date for the application for the Restraint Order. Mr Patel resisted the continuance of the Restraint Order, but Rimer J continued it until the 31st May 2002. West LB continued its cross undertaking until that date. The costs were reserved until the further hearing.

12. On the 16th May 2002 Mr Shierson signed a witness statement supporting continuance of the Restraint Order stating that the assistance of Mr Patel was required on many topics and that it was the provisional liquidators' case that Mr Patel was involved in the fraud perpetrated on the Claimant.

13. By his witness statement in opposition dated the 20th May 2002 Mr Patel objected to continuation of the Restraint Order on the grounds (amongst others) that he was willing to assist the provisional liquidators on any matter where he could help and that in view of his personal circumstances and family responsibilities there was no risk of his leaving the jurisdiction.

14. By its Particulars of Claim dated the 24th May 2002 the Claimant maintained its previous stance pleading that Mr Patel had either: (1) knowingly participated in or turned a blind eye to the frauds; or (2) taken steps to conceal the frauds or taken no or no adequate steps to prevent their disclosure.

15. On the 31st May 2002 after a full day's hearing Laddie J continued the Freezing Order in a revised form on a cross-undertaking by the Claimant (in place of the cross-undertaking by West LB) and the Restraint Order also in revised form on a cross-undertaking by the provisional liquidators but limited to the assets of the Claimant. The revised form of the Freezing Order (amongst other variations) permitted Mr Patel to use £30,000 out of £50,000 deposited by him with the Halifax Building Society ("the Halifax") as working capital for Stock Market spread betting. The application for the Restraint Order was adjourned for a further half-day hearing before Laddie J. Laddie J made an order for the immediate assessment and payment by Mr Patel of the costs of the hearing of the Claimant and the provisional liquidators.

16. The form of the Freezing Order required agreement and finalisation of its terms by all parties. This exercise was not completed until shortly before the end of June and the order was not sealed until the 1st July 2002. It is not (and cannot be) suggested on this application that the time taken was in anywise the fault of the Claimant.

17. Meanwhile Mr Patel was anxious to commence his spread betting without awaiting the finalisation of the order and on the 12th June 2002 requested Lovells to write to the Halifax confirming the agreement for use of the £30,000 and Lovells did so the same day. On the same day the winding up order was made of the Claimant and Mr Shierson (and another) were appointed liquidators. On the 17th June 2002 Lovells wrote to Magwells that the Halifax required a sealed order

and requested Magwells to confirm the wording of the provision to be inserted in the order relating to spread betting.

18. On the 19th June 2002 Lovells sent Magwells a draft settlement agreement ("the draft settlement"). By the draft settlement the Claimant offered to agree a stay of this action on a warranty by Mr Patel that he was innocent of the frauds and on his agreement to cooperate, with liberty for the liquidators to lift the stay in case the liquidators took the view that Mr Patel was in breach of warranty or was in breach of his obligation to provide assistance. There was no provision as to costs and no provision for discontinuance. The Freezing Order was to remain in place.

19. Between the 15th and 25th June 2002 Mr Patel started spread betting ahead of finalisation of the revised Freezing Order. On the 26th June 2002 Magwells wrote to Lovells asking them to explain to the Halifax that it was agreed that Mr Patel could use £30,000 immediately and deposit it for calls and that this was extremely urgent to avoid losses to Mr Patel. Lovells replied that the draft of the revised Freezing Order was agreed and on the 3rd July 2002 supplied a copy of the sealed order to the Halifax. Mr Patel's spread betting required positions to be exited on the 5th July 2002 but the Halifax had not yet allowed the release. Mr Patel's open positions were closed by Spreadex on the 15th July 2002 because Mr Patel had failed to meet a call for margin. Belatedly on the 19th July 2002 the Halifax released the £30,000 allowed for spread betting, but this was too late.

20. Meanwhile on the 10th July 2002 Magwells replied to the Claimant's offer in the terms of the draft settlement. This letter set the uniform pattern maintained by Mr Patel to all offers in settlement throughout this litigation and in his evidence on this application. The letter said that there was no purpose in negotiations unless the Claimant was prepared to accept terms (amongst others) requiring: (1) an agreed press release and letter of reference retracting all allegations against him, expressing regret and apologies that he was joined in the action and explaining that he was entirely innocent of any imputation against his character and conduct; (2) the Claimant to arrange that West LB withdraw its report against Mr Patel to the SFO; and (3) payment of Mr Patel's costs on an indemnity basis.

21. On the 12th July 2002 Mr Patel made an application under Part 24 of the CPR for summary judgment dismissing the action against him. On the 29th July 2002 a meeting took place between Magwells and Lovells to discuss the draft settlement. Lovells made clear that they would not agree to the press release or letter of exoneration required by Mr Patel because the liquidators did not believe in Mr Patel's innocence. They believed that Mr Patel did not have the funds to make him worth pursuing and they required a "drop hands" settlement with no order as to costs. Magwells said that costs might be a "deal breaker". On the 9th August 2002 Magwells wrote to Lovells that Mr Patel would enter no agreement unless his costs were paid on an indemnity basis, he received a letter of apology and exoneration and his Employment Tribunal claims were settled.

22. On the 30th August 2002, Mr Patel who had until then paid his costs out of his own funds learnt of the existence of a Management Assurance Policy ("the Policy") taken out by the Claimant with the Royal and Sun Alliance ("the Royal") and obtained a copy. The Policy afforded protection to a ceiling of £5 million to officers of the Claimant (including Mr Patel) in respect of legal costs and (save in case of fraud on their part) damages. On the 4th October 2002 Magwells wrote

letters: (1) to the Royal making a claim under the Policy (which Royal accepted on the 22nd November 2002 as from the 14th June 2002); and (2) to the Claimant stating that the only realistic prospect of obtaining anything by way of damages or costs was from the insurers, who might be more "lenient" as to terms of settlement than Mr Patel.

23. On the 21st October 2002, in the course of a telephone conversation between Lovells and Magwells, Magwells stated that they thought that they could work round the letter of apology but costs seemed to be a real impasse. Lovells suggested that the Royal could overcome the problem by funding Mr Patel's costs without looking to the liquidators for reimbursement or contribution.

24. A meeting took place between Mr Patel and Mr Shierson (accompanied by their solicitors) on the 8th November 2002. There is an issue which I cannot resolve as to what was said at the meeting. But on the 14th November 2002 Lovells wrote to Magwells that their "drop hands" offer made at that meeting had expired as a result of the creditors' committee meeting that had then taken place.

25. The hearing of Mr Patel's application under Part 24 of the CPR for summary judgment commenced on the 28th November 2002. On the 20th December 2002 Laddie J dismissed the application and on the 17th January 2003 ordered Mr Patel to pay immediately the Claimant's costs to be taxed and he ordered immediate payment of £75,000 on account. This £75,000 was duly paid.

26. The relevant paragraphs of his judgment read as follows:

> "Is there a sufficiently arguable case of Mr Patel's breach of his obligation to the company? …
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> 71. In my view the liquidators have raised a sufficiently arguable case that Mr Patel must have been involved in the frauds or in suppressing their discovery. The absence of a smoking gun, which Mr McDonnell relied on, may well be due to the extensive clean up which was organised in the last three months of the company's life. If, as is arguable, Mr Patel was involved in the frauds and the subsequent cover-up, one would not expect to find many of his fingerprints on any of the remaining company records.
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> 72. The liquidators have gone beyond the generalities and have pointed to a significant number of individual events with which Mr Patel was involved which taken together, so they say, give rise to a reasonable inference that Mr Patel was involved in the frauds and hindered the investigation of them. Some of these are set out in the particulars of claim and they are the subject of lengthy evidence from Mr Shierson.
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> 73. Mr McDonnell acknowledges that his side's spirits fell when it read Mr Shierson's evidence. It creates a telling picture, from numerous small strands, of Mr Patel's involvement. Mr Patel's response to this was in two parts.

> First, he accused the liquidators, and particularly Mr Shierson, of exaggeration, unfairness, paranoia, dishonesty and deliberately making selective use of material to bolster a case which he, Mr Shierson, knew was false. This is supported by Mr McDonnell who not only reiterates his client's criticisms but adds to them. At one point he suggested that Mr Shierson was 'unbalanced'. It is said that the liquidators had realised that they got the wrong man but had filed deceitful evidence so that they would not have to admit as much as this stage.
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> 74. I have read Mr Shierson's evidence again with some care. As far as I can see the allegations of dishonesty and deliberate deceit are without any foundation…
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> The application to set aside the freezing order.
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> 96. At the beginning of the hearing, I entertained considerable sympathy for the predicament in which Mr Patel found himself. There can be little doubt that the freezing order will have had a severe adverse effect upon him. However it is inevitable while he continues to be a defendant in this action that a cloud of suspicion will hang over his head. As Mr McDonnell said in his opening submissions, unless his client is able to extricate himself from the proceedings, he will be virtually unemployable. Mr McDonnell's argument is that even if his client failed on his Part 24 application, nevertheless the claims made are so weak that they are incapable of supporting such an order.
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> 97. Initially I thought there was considerable strength in this argument. However one of the effects of the detailed examination of the allegations made against Mr Patel and his responses to them is that the claimant's case appears to be stronger than a superficial assessment of the evidence might have indicated. One of the disadvantages of applications like this is that it is possible to misconstrue the court's decision. I wish to emphasise that I am not reaching even a preliminary conclusion about Mr Patel's liability to RBG. I am not in a position to do so. Nevertheless on the material that I have been shown, some of which I have referred to above, it appears to me that the claimant has a good arguable case against him. In view of the enormous sums said to have been misappropriated from the company, the destruction of company records alleged and, if liability is proved, Mr Patel's involvement in these activities, I continue to be of the view that this is a case where a freezing order against him is appropriate."

27. On the 21st January 2003 the Restraint Order was discharged by consent and costs were reserved to Laddie J. (The incidence of those costs is a matter by consent now before me.)

28. On the 27th May 2003 by agreement the Claimant discontinued its claim against Mr Majumdar with no order as to costs.

29. On the 1st June 2003 the Claimant made an application for summary judgment against Mr Rastogi and Mr Jain.

30. On the 11th June 2003 in their Replies to Request for Further Information the Liquidators stated:

> "138 Quantum is to a large extent academic within the context of the asset disclosure provided by Mr Patel."

31. By letter dated the 23rd June 2003, Magwells wrote to Lovells that by reason of those Replies the Freezing Order should be lifted. Lovells responded on the 1st July 2003 that the purpose of the Freezing Order had not changed since it had been obtained; and that "Next to nothing in assets" indicates that Mr Patel had some assets.

32. On the 8th July 2003 Mr Patel applied for security for costs. The bill produced by Mr Patel shows costs incurred (assessed on an indemnity basis) down to July 2003 as £508,216.88 (excluding costs and disbursements relating to the Part 24 Application) and estimated costs from August 2003 up to (but not including) trial at £765,630.

33. On the 14th July 2003 a case management conference took place at which, in view of the application by the Claimant for summary judgment against Mr Rastogi and Mr Jain, separate directions were given for trial of the claim against Mr Patel, including an attempt at mediation, directions for security for costs, further information and disclosure and for witness statements. On the 29th October 2003 an attempt was made at mediation but it failed.

34. On the 17th October 2003 Lovells made an offer "without prejudice save as to costs" to pay £50,000 towards Mr Patel's costs, to forgo the outstanding £130,000 odd due under the Order of the 17th January 2003 and not to contest Mr Patel's claim in the Employment Tribunal. Lovells made plain that, in the light of the judgment of Laddie J, it would be unprofessional for the liquidators to provide a letter of exoneration. Privilege in respect of all disclosed "without prejudice" documents has been waived.

35. On the 29th October 2003 Lovells wrote an open letter to Magwells: (1) stating that a trial against Mr Patel alone would make no sense in view of his asset disclosure and that the court would be likely to consider it contrary to the overriding objective; (2) stating that the figure for security for costs was excessive though the sum would clearly be substantial; and (3) proposing that (reflecting the confidence which the liquidators had in the summary judgment application) the claim against Mr Patel should be withdrawn with no order as to costs on terms that the liquidators would forgo the outstanding £130,000 due under the order of the 17th January 2003 and the costs due under the order dated 31st May 2002.

36. On the 5th November 2003 by consent the Freezing Order was discharged, and the costs and liability under the cross-undertakings was reserved.

37. On the 7th November 2003, Magwells wrote to Lovells stating: (1) that nothing had changed about the utility of a judgment against Mr Patel since the action began except that the costs had depleted his resources to nil; (2) (incorrectly) that the Claimant had commenced the proceedings and obtained the Freezing and Restraint Orders on the basis of participating in the frauds (as pleaded in the Claim Form) and then reduced it to knowledge of the Fraud (as pleaded in the Particulars of Claim); and (3) that it was paramount to Mr Patel to restore his good name and that if the liquidators would not exonerate him, he had no choice but to go to trial.

38. On the 10th November 2003 the Claimant applied for a stay of the action against Mr Patel until after its application for summary judgment against Mr Rastogi and Mr Jain and in his witness statement in support Mr Shierson said that, if the application against Mr Rastogi and Mr Jain succeeded, the court would be faced with time-consuming and expensive litigation that would appear to make no commercial sense. By letter dated the 12th November 2003 Magwells replied that the application would be opposed.

39. On the 20th January 2004 Mr Patel for the first time was interviewed by the Serious Fraud Office and was placed on Police Bail to return for further interviews when required. No further interviews have so far been required.

40. On the 27th March 2004 Hart J gave summary judgment against Mr Rastogi and Mr Jain. No penny of the damages awarded has been paid. Permission to appeal was refused by Hart J and the Court of Appeal.

41. On the 1st June 2004 the Claimant ahead of any disclosure made the application now before me for permission to discontinue without liability to pay Mr Patel's costs. In August 2004 the Claimant agreed to deposit £100,000 with Lovells as security for Mr Patel's costs.

42. On the 8th December 2004 on the unopposed application by Mr Patel the Employment Tribunal awarded Mr Patel £15,877.20, made up as to £3,461.54 for unauthorised deductions from wages, £5,614.14 in damages for breach of contract and £6,801.52 for unfair dismissal.

43. In his witness statement on this application Mr Patel once again asserted that no outcome was acceptable except open exoneration.

44. On the 25th April 2005 Mr Patel made applications now before me for an inquiry as to damages under the Freezing Order and for the costs of the Insolvency Proceedings.

45. The Company does not at present have free funds available to meet any order for costs in favour of Mr Patel. The liquidators will have to discharge any such liabilities out of funds appropriated for payment and (perhaps) already paid to the liquidators as their remuneration. The liquidators are bringing proceedings against the Claimant's former auditors. Any shortfall to the liquidators may be made good out of the recoveries obtained (if any) in the course of proceedings.

DISCONTINUANCE

46. The Claimant's application is made pursuant to CPR Part 38. Under CPR 38.2(2) the Claimant requires the permission of the court to discontinue because the court has previously granted an interim injunction in relation to the claim. CPR 38.6(1) provides that, unless the court orders otherwise, a claimant who discontinues is liable for the costs which a defendant against whom he discontinues incurred on or before the date on which a notice of discontinuance was served on him.

47. The Court of Appeal in Walker v. Walker [2005] EWCA 247 (in a case very similar to the present) gave guidance on the approach to be adopted by the court on an application for discontinuance where the incidence of costs is in issue. Decisions in cases such as the present should in my judgment be arrived at upon consideration of the language of CPR Part 38 applying the guidance so given. Little (if any) assistance should be sought from, or can be afforded by, authorities preceding the CPR.

48. The following principles can be deduced from the judgment of the Court of Appeal:

i) it is no part of the function of a court on an application to discontinue to attempt to reach a decision on whether or not the claim will succeed (para 11);

ii) the burden is upon the party who seeks to persuade the court that some other consequence should follow than that the claimant should bear the defendant's costs on discontinuance and the task of the court is to consider whether there is some good reason to depart from the normal order (para 24);

iii) the test to be applied is not the simple one of looking at the action as it is and seeing what is the fair and just thing to do at the moment in time (para 36);

iv) justice will normally lead to the conclusion that a defendant who defends himself at substantial expense against a claimant who changes his mind in the middle of the action for no good reason other than that he has re-evaluated the factors which have remained unchanged should be compensated in costs (para 36); and

v) it is not the law that a claimant will only be required to pay a defendant's costs on discontinuance if he is in effect surrendering and acknowledging defeat (para 37).

49. I should add the quotation of two paragraphs in the judgment of Chadwick LJ:

> "23. The stance adopted on behalf of the liquidator is that it is perfectly proper to bring proceedings against a defendant for a claim which can never be met having regard to the assets available to meet it; to pursue that claim until all those assets have been expended by the defendants in defending that claim, perfectly properly; and then to walk

> away on the basis that the defendants are left to bear all their own costs. If that is what the law permits or requires, then I am bound to say I find that startling.
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> …
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> 42. The question then is whether there is a good reason for departing from the normal rule. To my mind, there is no reason at all for departing from the normal rule. Indeed as it seems to me, it would be most unjust if Mr Walker was left to bear the costs of these proceedings – amounting to a sum likely to be in excess of £100,000 – simply because the liquidator has arrived late at a decision which he could and should have reached at the time when the proceedings were commenced. I do not think it is just to allow the liquidator to walk away from these proceedings leaving Mr Walker to bear his own costs, in the circumstances that the relevant factors have not changed in any material respect since the time at which proceedings were commenced. "

50. The burden is accordingly on the Claimant to persuade me that there is some good reason to depart from the normal rule which is to direct the Claimant to pay Mr Patel's costs on the standard basis. The Claimant seeks to discharge the burden on three grounds, namely: (1) that circumstances have changed very considerably since the commencement of the proceeding such that the decision to discontinue is a reasonable (and indeed the right) decision and that there is no element of surrender; (2) that Mr Patel has adopted a totally unreasonable response to all overtures by the Claimant for settlement; and (3) that Mr Patel has had to pay a very small sum from his own funds, with most of the costs paid by the insurers under a policy taken out and paid for by the Claimant. I shall consider each of these grounds in turn.

51. The Claimant has known since the 8th May 2002 the financial position of Mr Patel, that he was scarcely worth powder and shot, and that the liquidators would in all likelihood be unable to fund the prosecution to judgment of the claim against him on its own and not merely as one part of an action against one or more of the other defendants. The maintenance of the claim against him on its own did not make commercial sense in view of the likely vast expense and complication of the proceedings and unlikelihood of any recovery. The acceptance by the Royal of the claim on the Policy made the claim even less palatable, for thereafter the defence of Mr Patel was funded but the policy did not cover awards of damages for the fraud alleged. Indeed concern about the viability of proceeding with the claim against Mr Patel was the consideration which prompted the Claimant's offer made on the 19th June 2002 to enter into the draft settlement. Nonetheless, when this offer (and later offers) were declined, the Claimant did not apply for permission to discontinue. The Claimant did not even apply when it made its application for summary judgment against Mr Rastogi and Mr Jain. It only did so a month after that judgment had been obtained.

52. Whilst the grant of summary judgment against Mr Rastogi and Mr Jain was a circumstance which placed beyond question the fact that the pursuit of the claim against Mr Patel was neither commercial nor viable, this was foreseeable and foreseen beforehand and, once the application for summary judgment was made,

the liquidators were confident of its outcome. The Claimant was in law entitled to take the course which it did of keeping Mr Patel a defendant in the action unless and until he agreed terms of settlement which were acceptable to the Claimant and until judgment was obtained against Mr Rastogi and Mr Jain, but the exercise of this choice carries with it in a case such as the present the price (in particular since the outcome was reasonably foreseeable if not actually foreseen), that the ordinary rule should prima facie apply on the subsequent discontinuance and the Claimant should pay Mr Patel's costs. Subject to one matter as it seems to me there is no good reason to depart from the normal rule. It is of course no answer to Mr Patel's claim for costs that the Claimant has at all times had a good arguable case and continues to do so. It is of course no reason to depart from the normal rule that any costs order to be paid by the Claimant will have to be funded out of monies already paid or set aside for payment of the liquidators' remuneration. The liquidators should have appreciated the risk of commencing and continuing the proceedings against Mr Patel. Liquidators should think very carefully before making decisions to bring or continue expensive proceedings for damages against impecunious defendants, most particularly when they involve serious allegations such as fraud. They should realise that they may not be able to extract themselves from those proceedings save on terms requiring payment of the defendant's costs of those proceedings. If to the mind of the liquidators the defendant acts unreasonably in refusing to agree terms of settlement, in the ordinary case the prudent course for the liquidator is to apply to the court for permission to discontinue and leave it to the court to decide what (if any) terms should be imposed.

53. The question however arises whether the conduct of Mr Patel and the attitude which he adopted in negotiations for settlement affords a good reason to depart (in whole or in part) from the normal rule. CPR 44.3 requires the court in exercising its discretion as to costs to have regard to the conduct of the parties and admissible offers to settle made by the parties. There can be no doubt that the Claimant did wish to negotiate terms with Mr Patel in particular for discontinuance and made a series of offers. I do not think that the offers were generous, but they afforded the basis for negotiations and (most particularly with the Royal as insurers liable to pick up the tab for any shortfall in recovery from the Claimant of Mr Patel's costs incurred from the 14th June 2002) a settlement should have been achievable. There was substance in Magwells' letter to Lovells dated the 4th October 2002 that the Royal might be expected to adopt a more conciliatory approach to a settlement than Mr Patel. But success in the negotiations was totally stymied by the insistence by Mr Patel that he receive (as well as costs on an indemnity basis) a public statement of exoneration and an apology. This was something which he (or at least his solicitors) must have known the liquidators could not properly furnish. In view of their belief in his guilt, the liquidators could never have honestly or reasonably met his request. The attitude taken by Mr Patel in this regard is all one with the serious and (so far as I can see) unfounded allegations made throughout this litigation (including in the evidence on this application) against the liquidators. His unnecessarily aggressive approach in the litigation has been calculated to increase costs, make any compromise at any stage the more difficult and occasioned the cost of rebuttal of his allegations against the liquidators. It seems to me that the totally unreasonable and unjustified stance adopted by Mr Patel is a good reason to order that Mr Patel should be deprived of a proportion of his costs. A fair proportion in my judgment is forty per cent reflecting the real

prospect that a settlement might and should have been reached at an early date, and the saving of costs, if Mr Patel had not adopted the attitude and stance which he did. I can take into account the fact that Mr Patel was insured for the purpose of evaluating the prospects of settlement if Mr Patel had acted reasonably and indeed rationally.

54. Magwells (through Mr McDonnell) have told me that they informed the Royal of the stance taken by Mr Patel. I am surprised and disturbed that the Royal countenanced the adoption of this stance in litigation which as insurers they were financing. (A copy of this judgment should be sent to the Chief Executive of the Royal.) But if Mr Patel had not taken that stance, I would have a reasonable expectation that terms would have been arrived at for the mutual benefit of all concerned.

55. Mr Patel has claimed that in respect of the costs order in his favour costs should be assessed on the indemnity rather than the standard basis. I have in mind (as Mr McDonnell insists that I should) the very serious allegations made in the action against Mr Patel which have had the most serious impact on his life and employment prospects and which, if the action is discontinued, he will have no means of rebutting, let alone in proceedings in open court. But Laddie J held that there was a real basis for them, even if they might not be established at the trial, and the investigation and arrest by the police is ongoing and would in any event have seriously tarnished his reputation. The Claimant is discontinuing the action for good reason, though not for a reason which excuses it from an adverse order for costs. I do not think that there are circumstances or conduct which take this case out of the norm or that there is any sufficient reason to direct the Claimant to pay the 60% of Mr Patel's costs which I have awarded Mr Patel on an indemnity basis: the order should be for payment on the standard basis only. The Claimant will of course be free to set-off against these liabilities the orders for costs which it has obtained against Mr Patel. The costs include costs reserved on previous applications to the court in respect of which no order has subsequently been made.

COSTS OF RESTRAINT ORDER

56. I should give a brief résumé of the facts. Laddie J made the Restraint Order on the 2nd May 2002 in the Insolvency Proceedings. Pursuant to the Restraint Order Mr Patel cooperated and furnished information to the provisional liquidators such that on the 8th May 2002 Lovells confirmed that they did not presently require further information. Against the opposition of Mr Patel, on the 15th May 2002 Rimer J continued the Restraint Order until the 31st May 2002 and reserved the costs until the further hearing. On the 31st May 2002 Laddie J adjourned the application for the Restraint Order for a half day hearing before himself, continuing the order in force. The Restraint Order was discharged by consent and the costs were reserved to Laddie J. All parties have asked me to determine the incidence of these costs.

57. Mr McDonnell submits that it is quite plain from Mr Patel's witness statement that the Restraint Order and its continuation was not justified and that the liquidators did not need it. I take quite the contrary view. As it seems to me the provisional liquidators acted entirely reasonably in obtaining and maintaining it until it was discharged. They required the information and protection sought when it was obtained and thereafter needed to retain it in reserve. This view is entirely in accord with the judgments of Laddie J given on the 31st May and the 20th

December 2002. I make no order as to Mr Patel's costs of the Restraint application.

CROSS UNDERTAKING IN FREEZING ORDER

58. Mr McDonnell seeks to enforce the cross-undertaking in damages under the Freezing Order so as to recover Mr Patel's costs on his spread betting which he incurred through the non-availability of his own money to meet margin calls required to support his trading positions. Mr Patel was effectively prohibited by the Freezing Order in its original form from spread betting, for under the terms of that order Mr Patel could not make available the necessary monies required to secure the margin. It was in order to enable Mr Patel to undertake spread betting that amendments to the Freezing Order were agreed on the 31st May 2002. The contemplation of the parties and the court must have been that Mr Patel would be free to spread bet once the final terms of the revised order were agreed and the order was sealed and the necessary margin was released by the Halifax. Mr Patel however jumped the gun and began spread betting before the order was drawn up and the margin released.

59. I will proceed on the assumed basis that the Freezing Order in the revised form was wrongly granted. In my judgment the agreed form of order did not occasion the loss claimed, for the form of order specifically provided for the availability of the margin. Mr Patel could not spread bet under the original order: the revised order made on the 31st May 2002 permitted it. There can accordingly be no justice in Mr Patel's claim that the Claimant is liable under the cross-undertaking in respect of the betting loss. The loss was not occasioned by the agreed form of order: so far as the loss was attributable to the absence of margin, this was caused by Mr Patel jumping the gun and betting before security was in place, for which the agreed form of order provided. The critical delay after the order was sealed was attributable solely to the time taken by the Halifax to reach and notify its decision to release £30,000 for this purpose. Leaving aside causation, in any event in the special circumstances in which the loss was incurred, in my discretion I should not permit Mr Patel to enforce the cross-undertaking: it would be unjust to do so.

60. I accordingly see no merit in this application by Mr Patel and refuse it.

CONCLUSION

61. I accordingly hold that the Claimant should have permission to discontinue the claim against Mr Patel on terms that the Claimant pays 60% of Mr Patel's costs of the action to be assessed on the standard basis; and I dismiss Mr Patel's applications for the costs of the Restraint Proceedings and for permission to enforce the cross-undertaking in damages under the Freezing Order.