In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. 279

BETWEEN:

(1) VISION EN ANALISIS Y ESTRATEGIA, S.A. DE C.V.

(2) CAPITALIZA-T, SOCIEDAD DE RESPONSABILIDAD LIMITADA DE CAPITAL VARIABLE

Plaintiffs

-and-

(1) CHRISTOPHER RONALD ERWIN, ALSO KNOWN AS CHRISTOPHER R. ERWIN AND/OR CHRISTOPHER ERWIN

(2) EMERGING MANAGER PLATFORM LTD (a segregated accounts company sued in the name of the LAUREOLA INVESTMENT FUND account) (a non-cause of action Defendant)

(3) LAUREOLA ADVISORS INC.

(4) EMERGING ASSET MANAGEMENT LTD. (a non-cause of action Defendant)

(5) BELLA, LLC

(6) LAUREOLA ADVISORS USA, LLC

(7) LAUREOLA POLICY SERVICING, LLC

(8) ERWIN LEGAL, PC, ALSO KNOWN AS ERWIN LEGAL PC AND/OR ERWIN LEGAL, A PROFESSIONAL CORPORATION AND/OR ERWIN LEGAL A PROFESSIONAL CORPORATION

(9) EMERGING MANAGER PLATFORM 2 LTD (a segregated accounts company sued in the name of LAUREOLA INVESTMENT MASTER FUND account) (a non-cause of action Defendant)

(10) APEX FUND SERVICES LTD (a non-cause of action Defendant)

Defendants

RULING (COSTS)

Date of Hearing: **26 April 2022**
Date of Ruling: **12 August 2022**

Appearances: **Sam Stevens, Carey Olsen Bermuda Limited, for the Plaintiffs**

Mark Diel, Katie Tornari, Chris Snell, Marshall Diel & Myers Limited, for the Third Defendant

RULING of Mussenden J

Introduction

1. This matter comes before me on three Summonses as follows:
    a. The Third Defendant's – Laureola Advisors Inc. ("**Laureola**") – Summons dated 1 December 2021 for an Order that the Plaintiffs pay its costs of the claims commenced against it and subsequently discontinued, together with an inquiry of damages sustained by it as a result of the fact that the Freezing Injunction obtained by the Plaintiffs was subsequently discharged;
    b. The Plaintiffs' cross-Summons dated 7 February 2022 for an order that Laureola pay the Plaintiffs' costs of the claims; and
    c. Laureola's Summons dated 12 April 2022 for an Order requiring the Plaintiffs to discontinue their claims against Laureola following the Plaintiffs having obtained an Order granting them leave to discontinue those claims, but the Plaintiffs having failed to file a notice of discontinuance. The Plaintiffs obtained that leave to discontinue as long ago as 8 October 2021.

Background

2. Mr. Christopher Erwin ("**Mr. Erwin**") and Mr. Gordon Bremness ("**Mr. Bremness**") founded Laureola which was incorporated in the British Virgin Islands ("**BVI**") on 21 December 2012. Since incorporation, Mr. Bremness has acted as Laureola's sole director and, at varying times, Mr. Erwin served as Laureola's Chief Investment Officer, Reserve Director and Director of Sourcing. From the date of incorporation until 1 March 2021, it was known that Mr. Erwin owned at least 12,500 voting shares in Laureola.

3. Laureola is an active company engaged in fund management. At all relevant times, the Plaintiffs believed based on information available to them that Laureola received an income stream from both the Second Defendant ("**EMP**") and the Ninth Defendant ("**EMP2**") in the form of investment management fees. EMP and EMP2 are Bermuda segregated accounts companies which form part of the well-known fund administrator, the Apex Group.

4. Mr. Jose Hernandez filed his Third Affidavit dated 4 February 2022 ("**Hernandez 3**") on behalf of the Plaintiffs. He set out some background to this matter as follows. In proceedings in California (the "**California Proceedings**"), the Plaintiffs obtained judgment against Mr. Erwin in September 2019 (the "**California Judgment**"). In those proceedings, Mr. Erwin provided sworn testimony that (i) he had a share interest in Laureola; and (ii) he transferred his equity interest in those shares into another entity known as Bella LLC ("**Bella**") for no consideration.

5. On 9 July 2019 the Plaintiffs filed a Specially Indorsed Writ of Summons (the "**Writ**") in an effort to enforce the California Judgment. Laureola was joined as a non-cause of action Defendant on the basis of Mr. Erwin's testimony in the California proceedings. The Plaintiffs sought relief to void any transfer by Mr. Erwin of his beneficial interest in his Laureola shares. The Writ has been amended from time to time.

6. On 11 July 2019 the Plaintiffs obtained an *ex parte* freezing injunction (the "**Freezing Injunction**") against Laureola, amongst others. The Freezing Injunction did not include a

provision allowing any of the respondents to make any payments in the ordinary course of business. On 9 October 2019 an order was granted varying the Freezing Injunction to allow Laureola to make and receive payments in the ordinary course of business. On 10 October 2019 there was a further variation to the Freezing Injunction which prohibited the Fourth Defendant, Emerging Asset Manager Ltd, from making any payments to Laureola. Also on 10 October 2019 default judgment was entered against Mr. Erwin in Bermuda in the sum of $3,847,346.

7. On 14 – 16 December 2020 the Plaintiffs obtained a Norwich Pharmacal Order in BVI which revealed that Mr. Erwin had lied in his testimony in the California Proceedings and that he had not in fact transferred any interest of his shares in Laureola.

8. Mr. Stevens submitted that the onset of the Covid-19 pandemic effectively stayed proceedings for a considerable part of 2020. On 24 December 2020 Carey Olsen filed a notice of change of attorney replacing ASW Law Ltd. On 14 January 2021 Jan Woloniecki, formerly of ASW Law Ltd., passed away. Mr. Stevens submitted that the passing of Mr. Woloniecki resulted in more time being required to transition, consider and advance the action.

9. On 29 March 2021 the BVI Court granted the Plaintiffs' *ex parte* receivership order over all of Laureola's shares and also granted a freezing injunction against Mr. Bremness. On 27 August 2021 the BVI Court discharged the *ex parte* receivership order over all of Laureola's shares.

10. On 6 October 2021 the Freezing Injunction in Bermuda was discharged against Laureola. On 8 October 2021 the Plaintiffs and Laureola agreed by consent that the Plaintiffs shall have leave to discontinue all of the claims against Laureola. The cost of the discontinuance was expressly reserved.

Rules of the Supreme Court 1985 and Case Authorities

11. Order 21, rule 3 states as follows:

"21/3 Discontinuance of action, etc. with leave

(1) Except as provided by rule 2, a party may not discontinue an action (whether begun by writ or otherwise) or counterclaim, or withdraw any particular claim made by him therein, without the leave of the Court, and the Court hearing an application for the grant of such leave may order the action or counterclaim to be discontinued, or any particular claim made therein to be struck out, as against any or all of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just."

12. The relevant commentary in the Supreme Court Practice 1999 (the "**White Book**") at 21/5/10 states the Court has a wide discretion as to the terms upon which it may grant leave to discontinue a claim and that:

"*Nevertheless, it is not desirable that a plaintiff should be compelled to litigate against his will; the Court will normally grant him leave to discontinue if he wants to, provided no injustice will be caused to the defendant nor will he be deprived of any advantage which he has already gained in the litigation, which so far as possible should be preserved, but the order of the Court must take effect from the date on which such leave is granted, since the court has no power under the rules or under its relevant jurisdiction to back-date such an order*.

13. Order 62, rule 3 states as follows:

"3 - If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."

14. Order 62, rule 5(3) states as follows:

"5(3) Where a party by notice in writing and without leave discontinues an action or counterclaim or withdraws any particular claim made by him as against any other party, that other party shall be entitled to his costs of the action or counterclaim or his

costs occasioned by the claim withdrawn, as the case may be, incurred to the time of receipt of the notice of discontinuance or withdrawal."

15. The relevant commentary in the White Book at 21/5/9 states:

"It is open to a plaintiff to apply for and obtain leave to discontinue, even when he could do so without leave, in order to avoid the necessity of paying costs which discontinuance without leave involves, and in a proper case leave may be given to discontinue without paying costs."

16. The relevant commentary in the White Book at 21/5/11 further states:

"The general rule that a defendant is entitled to costs when an action is discontinued may be departed from in a case where the discontinuance of the proceedings is due to the matter having become academic, rather than to any acknowledgment by the Plaintiff of likely defeat (Barretts & Baird (Wholesale) Ltd v Institution of Professional Civil Servants, The Independent, December 9, 1988; (1988) New L.J. 357)."

17. Order 62, rule 10 states as follows:

"62/10 Misconduct or neglect in the conduct of any proceedings

10 - Where it appears to the Court in any proceedings that any thing has been done, or that any omission has been made, unreasonably or improperly by or on behalf of any party, the Court may order that the costs of that party in respect of the act or omission, as the case may be, shall not be allowed and that any costs occasioned by it to any other party shall be paid by him to that other party."

18. In *Binns v Burrows* [2012] SC (Bda) 3 Civ at [6], the Bermuda Court set out the general principles with regard to the award of costs as follows:

" ...unless the Court or the parties have identified discrete issues for determination at the trial of a Bermudian action, the Court's duty in awarding costs will generally be to:

i. determine which party has in common sense or "real life" terms succeeded;

ii. award the successful party its/his costs; and

iii. *consider whether those costs should be proportionately reduced because e.g. they were unreasonably incurred or there is some other compelling reason to depart from the usual rule that costs follow the event."*

19. In *Butterfield Trust Ltd v Rutli Stifung and Salle Modulable* [2012] BDA LR 71 Evans JA held as follows:

"The appeal raises the question for this Court as to what was the correct approach for the Learned Judge to adopt. Broadly, the Learned Judge had a discretion as to what costs order to make in a situation such as this. There is some support for the view that in a case of discontinuance, with or without leave to do so, the normal order would be to require the Plaintiff, who is discontinuing, to pay the Defendant's costs of the proceedings unless there is some good reason why they should not do so. I would prefer to put it more broadly and ask, what is the appropriate order to make in all circumstances of the case, bearing in mind that the Plaintiff started the proceedings and caused the Defendant to incur costs of defending them?"

20. In the English Court of Appeal case of *RTZ Pension Property Trust Ltd v ARC Property Developments Ltd and another* [1999] 1 All ER 532 it was stated:

"Where a plaintiff discontinued an action with leave under Order 21 r 3 in circumstances tantamount to an acknowledgment of defeat, although the court had a wide discretion as to costs, the normal rule, namely that the defendant was entitled to an order for his costs of the action, applied, unless good reason could be shown to the contrary. For the purpose of justifying an order that the defendant pay the plaintiff's costs, it would be necessary to demonstrate misconduct of the defence in the sense of some act, omission, or course of conduct on the part of the defendant which would be unreasonable or improper for the purposes of Ord 62 rule 10(1); and in order to justify an order that there be 'no order as to costs in respect of the proceedings or any part of them, the test was what was fair and just in all the circumstances, the starting point, and the principal circumstance to be borne in mind, being that the plaintiff had abandoned all pleaded issues without argument or adjudication and had therefore prima facie to be regarded as having lost the day on all of them."

21. *Re Elgindata Ltd (No 2)* [1993] 1 All ER 232 is the leading English judgment on the extent of the court's discretion on costs. The principles elucidated by the English Court can be summarised as follows:
    (i) costs are in the discretion of the Court;
    (ii) costs should follow the event except where it appears to the Court that in the circumstances of the case some other order should be made;
    (iii) the general rule does not cease to apply only because a successful party raised issues or made allegations that failed, but a successful party can be deprived of his costs, in whole or in part, where he has caused a significant increase in the length of proceedings; and
    (iv) where the successful party raised issues or made allegations improperly or unreasonably the court could not only deprive him of his costs but could also order him to pay the whole or part of the unsuccessful party's costs.

22. In respect of determining who is the successful party in litigation, Bell J in *SCAL Ltd. v Beach Capital Management Ltd* [2006] Bda L.R. 93 held as follows:

    "In BCCI v Ali (#4) [1999] N.L.J. 1734 Lightman J. said that for the purpose of the Civil Procedure Rules 1998, operative in the UK, "success is not in my view a technical term but a result in real life, and the question as to who succeeded is a matter for the exercise of common sense. I respectfully agree …"

23. I recently set out the principles in respect of the Court's jurisdiction and discretionary powers to award indemnity costs in *Noesis Consulting Limited v Saturn Solar Developments Ltd* [2021] SC (Bda) 50 Comm. I cited the leading speech on the issue of Evans JA in *American Patriot Insurance v Mutual Holdings* [2012] Bda LR 23:

    "In our judgment, it would be wrong to say that indemnity costs should be ordered in every case where fraud is proved, but equally wrong to suggest that they can only be ordered when the proceedings have been misconducted by the losing party. Both "the way the litigation has been conducted" and the "underlying nature of the claim" (per

Kawaley J in Lisa SA v Leamington and Avicola at para 6) may be relevant in determining whether or not the circumstances are such as to make an indemnity costs order just."

The Applications for Costs

Laureola's Submissions on Costs

24. Mr. Diel submitted that as a general principle, where a party who has commenced a claim subsequently discontinues it, the discontinuing party is liable to pay the other party's costs; unless there is some good reason for the Court not to so order. This rule reflects the usual rule that the loser ought to pay the winner's costs. Mr. Diel argues that Laureola was the winner, the Plaintiffs having effectively discontinued the claims against Laureola without any modicum of success. Therefore, the Plaintiffs ought to pay the costs associated with their discontinuance.

25. Mr. Diel submitted that there were some features of this case which warranted that the Plaintiff pay costs on an indemnity basis. He stressed that the Plaintiffs obtained the Freezing Injunction against Laureola as early as 11 July 2019 which remained in place until 6 October 2021, despite the fact that the Plaintiffs knew since at least December 2020 that the factual basis on which they obtained the Freezing Injunction was incorrect. The Plaintiffs failed to return to Court, in breach of their continuing duties of full and frank disclosure, to inform the Court of the very material change of facts. Further, the Plaintiffs failed to take any steps properly to investigate the fact upon which they obtained *ex parte* relief, prior to obtaining the Freezing Injunction. Thus the maintenance of a Freezing Injunction for over two years in a case which the Plaintiffs ultimately lost is egregious conduct.

26. Mr. Diel submitted that there were several aggravating factors to take into account.

27. First, the Plaintiffs had knowledge shortly after 14 December 2020 that there had never been a transfer by Mr. Erwin of either his shares or any interest in his shares to Bella. Mr.

Diel pointed to Hernandez 3 which showed that the Plaintiffs had obtained a Norwich Pharmacal Order in the BVI, thus obtaining a copy of Laureola's share register which showed no transfer of shares by Mr. Erwin. Despite this knowledge, the Plaintiffs maintained: (i) the Freezing Injunction, obtained on a factually incorrect basis; and (ii) the claims against Laureola. Mr. Diel relied on Hargun CJ's Ruling in *St John's Trust Company (PVT) Limited v Watlington & Others* [2020] SC Bda 19 Civ ("**SJTC Ruling**") where he set out that the Plaintiffs had a continuing duty to return to the Bermuda Court when there had been such a material development in the case after the hearing at which the *ex parte* injunction had been granted. Thus, in the present case, the Plaintiffs had breached their duty of full and frank disclosure. Mr. Diel rejected any criticism by the Plaintiffs for not correcting the incorrect factual basis relied on by the Plaintiffs and reiterate that there was no obligation on Laureola to do so.

28. Second, it was not Laureola or Mr. Bremness who caused the Plaintiffs to issue the claims against Laureola but per the First Affidavit of Hernandez, it was Mr. Erwin's false testimony in the California Proceedings which was the trigger. Mr. Diel submitted that it was incumbent upon the Plaintiffs to make proper inquiries to confirm the facts which they relied before making the *ex parte* injunction application. However, they failed to make any such inquiries at all to verify Mr. Erwin's testimony, an individual who they knew was inherently untrustworthy. He relied on Hargun CJ in the SJTC Ruling where he cited *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350 as follows:

> *"(3) The applicant must make proper inquiries before making the application … The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries."*

29. Third, the Plaintiffs displayed egregious conduct in that they neglected to explain to this Court that they maintained the proceedings in Bermuda – on a knowingly incorrect factual basis – after they had obtained a Norwich Pharmacal Order in the BVI because they wished to use the existence of the Freezing Injunction and claims in Bermuda as a justification for obtaining yet further *ex parte* relief against Laureola in the BVI. Mr. Diel submitted that the Plaintiffs further breached their duty of full and frank disclosure in failing to inform

the Bermuda Court that they used the existence of the Freezing Injunction to obtain *ex parte* relief in the BVI. He relied on Hargun CJ in the SJTC Ruling citing *Todaysure Matthews Limited v Marketing Ways Services Limited* [2015] EWHC 64 (Comm):

> *"Where a person who applies ex parte for an injunction intends to use the grant of the injunction to support an application for an injunction from another court in a foreign jurisdiction such intention is a matter which "reasonably could or would be taken into account by the Judge in deciding whether to grant the application". That is because the intention affects or may affect the consequences of granting the injunction. Any judge of this court when asked to grant an injunction ex parte wishes to know the likely consequences of acceding to the application and making the requested order. If the judge is not informed of the applicant's intention to use the order in support of another application abroad the judge will have an inadequate or incomplete appreciation of the likely consequences of making the requested order. …"*

30. Mr. Diel submitted that in the BVI, the Plaintiffs issued and ran a very different factual case to that which they simultaneously ran in Bermuda. They also obtained *ex parte* relief against Laureola in the BVI in the form of a receivership order on 24 March 2021 and simultaneously obtained a freezing injunction against Mr. Bremness personally – both of which were subsequently set aside on 27 August 2021. Mr. Diel directed the Court to parts of the Judgment of the BVI Court as follows:
    a. The BVI Judge noted that despite the Plaintiffs alleging that Laureola and Mr. Bremness had breached the Freezing Injunction, the Plaintiffs had taken no steps in Bermuda to enforce the breach, thus the BVI Judge was inclined to think there had been no breach;
    b. The apparent breach of the Freezing Injunction was the major premise upon which the Plaintiffs based their application for receivership, which was a draconian form of relief requiring solid evidence of a real risk of dissipation; and
    c. Laureola had persuaded him sufficiently that the Freezing Injunction had not been breached – or that the Plaintiffs had not persuaded him that it had been breached.

31. Fourth, the BVI Court did not know, because the Plaintiffs did not inform it, is that the Plaintiffs had obtained the Freezing Injunction in Bermuda on a false factual basis because they had failed to make any proper inquiries to corroborate Mr. Erwin's testimony.

32. Mr. Diel rejected the Plaintiffs' application for Laureola to pay the costs of the claims on the basis that Mr. Bremness ought to have corrected the factually incorrect basis on which the Plaintiffs had issued their claims when Laureola filed a Defence to the Plaintiffs' claims. He relied on several grounds. First, no cause of action was ever pleaded against Laureola which was a non-cause of action Defendant. Thus, there was no claim to defend and no allegations which it had to admit or deny.

33. Second, Laureola was still entitled to require the Plaintiffs to prove each of the facts that they alleged against it. 'He who asserts must prove.' It is not for the Defendant to correct a misapprehension of fact on the part of a Plaintiff and there is no rule which requires them to do so.

34. Third, Mr. Bremness, on behalf of Laureola, gave evidence that he did not know – and had no way of knowing – whether or not Mr. Erwin had transferred any interest in his shares to Bella. Thus, he had no way of correcting the facts which the Plaintiffs alleged he ought to have corrected. On the basis that the matter has been discontinued against Laureola and there will be no trial of any contested facts, the Court is bound to accept the evidence of Mr. Bremness as being true unless it is simply incredible. Mr. Diel relied on the English High Court decision in *Wards Solicitors v Hendawi* [2018] EWHC 1907 (Ch) where it stated:

> *"I also record here that I was not asked to order cross-examination of any witness, and none was tendered for cross-examination. In the absence of cross-examination, the court is not entitled to reject any written evidence as being untrue, unless on the basis of all the evidence before the court it considers that that written evidence is simply incredible."*

35. Mr. Diel submitted that nothing that Mr. Bremness or Laureola had done either caused or would have caused the Plaintiffs to alter their course of action as the litigation has demonstrated that they were determined to pursue their claims at all costs against multiple parties regardless of the merits. He argued that even if Mr. Bremness had informed the

Plaintiffs that its case was factually incorrect, it is highly unlikely that they would have immediately discontinued the claims against Laureola, noting that even when they did know the facts they relied on were untrue, they maintained the claims for a further 10 months before applying for leave to discontinue them.

36. Mr. Diel submitted that the Fourth Affidavit of Mr. Hernandez (**Hernandez 4**) is clearly wrong to state that the Plaintiffs never pleaded or suggested that Mr. Erwin had only transferred his beneficial interest in the shares to Bella. He pointed to the Writ in which the only remedy which the Plaintiffs asserted in respect of Mr. Erwin's Laureola shares was to allege that the transfer of the beneficial interest in those shares was void. In the prayer to the Writ, again the only remedy sought related to Mr. Erwin's beneficial interest in the Laureola shares. In the amended Writ, the pleadings were maintained in respect of the beneficial interest. In Hernandez 4, Hernandez states that Mr. Erwin gave evidence in the California Proceedings that he had transferred the equity interest (i.e. the beneficial interest) in the Laureola shares to Bella. Thus, Mr. Bremness's position that he believed the claim to be that Mr. Erwin had transferred his beneficial interest in the shares to Bella, and that he had no way of knowing if that was true or not is entirely credible and correct. Therefore, the Court should follow the general rule that the loser pays the winner's costs on the basis that there are more than sufficient reasons why.

The Plaintiffs' Submissions on Costs

Plaintiffs' submissions on background events

37. Mr. Stevens relied on the Hernandez affidavits filed in this matter. He submitted that the Plaintiffs considered their enforcement options and commenced the Writ proceedings in July 2019. They believed at that time that Mr. Erwin still owned a beneficial interest in Laureola and that the investment management fees that were payable from time to time by EMP to Laureola were an asset of Mr. Erwin within the jurisdiction of the Bermuda Court against which the California Judgment could be enforced. The Plaintiffs therefore sought a declaration from this Court that they were entitled to recover the California Judgment debt from any investment management fees payable by EMP to Laureola (the

"**Declaratory Claim**"). The Plaintiffs pleaded that Mr. Erwin had stated under oath that he had transferred his interest in Laureola to Bella for no consideration, thus the Plaintiffs were entitled to unwind the transfer of shares as a transaction at an undervalue pursuant to section 36C of the Conveyancing Act 1983 (the "**Fraudulent Conveyance Claim**"). Therefore the Plaintiffs obtained the Freezing Injunction (an ancilliary Mareva injunction) on 11 July 2019, modified over time to allow payments to Laureola in good faith and in the ordinary course of business, the main purpose of which was to restrain Mr. Erwin from causing any of the said investment management fees to be paid by EMP to Laureola up to the value of the California Judgment pending an *inter partes* hearing or further order.

38. Mr. Stevens submitted that a Defence was filed on behalf of Laureola on 29 October 2019 wherein at paragraph 1 it pleaded that it had "*no knowledge of the facts alleged in paragraphs 1 – 6 of the Amended Writ and as such those paragraphs are not admitted.*" Thus, Laureola represented to the Plaintiffs and to the Court that it had no knowledge of the fact that Mr. Erwin had indicated under oath that he had transferred his interest in Laureola to Bella for no consideration.

Proceedings in the BVI

39. Mr. Stevens referred to proceedings in the BVI. The Plaintiffs had learned of California State Bar proceedings against Mr. Erwin in respect of allegations that he had filed false and misleading pleadings in the California Proceedings. Therefore, the Plaintiffs obtained in the BVI Court a Norwich Pharmacal Order against Laureola's agent in the BVI, Coverdale Trust Services Limited ("**Coverdale**") but did not receive all of the required disclosure until February 2022. The disclosure included a copy of a shareholder register dated 7 January 2021 which appeared to show that Mr. Erwin was still a shareholder in Laureola Advisors. Based on that disclosure, the Plaintiffs obtained various urgent *ex parte* orders from the Eastern Caribbean Supreme Court in BVI (the "**BVI Receivership Order**").

40. On 2 April 2021 Counsel for Laureola in the BVI informed the Plaintiffs that Mr. Erwin was no longer a shareholder in Laureola as he had entered into an agreement to redeem his

shares on 26 January 2021. This caused the Plaintiffs concern as under the Freezing Injunction, Laureola had been restrained since 10 October 2019 from transferring assets or paying any money to Mr. Erwin other than in the ordinary course of business. Thus, based on the disclosure obtained in the BVI, the Plaintiffs considered the share redemption and payments of loans and dividends to Mr. Erwin to be a breach of the Freezing Injunction as well as a sham designed to facilitate the dissipation of Mr. Erwin's shares in Laureola in circumstances where Mr. Bremness was well aware that: (i) the terms of the Freezing Injunction forbid the transactions; and (ii) Mr. Erwin was being actively pursued by the Plaintiffs for a very significant judgment debt. On 8 April 2021 the Plaintiffs filed a claim in the BVI which sought, amongst other things, to unwind the redemption of Mr. Erwin's shares and thereafter transfer the benefit of Mr. Erwin's shareholdings to the Receiver in order to satisfy the Modified California Judgment (the "**BVI Claim**").

41. On 27 August 2021, on the application of Laureola, the BVI Receivership Order was discharged. In his written ruling dated 17 February 2022 the Judge in the BVI set out his reasons for the discharge.

42. Mr. Stevens submitted that despite the discharge of the BVI Receivership Order, the BVI Claim remains ongoing and has become the epicenter of the Plaintiffs' enforcement efforts outside the United States. Further, by September/October 2021, it had become clear based on all of the new information that had come to light since the Bermuda proceedings were first commenced, in particular the disclosures by the Plaintiffs in the BVI, that the Plaintiffs' claims in the Bermuda proceedings against Laureola had been superseded for practical purposes by the BVI Claim. On 6 October 2021, counsel for the Plaintiffs informed this Court at an *ex parte* hearing that they intended to discontinue the pleaded claims against Laureola – which had been rendered nugatory by the commencement of the BVI Claim. The Plaintiffs filed a Summons dated 7 October 2021 seeking leave to discontinue the pleaded claims against Laureola in Bermuda but without prejudice to pursuing any contempt proceedings against Laureola. On 8 October 2021 this Court granted the Order at an *inter partes* hearing at which counsel for Laureola was present.

Plaintiffs' submissions on the Law

43. Mr. Stevens submitted that while the usual order on costs is that costs should follow the event, citing *Binns & Ors v Burrows*, Order 62 rule 3(3) provides the Court with a broad discretion to depart from the usual rule "*when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs*". He referred to Order 1A rule 2 of the RSC which obliges the Court to apply the Overriding Objective when exercising any power conferred by the Rules. He also referred to Order 1A rule 3 which obliges the parties to assist the Court to achieve the Overriding Objective, citing *Mederios v Island Construction Services Co Ltd and ors* (Costs) [2018] Bda LR 22. He referred to the Overriding Objective itself which includes an obligation to ensure cases are dealt with expeditiously and in a manner that saves expense. Mr. Stevens relied on *Noesis Consulting* where I decided to depart from the usual order on costs because I was not satisfied that the successful party had complied with the Overriding Objective. There, the successful Defendant had withheld important information known to it at all material times which was germane to an *ex parte* application on notice made by the Plaintiffs, which omission I concluded was inconsistent with the Defendant's duty pursuant to the Overriding Objective.

Plaintiffs' submissions on the exercise of the Court's discretion to award costs

44. Mr. Stevens submitted that the Plaintiffs sought leave to discontinue the action on 8 October 2021 as against Laureola because the claims had been rendered nugatory by the BVI Claim, which was based on information that came to light after the Plaintiffs had commenced these proceedings. The most pertinent information that came to light was that Mr. Erwin was still a shareholder in Laureola in July 2019 when these proceedings were first commenced and he remained a shareholder until March 2021 when in an apparent breach of the Freezing Injunction, Mr. Bremness permitted Mr. Erwin to redeem his shares in Laureola. He argued that, crucially, the fact that Mr. Erwin was a shareholder in Laureola until 1 March 2021 and that he had not in fact transferred his shares to Bella as he falsely claimed under oath in the California Proceedings was known to Laureola, Mr. Bremness and Mr. Erwin at all material times in these proceedings.

45. Mr. Stevens submitted that the discontinuance of the claim against Laureola was not by any means an acknowledgement by the Plaintiffs of likely defeat. He referred to a strike-out application by Laureola (on the basis that no cause of action was disclosed), which was not supported by evidence or submissions and which was delisted by consent pending the written ruling of the BVI Court in respect of the application to discharge the BVI Receivership Order. Thus, Laureola never articulated why the Plaintiffs' Declaratory Claim was liable to be struck out for disclosing no cause of action. He stressed that the Plaintiffs never conceded that Laureola was likely to prevail in either the strike-out application or on the merits at trial.

46. Mr. Stevens submitted that in the circumstances, the Court should be guided by the principle cited in the White Book that the general rule can be departed from for several reasons:
    a. Laureola and its officers knew, contrary to the Plaintiffs' pleaded case, that Mr. Erwin had not transferred his shareholding in Laureola to Bella; but nonetheless
    b. Took no steps at any stage, in breach of the Overriding Objective, to disabuse the Plaintiffs and this Court of this falsehood which the Plaintiffs had been prompted to plead by Mr. Erwin's perjurious lie in the California Proceedings when he was still an officer in and shareholder of Laureola.

47. Mr. Stevens further submitted that when Laureola filed its Defence on 29 October 2019, it expressly disavowed any knowledge of whether Mr. Erwin had transferred his shares in Laureola to Bella. He referred to the reasons set out in Hernandez 3 and Hernandez 4 to show that the pleading at paragraph 1 of the Defence was false and that Mr. Bremness and Mr. Erwin would have known it was false. He stressed that on the date that the Defence was filed, Mr. Erwin was still Laureola's Chief Investment Officer – and a shareholder – and remained CIO until May 2020 when Mr. Bremness appointed him as Director of Sourcing on 15 May 2020 a position he held until 21 December 2020. Mr. Stevens referred to correspondence dated 2 April 2021 wherein Mr. Bremness admitted that he delegated responsibility for these proceedings to Mr. Erwin. Although Mr. Bremness now says that he had no way of knowing whether the averments in the Plaintiffs' Statement of Claim

were true or false, it was unarguable that Mr. Erwin knew he had not transferred anything to Bella and therefore that the pleading was wrong. Thus, it was Mr. Erwin who caused Laureola to file a Defence which pleaded a falsity. Therefore, Laureola cannot escape the consequences of the actions of its officer and shareholder.

48. Mr. Stevens submitted that Mr. Bremness's personal defence, as set out in his second affidavit, is a lawyers construct in that Mr. Bremness states he believed that the Plaintiffs' Statement of Claim was referring to a purported transfer of the beneficial interest in Mr. Erwin's shareholding to Bella, not a transfer of the legal interest. Mr. Stevens pointed to statements in Mr. Bremness's First Affidavit sworn on 30 November 2021 including "*owned the membership or beneficial interest in Laureola*", "*he had sought to transfer any interest*" and "*had transferred shares*". Thus, it was clear that Mr. Bremness's evidence was not reflective of someone who believed the Plaintiffs' case was concerned with an alleged transfer of a beneficial interest. Mr. Stevens also submitted that Laureola was served with the Plaintiffs' evidence in support of the Freezing Injunction which stated that Mr. Erwin had admitted "*transferring his ownership and distribution interest in Laureola* ..." to Bella, not his beneficial interest. Thus, the Court should reject Mr. Bremness's evidence on this issue as lacking credibility.

49. Mr. Stevens submitted that it is wrong for Mr. Bremness to take the position that, even if he understood the Plaintiffs' case, Laureola was under no obligation to correct the Plaintiffs' misapprehension. He cited *Noesis Consulting* and the principle that all parties are required to assist the Court to further the Overriding Objective. Thus, Laureola had failed in this duty as it (through Mr. Bremness and Mr. Erwin) had always known since being served with the Writ and the Freezing Injunction that Mr. Erwin was still a shareholder in Laureola. Despite this knowledge, Laureola did absolutely nothing to correct the record, either in its Defence or by simply writing to the Plaintiffs to confirm the true position. Mr. Stevens invited the Court to take the same approach as it did in *Noesis Consulting*. Further, he submitted that the evidence indicates that if the Plaintiffs had been made aware in July 2019 or shortly thereafter by Laureola that Mr. Erwin was still a shareholder then they would have proceeded to enforce the California Judgment against

Mr. Erwin's shares in the BVI and also taken steps to discontinue or compromise the claims in these proceedings at an early stage.

50. Mr. Stevens submitted that, in respect of the Plaintiffs' cross-Summons, in the circumstances set out in the preceding paragraph, Laureola should pay the Plaintiffs costs on an indemnity basis, alternatively the standard basis, as well as any costs the Plaintiffs are required to pay EMP and EMA following the withdrawal of the claims against those companies. He relied on the evidence in Hernandez 3 and Hernandez 4 that the Plaintiffs would never have commenced these proceedings but for the lie of Mr. Erwin and later on when that lie was perpetuated by Mr. Erwin when he caused the Defence to be filed containing the crucial false statement. Thus the Court has the discretion to make such a costs order under Order 62 rule 10(1) if it considers that the conduct of Laureola was unreasonable or improper.

Analysis

51. In my view, there should be no order as to costs in favour of the Plaintiffs or Laureola in this matter for several reasons. First, I am guided by *Binns v Burrows* in respect of the general principles with regard to the award of costs. The starting point is to determine which party has in common sense or "real life" terms succeeded. In applying Bell J's reasoning in *SCAL Ltd. v Beach Capital Management Ltd* I am not so readily inclined to accept Mr. Diel's arguments that Laureola was the winner just because the matter has been discontinued. I note on 10 October 2019 default judgment was entered against Mr. Erwin in Bermuda in the sum of $3,847,346. Thereafter, I take into consideration the arguments of Mr. Stevens that the Plaintiffs in no way conceded that Laureola was likely to prevail in the strike out application or the on the merits at trial of the remaining issues. Further, I accept that the Plaintiffs were proceeding with the BVI proceedings in order to enforce the California Judgment. Looking at the matter globally, I am unable to say that Laureola is the winner. However, I am obliged to focus on the Bermuda proceedings, and in applying common sense, I find that Laureola was the successful party in this matter in the Bermuda proceedings.

52. Second, in following *Binns v Burrows*, I should next award Laureola its costs unless there is some other compelling reason to depart from the usual rule that costs follow the event. In my view, there are such other compelling reasons to depart from the usual rule, namely the conduct of Laureola, Mr. Bremness and Mr. Erwin. It seems clear to me that Mr. Bremness and Mr. Erwin at all material times knew that Mr. Erwin had not transferred any of his interests in Laureola to Bella or to any other entity. I reject the submissions by Mr. Diel on this point. On the contrary, simply put, Mr. Bremness and Mr. Erwin were key principals in Laureola and it is incredible that they would not be aware whether Mr. Erwin had or had not transferred his shares or interests in his shares to Bella. Additionally, Mr. Bremness delegated conduct of the Bermuda litigation to Mr. Erwin. It is abundantly obvious to me that Mr. Erwin should have known whether he had transferred his shares and it is equally obvious that he knew that he had not done so.

53. Third, another aspect in relation to the conduct of Laureola, is that the evidence shows that Mr. Erwin lied in the California Proceedings and it further shows that he indeed perpetuated that lie when he gave instructions in the Bermuda proceedings in respect of Laureola's Defence which were not true and which he knew were not true. As he was delegated to conduct the litigation on behalf of Laureola then Laureola is bound by his instructions. I take a dim view of such dishonest conduct which in my view is a compelling reason to depart from the usual rule that costs follow the event.

54. Fourth, I have given consideration to Laureola's arguments that the Plaintiffs should have taken steps to conduct an investigation prior to obtaining the Freezing Injunction. In my view, the Plaintiffs were seized of the information from Mr. Erwin's testimony in the California Proceedings. I ask myself what better evidence did the Plaintiffs need at the time other than the sworn evidence of Mr. Erwin in a court proceeding in order to commence the Bermuda proceedings and seek the Freezing Injunction. I am mindful of the need to make proper inquiries as set out in *Brink's Mat Ltd v Elcombe* case, but in my view, the statements by Mr. Erwin were a sufficient basis to commence the proceedings as they did. Laureola complains that the Plaintiffs should have obtained a Norwich Pharmacal Order, as they did subsequently. However, on the basis of the very words out of Mr. Erwin's own

mouth on oath, in my view, any further steps would have been of a 'belt and braces' nature, rather than a mandatory requirement.

55. Fifth, I have given consideration to the Plaintiffs' arguments that Laureola could have resolved the matter early in the proceedings by adherence to the Overriding Objective to assist the Court. In *Noesis Consulting*, I took a dim view of the conduct of the successful party because it had withheld information known to it at all material times which was germane to the *ex parte* application. Similarly, I am of the view that on the basis that Laureola had knowledge that the shares had not been transferred, it could have assisted the Court by informing the Plaintiffs that Mr. Erwin had not transferred his shares, a point which was germane to the *ex parte* application and the proceedings. The Overriding Objective exists for reasons, not least for the obligation to ensure cases are dealt with expeditiously and in a manner that saves expenses, such expenses now ironically the subject of this application. Following on from that point, I am persuaded that had the Plaintiffs been made aware in July 2019 or shortly thereafter by Laureola that Mr. Erwin was still a shareholder then they would have proceeded in the BVI to enforce the California Judgment against Mr. Erwin's shares and discontinued these proceedings.

56. Sixth, I have considered the Plaintiffs cross-Summons for costs on an indemnity basis or alternatively on the standard basis. I have already found that the conduct of Laureola is such that I should deny it its costs. However, I am not persuaded that costs should be awarded to the Plaintiffs on any basis.
    a. The primary reason for my decision is because I have already found that in these proceedings, the Plaintiffs were not the successful party.
    b. Further, the Plaintiffs obtained the Freezing Injunction on 11 July 2019, learned that Mr. Erwin still owned the shares around 14 – 16 December 2020 but did not seek leave to discontinue the proceedings until 8 October 2021, nearly 10 months later. In my view, the passing of Mr. Woloniecki did not affect the proceedings as Carey Olsen had come on the record already. Meanwhile, the Plaintiffs commenced and were proceeding with the litigation in the BVI. It seems to me that it is more likely than not that the Plaintiffs were using the existence of the Freezing Injunction to advance their case in the BVI as the judge in the BVI proceedings ruled that he

was satisfied "*that the [Plaintiffs] laid before the Court the material they had without improperly holding anything back …*".

c. In my view, applying Hargun CJ's reasoning in the SJTC Ruling the Plaintiffs did have a duty to return to Court when there was a material development in the case after the hearing at which the *ex parte* injunction had been granted.

d. Also in my view, in applying Hargun CJ in the SJTC Ruling where he cited *Todaysure Matthews Limited* the Plaintiffs failed to inform the Bermuda Court that they had used the existence of Freezing Injunction to obtain *ex parte* relief in the BVI.

e. For these reasons, I am not persuaded that Laureola should be further penalized by having to bear the Plaintiffs' costs or any costs the Plaintiffs are required to pay EMP and EMA following the withdrawal of the claims as against those companies.

Inquiry as to Damages

57. Upon obtaining the Freezing Injunction, the Plaintiffs gave an undertaking as to damages as follows:

"AND UPON THE PLAINTIFFS' UNDERTAKING to abide by any order the Court shall hereafter make to pay damages to the Defendants for any loss they suffer as a consequence of this order in the event the Court finds it ought not to have been made."

58. Mr. Diel submitted that based on the facts of the case, it is obvious and foreseeable that Laureola has been caused harm and damage – not least to its reputation. Further, the Plaintiffs cannot simply assert that Laureola suffered no damage, without the Court undertaking a proper inquiry. Therefore, Laureola invited the Court to give directions allowing it to file evidence setting out those damages that it has sustained as a result of the Plaintiffs' conduct.

59. Mr. Stevens submitted that an undertaking in damages is given to the Court, not directly to the party identified in it. A Defendant with the benefit of such an undertaking has the right

at the appropriate time to ask the Court to enforce the undertaking in damages against a Plaintiff.

60. Mr. Stevens submitted that Laureola's application for an inquiry as to damages must fail because:

    a. The Freezing Injunction was not wrongly granted; further, or in the alternative
    b. No credible evidence of recoverable damage has been adduced in support of the application; further, or in the alternative
    c. The conduct of Laureola would make it inequitable in all the circumstances for the Plaintiffs' undertaking to be enforced.

Discussion

61. The case of *Yukong Line Ltd* sets out that the evidence of loss relied on by the applicant has to be credible and *Smith v Day* (1882) 21 Ch. D. 421 sets out that it should not be too remote. Mr. Bremness's evidence is that: (i) three investors waked away as a direct result of the Freezing Injunction and the BVI Receivership Order; (ii) Laureola's growth rate became negative after the Freezing Injunction was obtained; and (iii) word of the Freezing Injunction was published on the website Offshore Alert. In my view, this evidence is credible and it does meet the test that there is an arguable case that Laureola has sustained some loss falling within the undertaking.

62. However, in my view, I decline the application for an inquiry of damages sustained by Laureola as a result of the fact that the Freezing Injunction was subsequently discharged for several reasons. First, the Freezing Injunction was not wrongly granted relying on Gee at 11-037 which cited *Yukong Line Ltd v Rendsburg Investment Corp* [2001] 2 Lloyd's Rep 113 where a claimant failed on their substantive claims at trial but were able to justify the freezing relief granted which was ancillary to the claim to enforce the judgment against the company. The Plaintiffs had believed, based on Mr. Erwin's own testimony on oath, that he had transferred his shares in Laureola to Bella. Thus, I accept that the Declaratory Claim was the basis for the Freezing Injunction which purpose was to preserve an income stream

which the Plaintiffs maintained was an asset of Mr. Erwin's within the jurisdiction of the Bermuda Court.

63. Second, there were variations to the Freezing Injunction that allowed Laureola to make payments in good faith and the ordinary course of business. Thus, I do not accept that the Freezing Injunction interfered with the ordinary course of business.

64. Third, in *Hoffmann-La Roche & Co. AG v Secretary of State* [1975] 1 AC 295, 361 Lord Diplock, in respect of enforcing cross-undertakings given in support of interim injunctions and assessing what should be paid under them, stated *"[The Court] retains a discretion not to enforce the undertaking if it considers that the conduct of the defendant in relation to the obtaining or continuing of the injunction or the enforcement of the undertaking makes it inequitable to do so …*". The case of *Richard John Hone & Ors v Abbey Forwarding Limited (in liquidation) & Anor* [2014] EWCA Civ 711 (CA) cited Lord Diplock to underscore that the Court can refuse an undertaking on this basis and *Fiona Trust & Holding Corp v Privalov* [2014] EWHC 3102 (Comm) cited the same extract to underscore that the court can refuse an inquiry on that basis. In my view, (i) the conduct of Mr. Erwin in stating lies on oath, (ii) together with the conduct of Mr. Erwin to file the Defence perpetuating the lies and (iii) Laureola failing to inform the Plaintiffs that Mr. Erwin never transferred his shares to Bella leads me to exercise my discretion not to order an inquiry.

Summons re Notice of Discontinuance

65. Mr. Diel submitted that the Plaintiffs have failed to file a Notice of Discontinuance. He argued that procedurally it was both vital and necessary that the Plaintiffs file that notice so as to bring the claims to an end. Practically, it was vital that the Plaintiffs formally discontinue their claims on the basis that as an active fund manager, Laureola needs to be able to confirm that the claims brought against it have been formally brought to a conclusion. There is no reason why Laureola should have to continue to be subjected to such a reporting obligation.

66. Mr. Stevens submitted that the order granting leave to discontinue the proceedings stands as the order discontinuing the proceedings. He argued that when discontinuing an action without leave, then the RSC Order 21 rule 2(2) positively requires a Plaintiff to file a Notice of Discontinuance. However, the RSC and the White Book are silent on the procedure to discontinue with leave. He noted that in the commentary in Atkins Court Forms, Second Edition, Volume 15 there was no suggestion that an order granting leave to discontinue must then be followed by the filing of a Notice of Discontinuance. He argued that if there was a need to remove any doubt, real or perceived that the 8 October 2021 Order discontinued the Plaintiffs' claims as against Laureola, then the appropriate way to proceed would be under Order 20, rule 11 and for the Court to order the Registrar to amend the wording of the Order as appropriate.

Discussion

67. In my view, the Plaintiffs should file a Notice of Discontinuance. The 8 October 2021 Order grants leave to the Plaintiff to discontinue the action. Order 21 rule 3 states "*and the Court hearing an application for the grant of such leave may order the action or counterclaim to be discontinued…"* Thus, on the face of the 8 October 2021 Order, I did not order the action to be discontinued, I granted leave for it to be discontinued. It appears to me that it follows that the Plaintiffs should thereafter file a Notice of Discontinuance. Had I granted leave and also ordered the action to be discontinued then there would not be a need for a Notice of Discontinuance.

68. Looking at it another way, to lawyers it may seem straightforward that the matter has ceased once leave was granted to discontinue the action, although I now doubt that proposition as I write it, since it is now an issue. However, the parties to an action require certainty as they move on after an action has been discontinued and they deal with third parties such as clients, investors and regulatory bodies, who may likely require certainty and who may not understand the meaning of granting leave. A Defendant in a matter which has been discontinued with leave is entitled to the certainty that a Notice of Discontinuance

affords. In my mind, it is commonsensical to file a Notice of Discontinuance for further use by all parties as appropriate. In this case, I direct the Plaintiffs to file a Notice of Discontinuance.

Conclusion

69. In summary, I have made the following Orders:
    a. I decline Laureola's application for the Plaintiffs to pay its costs and for an inquiry of damages;
    b. I decline the Plaintiffs' application for Laureola to pay its costs; and;
    c. I grant Laureola's application for an order that the Plaintiffs file a Notice of Discontinuance.

70. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs of these applications, I direct that there be no order as to costs for these applications.

Dated 12 August 2022

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HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT