SGI v Wijsmuller

Jurisdiction:	Jersey
Judge:	H. W. B. Page
Judgment Date:	20 May 2008
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Text

[2008] JRC 78

ROYAL COURT

(Samedi Division)

Before:

H. W. B. Page, **Esq., Q.C., Commissioner (sitting alone)**.

Between
(1) SGI Trust Jersey Limited
(2) Philip Cowan Sinel
Plaintiffs
and
(1) Johan Hendrick Laurentius Bartholomeus Wijsmuller
(2) Timothy Roderick Parker-Garner
(3) Wysa Limited
Defendants

Advocate A. J. Clarke **for First Plaintiff**.

Advocate J. D. Kelleher **for the Second Plaintiff**.

Advocate A. P. Begg **for the First Defendant**.

Advocate T. V. R. Hanson **for the joint liquidators**.

Authorities

UCC v Bender [2006] JRC 068A .

UCC v Bender [2006] JRC 150A .

Everton v WPBSA (Promotions) Limited (unreported) 13 December 2001 .

In re Walker Wingsail Systems plc [2006] 1 WLR 2194 .

Giles v Rhind [2002] EWCA Civ 1428 , [2003] Ch. 618.

Watkins v Egglishaw [2002] JLR 1 .

JFSC v Black [2007] JLR 1 .

Metalloy Supplies Ltd. (in liq.) v MA (UK) Ltd [1997] 1 WLR 1613 , [1997] 1 BCLC 165.

Baron Everlo v Fitel Ltd [1987-88] JLR 687 .

Human Rights (Jersey) Law 2000.

European Convention on Human Rights.

Johnson v Gore-Wood [2002] 2 AC 1 .

Les Pas Holdings Ltd v Receiver General [2002] JLR N 27 .

THE COMMISSIONER:

The applications and the background

1 The Court has before it applications by the First Plaintiff ("SGI") and the Second Plaintiff, Advocate Philip Sinel, for leave to discontinue these proceedings against the First Defendant, Mr Bartholomeus Wijsmuller, and the Third Defendant ("Wysa"). Proceedings against the Second Defendant, Mr Timothy Parker-Garner have already been discontinued on agreed terms.

2 The contentious issues are, first, the appropriate orders for costs, and secondly whether it

should be a condition of discontinuance that Mr Sinel be restrained from repeating outside court allegations of the kind made by him in the current proceedings and/or that there should be a bar on assignment of the plaintiffs' causes of action to others. The matter of costs on discontinuance of an action would not ordinarily be one that would detain a court long. But, in the present case, it is a subject that has attracted fiercely opposing contentions between the principal protagonists, Mr Sinel and Mr Wijsmuller, supported on each side by voluminous written submissions, affidavits and exhibits. The issues are also complicated by the fact that SGI has been in liquidation since 2005.

3 The matter was argued orally at an all-day hearing on 12th March 2008. Advocate Kelleher appeared for Mr Sinel; Advocate Clarke for SGI; Advocate Hanson for the joint liquidators of SGI ("the Liquidators") in their personal capacities; and Advocate Begg for Mr Wijsmuller. Wysa Limited was not represented. With the leave of the court, Mr Clarke, on behalf of SGI, withdrew after making a brief statement explaining that the Liquidators wished to minimise further expenditure on the proceedings, that there would be no opposition to an order for costs against SGI on the standard basis, but to the extent that submissions made on behalf of Mr Sinel might find favour with the court, SGI would wish to associate itself with them. Subsequent to this oral hearing, further written submissions were lodged on behalf of Mr Wijsmuller and Mr Sinel, as well as further affidavits by Mr Wijsmuller and Mr Begg.

4 The background to the action, shortly, is this (adopting, to a large extent, the summary of the learned Deputy Bailiff in his judgment of 24th June 2005 on an application for leave to join other defendants outside the jurisdiction). Mr Sinel and Mr Wijsmuller were at one time close friends and business colleagues. They were joint owners of SGI, which had carried on business as a registered trust company in Jersey for some years. Mr Sinel owned 60% and Mr Wijsmuller 40%. Mr Wijsmuller was the managing director, while Mr Sinel concentrated for the most part on his legal practice, Sinels. The finance director was Mr Parker-Garner. Wysa, also a Jersey company, was owned by Mr Wijsmuller. There was also a parallel organisation in Anguilla, established in about 2000, in which the ultimate ownership percentages mirrored those of the Jersey business, although the corporate structure was more complicated.

5 In the latter part of 2004 strains began to develop in the relationship between Mr Sinel and Mr Wijsmuller. In early 2005 these came to a head with Mr Sinel accusing Mr Wijsmuller, aided and abetted by Mr Parker-Garner, of engaging in a fraud on him and on SGI - essentially of trying to steal business from SGI. On 16th March 2005 Mr Wijsmuller resigned as a director of SGI and Mr Parker-Garner was removed from office. Thereafter, a number of important clients left SGI. On 27th July 2005 Mr Adrian Rabet and Mr Dermot Boylan of Moore Stephens were appointed joint liquidators.

The proceedings

6 Because of the nature of the rival contentions on the subject of costs it is necessary to set out the history of the action at some length.

7 On 27th April 2005, SGI and Mr Sinel instituted proceedings in the Royal Court by Order of Justice against Mr Wijsmuller, Mr Parker-Garner and Wysa, alleging, in effect:-

(i) that prior to Mr Wijsmuller's resignation and Mr Parker-Garner's removal from office, they had copied all the computer records of SGI with a view to using these for their own purposes and had failed to return copies following the termination of their appointment as directors and employees of SGI;

(ii) that they had taken control of SGI's email account to the prejudice of SGI;

(iii) that they had procured the transfer of the trusteeship of two substantial trusts from SGI to another trust company, Whitmill Trust Company ("Whitmill"), in which Mr Wijsmuller's brother had an interest; and

(iv) that they had caused Wysa to overcharge SGI in relation to the provision of computer services, so that Mr Wijsmuller, who owned Wysa, had benefited at the expense of SGI.

8 Service of the Order of Justice on 28th April 2005 had the effect, among other things, of operating as (i) an immediate freezing injunction restraining Mr Wijsmuller from disposing of his assets (other than within certain limits); (ii) an order for disclosure by Mr Wijsmuller on affidavit of his assets worldwide in excess of £3,000 in value; and (iii) an order for immediate delivery up to the plaintiffs' advocates of, among other things, all computers in the possession, custody or power of Mr Wijsmuller or Wysa which belonged to SGI or any associated company on which information relating to SGI or its Anguillan counterpart or to the business or affairs of the clients of those companies was stored (together with details of all passwords necessary to gain access to such computers), computer disks, data bases, printouts, copies of e-mails (and so on), and "Control of the website and email domains relating to or used by SGI".

9 Both Mr Wijsmuller and Wysa failed to comply with these orders within the times prescribed and were summoned by order of the Deputy Bailiff to attend before him on 5th May 2005 to answer allegations of contempt of court. In the event, Mr Wijsmuller and Wysa complied (or, at least, purported to comply) with the orders on the day before they were due to appear. In particular, Mr Wijsmuller's disclosure included a schedule of assets provided under cover of a letter from Bailhache Labesse dated 4th May 2005 which was subsequently verified by affidavit of Mr Wijsmuller sworn on 10th May 2005.

10 On 18th May 2005 it was ordered, by consent, that Carey Olsen or counsel and/or accountants instructed on behalf of the plaintiffs should be permitted to examine the material provided by Mr Wijsmuller and Wysa pursuant to the orders contained in the Order of Justice; that the process of examination should " *include a listing of all documents contained therein*"; and that the resulting list should be supplied to Mr Wijsmuller and Wysa " *together with details of those documents which in the opinion of Messrs. Carey Olsen, the*

Plaintiffs are entitled to access". In the event, although Mr Wijsmuller's lap-top was not returned to him until some fourteen months later, no such list appears ever to have been prepared (though whether this was or was not wholly or partly because of difficulties in obtaining access to the information is unclear).

11 According to Mr Sinel, whilst visiting Anguilla in April 2005, he discovered that Mr Wijsmuller, with the assistance of two local directors, Messrs. Brice and Richardson, was acting in relation to the Anguillan companies in much the same way as Mr Wijsmuller had been in Jersey. In particular (he alleged) Mr Wijsmuller was seeking to procure the transfer to Barwys Trust (Anguilla) Limited ("Barwys"), a company owned by Mr Wijsmuller, of certain key business of Sinel Trust Anguilla Limited ("STAL"), one of the main operating companies in the group, including the affairs of two very substantial trusts, Gemstone A and Gemstone B. As a result, on 19th May 2005 leave was sought and obtained *ex parte* by the plaintiffs in the Jersey proceedings to amend so as to add various additional defendants, including Barwys, in relation to what became known as "the Anguillan allegations" and to serve notice of process on them outside the jurisdiction. However, following an *inter partes* hearing the following month these orders were discharged, the Deputy Bailiff having ruled that the most appropriate forum for trial of the Anguillan allegations was Anguilla itself.

12 On 13th July 2005 an Answer on behalf of Mr Wijsmuller was served by Bailhache Labesse, defending his conduct and denying any wrong-doing. The subsequent progress of the action over the ensuing two years was fitful. A number of factors contributed to this, of which the main ones were as follows.

13 Stays of the proceedings pending attempts at mediation:-

(i) The first stay was for a period of seven weeks, by order of the Master on 22nd September 2005 (except that preparation and service of lists of documents by early December 2005 was to proceed): in the event this came to nothing, in part because Mr Sinel wanted the mediation to encompass the Anguillan allegations as well as those in issue in Jersey but Mr Parker-Garner was unwilling to agree to this, and in part (suggests Mr Sinel, in a recent affidavit) because "the liquidators rather lost heart".

(ii) The second stay, ordered by the Master on 28th February 2006 on the application of the Mr Sinel, allowed the parties a further period of fourteen days in which to explore the possibilities of seeking a settlement by mediation. But this, too, ran into difficulties, this time largely because Mr Wijsmuller declared, via Bailhache Labesse, that he doubted the likelihood of such a process being successful and wanted to proceed to trial as soon as possible.

(iii) Mr Sinel continued, nonetheless, to promote the idea of mediation, and by late April there appeared to be sufficient prospect of it happening for the Master to have ordered on 27th April 2006 that the position should be "noted" and the court kept informed of progress. On this occasion Mr Wijsmuller indicated a willingness to

engage in the process on the assumption that the process of discovery would have been completed before then. Mr Parker-Garner's approach was more tentative, seeking first an assurance that Mr Sinel was not simply looking for monetary compensation, given (said Crill Canavan on his behalf) that he had little in the way of financial resources and would not be able to obtain funding for a mediation from the legal aid vote. In the end, this requirement on Mr Parker-Garner's part and Mr Sinel's unwillingness to give any such assurance meant that this attempt at mediation also never got off the ground.

(iv) The possibility of mediation was canvassed once more at the very end of 2007 by Mr Sinel via Carey Olsen (possibly prompted by a suggestion from Mr Wijsmuller to Mr Sinel at some earlier point, though this is unclear). Andrew Begg & Co. responded on behalf of Mr Wijsmuller to the effect that their client had not ruled this out, but wanted to wait to see whether SGI was or was not going to continue with the litigation and until the extent of the remaining live issues had become clearer. But there remained, quite clearly, a lack of consensus as to whether any such mediation would include the Anguillan allegations; and, as it was, both SGI and Mr Sinel served notices of discontinuance before the matter was taken any further.

Difficulties with Mr Wijsmuller's legal representation

14 On 3rd April 2006 Bailhache Labesse gave formal notice that Mr Wijsmuller had withdrawn his instructions and those of Wysa with effect from 21st March 2006. There is insufficient evidence for me to be able to form a clear view as to the reasons for this. It is suggested on behalf of Mr Sinel that it looks like more than a co-incidence that Mr Parker-Garner also dis-instructed his lawyers at about the same time. And it may be remarked that, in Mr Wijsmuller's case, this development occurred within a matter of days of Mr Wijsmuller declaring that he would prefer to get on with the action rather than spend time on mediation. But there are indications elsewhere that the reason was in part a matter of the expense of instructing Bailhache Labesse and in part a perceived conflict of interest that had by then emerged. At all events, Mr Wijsmuller's subsequent attempts to secure representation under the legal aid scheme ran into various difficulties; and, although Advocate Begg originally gave notice on 23rd January 2007 that he had assumed representation of Mr Wijsmuller, further problems arose later in the year, and it was not until 26th November 2007 that these were finally resolved and funding was approved. After that, matters moved fairly swiftly; but on any view there was a period of many months during which the position regarding Mr Wijsmuller's legal representation was to some extent either in limbo or uncertain.

Discovery

15 The original order was for discovery by early December 2005. But only Mr Parker-Garner appears to have been ready to serve a list of documents at that point. Mr Wijsmuller did not swear his affidavit until 13th June 2006, a time when he was not legally represented. In that affidavit Mr Wijsmuller reproduced a passage from a letter sent by Bailhache Labesse to

Carey Olsen in December 2005 at a time when the former were still acting for Mr Wijsmuller:-

> " *I have considered the position of Mr Wijsmuller and Wysa in relation to documentation to be disclosed.* My opinion at this time is that neither is in a position to disclose any documentation as neither defendant holds any relevant documentation due to the terms of the injunctions which required each of them to deliver to Carey Olsen all relevant documentation. Those injunctions have been complied with (some time ago) without comment or objection [from] either Plaintiff. No relevant documents were retained. On any view my clients do not retain control over those documents either" (paragraph 3).....

He continued:-

> " *Pending settlement of their fees Messrs. Bailhache Labesse have retained the files relating to this matter.* I do not know if these files contain any information that I would be required to disclose.....As regards Wysa Limited, I can do no more than attach a copy of the Company's letter to the States of Jersey Police stating that the Second Plaintiff [i.e. Mr Sinel] removed the Company's records from the office where they were kept. We have not been able to locate these records despite enquiry."

16 But if this was unsatisfactory, which it undoubtedly was, so too was the affidavit of "the Plaintiffs" when it was eventually filed on 21st July 2006 under threat by Mr Parker-Garner of a summons to strike the action out if an affidavit of documents was not served. According to the affidavit, the plaintiffs had not completed their search for electronic documents; in particular they had only just received a further CD Rom full of files which they were endeavouring to search through (the source of that CD, not being disclosed); and there had not been time to search a database known as QuickBooks. It would also be necessary, the affidavit concluded, " *to have further recourse to the large store of documents relating to SGI kept by the liquidators*." In truth, both parties must have known that these efforts at discovery were woefully inadequate: in exchanges between their respective advocates some seventeen to eighteen months later, in December 2007, both recognised that further discovery was necessary and both were talking in terms of further lists by the end of January, or in the case of SGI's discovery, not until the end of February. In addition, for reasons that were not adequately explained, the plaintiffs never seem to have listed documents found on the computers handed over by Mr Wijsmuller in response to the original 27th April 2005 injunctions as contemplated by the later order of 18th May 2005.

The liquidation of SGI

17 On 16th November 2005 the Liquidators of SGI notified Carey Olsen, on behalf of the plaintiffs, that they could not, at that stage, afford to incur any further costs and that the litigation would have to be put into abeyance until such time as they might decide that they were able to pursue it.

18 As a result of this development, Mr Sinel decided to form a new Jersey company, by the name of Norglen Too Limited ("Norglen") for the purpose of acquiring SGI's rights in the litigation from the liquidators. The plan was put into effect (so it was thought) by the execution of a Deed of Assignment dated 19th January 2006 ("the Assignment"). Referring to this in an affidavit sworn on 27th February 2006 in support of his application for a further stay of proceedings, Mr Sinel wrote:-

> " *As is apparent, Norglen has only recently been incorporated.* It will be exploring with the liquidators how it can take the litigation forward in their stead. It will be stepping into the shoes of the liquidators in these proceedings, which will need to be amended and, additionally, fresh Defendants may have to be brought into these proceedings or other proceedings."

However, there was little point — said Carey Olsen on a number of occasions — in seeking leave to amend while there was a possibility of mediation succeeding.

19 In the event, it was not until some eighteen months later, on 19th July 2007, that Carey Olsen eventually sent Andrew Begg & Co. a draft summons for directions which included an application for leave to substitute Norglen as plaintiff in place of SGI. At about the same time, Jenners, acting for Mr Parker-Garner, took out a summons to dismiss the claim for delay in prosecution.

20 The immediate response from Andrew Begg & Co. to Carey Olsen's draft summons was to ask for an explanation of the basis for the proposed substitution, for a draft Amended Order of Justice and for copies of any documents purporting to effect any such assignment. In the absence of any reply Andrew Begg & Co. wrote again on 8th October 2007, and yet again on 28th and 29th November having still had no response other than a terse assertion that Mr Wijsmuller "has this documentation", a suggestion which Mr Wijsmuller, apparently, denied. Either way, this somewhat curt response did not attempt to answer the other requests made by Andrew Begg & Co. As it was, it was not until Carey Olsen supplied Andrew Begg & Co. with a copy of the Assignment on 3rd December 2007 that Mr Begg first saw the document. On 6th December 2007 he wrote to the Liquidators notifying them that he considered the document be ineffective in Jersey law with the consequence that SGI remained a party to the litigation and afterwards served a skeleton argument on behalf of Mr Wijsmuller setting out his reasons in full. On 10th December 2007 Carey Olsen wrote to say that the application would not be pursued.

The end of the action

21 That was, in a sense, the beginning of the end. The following day, 11th December 2007, Andrew Begg & Co. wrote to all concerned on behalf of the plaintiffs asking whether it was now accepted that the purported Assignment was not effective to transfer SGI's claims in the litigation to Norglen; whether the liquidators would now accede to an order for its claim to be dismissed with costs; whether it was accepted that the claims based on paragraphs

25 to 45 of the Amended Order of Justice ("Database of confidential client information" and "Control of SGI's email account") could no longer be live issues, given that all the information and hardware had been delivered up by Mr Wijsmuller in accordance with the original injunctions and SGI had, in any event, long since sold its client list to a third party; and whether it was accepted that the terms of the Amended Order of Justice did not include any claim for loss and damage by Mr Sinel personally. At a directions hearing on 13th December 2007, Mr Kelleher requested an adjournment of the various summonses then pending, mainly in order to give Mr Sinel an opportunity to discuss the future of the litigation with the Liquidators; this was granted on terms that required the Liquidators to inform the other parties and the court of their intentions by early in the New Year and, if they were not going to pursue the action, to get on and issue a summons to discontinue. I also made certain directions designed to elicit answers from Mr Sinel to the third and fourth points raised in Mr Begg's letter of 11th December 2007.

22 On 24th December 2007 Carey Olsen responded saying that Mr Sinel would be continuing with the litigation. The letter asserted that the claims pleaded at paragraphs 25 to 45 of the Amended Order of Justice remained live. It also explained that, so far as concerned Mr Sinel's personal losses, these had not all been pleaded yet but included loss of the value of his shareholding in SGI and of loans made by him to SGI, loss of future earnings and dividends from the company, the costs of borrowings that Mr Sinel had been obliged to enter into in order to fund his outgoings, loss of pension, together with other costs incurred as a result of Mr Wijsmuller's alleged breaches of duty. " *Depending on the joint liquidators' position*", said the letter:-

> " *Advocate Sinel believes that the amended Order of Justice should be re-amended in order to clarify his personal claims (on the basis that SGI were to continue with the litigation) or to clarify his personal losses and include his losses which are reflective of those of SGI (were the joint liquidators to seek leave to discontinue).* We will address these issues in the New Year once the joint liquidators have confirmed their intent."

23 On 4th January 2008 Le Gallais & Luce gave notice that the Liquidators had decided that SGI would no longer be pursuing any of the pleaded claims and issued a draft summons seeking leave to discontinue.

24 Replying on 11th January 2008 to Carey Olsen's letter of 24th December 2007, Mr Begg argued once more that, in the light of SGI's intention to discontinue, it was hopeless to contend that the case as then pleaded in the Amended Order of Justice included any claim for damages or other relief by Mr Sinel personally against Mr Wijsmuller. In addition, he suggested, any attempt to amend the pleading in order to claim damages for loss of Mr Sinel's shareholding in SGI (and other associated losses) would require the court to determine whose fault it was that SGI had gone into liquidation; that, he said, would involve a claim of a different nature to that pleaded so far and would require a new action, and, if that were to happen, Mr Wijsmuller would counterclaim that the demise of SGI was the result of actions taken by Mr Sinel and the directors appointed by him after 16th March

2005.

25 On 22nd January 2008 Carey Olsen wrote giving notice of Mr Sinel's wish to discontinue the proceedings.

The rival contentions

26 Mr Begg submits, in summary, that the claim against Mr Wijsmuller was misconceived from the start; that is was, in any event, doomed to failure from the time that it became obvious that SGI did not have the funds to pursue it; that Mr Sinel and his advisers should have known that the Assignment was ineffective to transfer the benefit of the action to Norglen; that Mr Sinel had wrongly sought to obstruct Mr Wijsmuller's efforts to secure legal aid but had conceded defeat once such aid had been granted, SGI had given notice of intention to discontinue and Mr Sinel had been forced to face up to the fact that he had no pleaded personal claims against Mr Wijsmuller. Additional factors of relevance to the issue of costs, says Mr Begg, are that the claim involved, in effect, claims of dishonesty on the part of Mr Wijsmuller and that in the course of the litigation Mr Sinel had written letters to the Jersey Financial Services Commission ("the JFSC") and others, including those responsible for the administering the legal aid system, which were disparaging of Mr Wijsmuller and which have had the result that he has been unable to secure work in the financial services field for some years now.

27 On this basis, Mr Wijsmuller is entitled, Mr Begg submits, to orders for his costs to be paid (i) by Mr Sinel on an indemnity basis from the start of the action, or at least from 16 th November 2005 when the Liquidators first declared that they did not have the funds to pursue the action thus leaving Mr Sinel as, in practice, the only surviving plaintiff; (ii) by SGI on a similar basis, though this was likely to prove largely academic in view of that company's insolvency; and (iii) by the Liquidators personally since 16th November 2005 on the basis that they had irresponsibly allowed Mr Sinel to continue to drive what was, in truth, a hopeless action.

28 By contrast, Mr Kelleher on behalf of Mr Sinel, argues that, while the usual practice is for a discontinuing plaintiff to have to pay the costs of an action, the circumstances here are such that the just result is that there should be no order for costs on discontinuance; alternatively that the costs up until 16th November 2005 should be paid by SGI and the costs thereafter should be paid by Mr Sinel but only on the standard basis and excluding the costs associated with some seven particular aspects of the litigation. The basis for this, he suggests, is that the original institution of proceedings against Mr Wijsmuller was fully justified and, if nothing else, can fairly be said to have been brought on his own head by Mr Wijsmuller; that Mr Wijsmuller has repeatedly played procedural games of one kind and another designed to block the progress of the action, notably by failing to comply with the original disclosure orders until he was faced with contempt proceedings, by his approach to discovery (as already described), by his failure to engage in the mediation process, by the dismissal of his original lawyers Bailhache Labesse and his subsequent (unwarranted)

applications for legal aid, and by his refusal until January 2008 to up-date the information contained in his original 2005 affidavit of means.

29 This last point was said to be central to Mr Sinel's decision to seek leave to discontinue, in that it was only on receipt of the letter from Andrew Begg & Co. dated 11th January 2008 that Mr Sinel came to accept - contrary to his previous belief - that Mr Wijsmuller was not in fact worth suing.

30 So far as SGI is concerned, as indicated earlier, Mr Clarke accepted that it would be proper for an order to be made against it for costs on the standard basis. Mr Hanson, on behalf of the Liquidators, strongly resisted the suggestion that there should be any order against them personally.

Justification for initiation of proceedings

31 The suggestion by Mr Begg that there was never any proper basis for bringing the action in the first place and that the case has only ever been about " *Advocate Sinel's paranoia*" is not one that bears examination. An application for leave to discontinue at the sort of stage involved here should not and cannot become the occasion for a mini trial of the merits of an action, when, *ex hypothesi*, no trial of the allegations made is going to take place (although the volume of material exhibited on behalf of Mr Sinel suggests that, despite warnings to this effect, he has harboured unrealistic hopes that extensive findings in his favour would be made). Nothing that follows, therefore, should be taken as a definitive finding of fact on any contentious issue. That said, there are certain matters as to which there appears to be little dispute.

32 First, the source of the breakdown in relations between Mr Wijsmuller and Mr Sinel. Without endeavouring to apportion blame, this appears to have lain in a combination of circumstances which may be summarised shortly as follows. For some considerable time prior to the latter part of 2004, Mr Sinel had been content to leave the running of SGI and STAL largely to Mr Wijsmuller and Mr Parker-Garner as Managing Director and Finance Director respectively, while he concentrated on his legal practice and on his own divorce proceedings and the related dispute concerning the custody of his daughter in which he was then embroiled. But from September 2004 or thereabouts, he began to take a more active interest in the trust companies and to make proposals for, as he thought, improving their profitability after several years of time-consuming, expensive and debilitating involvement in court proceedings (the Amber litigation). At the same time he became increasingly frustrated at not being able to obtain accounting information to which he considered he was entitled and increasingly dissatisfied with Mr Parker-Garner, whom he wanted Mr Wijsmuller to sack. Mr Wijsmuller, for his part, resented this new trend, believing (he says) that Mr Sinel did not understand the trust business, that he was overly interested in linking it with his, Mr Sinel's, litigation practice, and that Mr Sinel's intervention was generally damaging to the group's business. By the beginning of 2005 Mr Sinel's earlier dissatisfaction with Mr Parker-Garner had extended to Mr Wijsmuller and fundamental

differences of approach to the futures of SGI and STAL had opened up between the two men. A parting of the ways of some kind looked likely if not inevitable. Each put forward proposals for buying out the other but neither found them acceptable. On 8th March 2005 Mr Wijsmuller wrote to Mr Sinel making one final offer to acquire his 60% shareholding in return for which he would " *pay you in arrears 60% of the current group's declared and distributed profits for the next three years*" and concluding " *If I do not have apositive response from you by close of business at the end of this week I shall consent to the board appointments you wish to make and resign."* Mr Sinel wanted to get rid of Mr Parker-Garner and appoint additional directors, including his father, Advocate Malcolm Sinel.

33 Secondly, the parting of the ways. In late January/early February 2005, Mr Sinel as chairman and majority shareholder sought to requisition an Extraordinary General Meeting for 3rd March 2005 with a view to effecting the board changes that he thought necessary. In the event, that meeting never took place as planned because Mr Wijsmuller was out of the Island that day (though whether deliberately in order to prevent the passage of resolutions that would result in a change of control, as Mr Sinel contends, or as a result of a genuine belief that an adjournment of the proposed meeting had been agreed, is not something that I am in a position to determine). When the meeting eventually did take place on 16th March 2005, Mr Parker-Garner was removed as a director, Mr Wijsmuller resigned his directorship, Advocate Debbie Lang was appointed Managing Director, Ms. Yande Taylor a director, and Advocate Malcolm Sinel a non-executive director and Chairman.

34 Thirdly, the departure of SGI clients. Over the ensuing days and weeks, a number of SGI's clients gave notice of their intention of terminating arrangements with SGI. These included two of the group's largest clients, the Poseidon and Bentley Trusts, of which Mr Frederick Zimmer was the principal beneficiary, and Reserve Trust Company Limited ("Reserve Trust"), which handled the family trusts of Mr John Bender. A number intended to transfer to Whitmill, Mr Wijsmuller's brother's company and of which Mr Wijsmuller became a consultant in April 2005 (paragraph 39 of Mr Wijsmuller's affidavit of 31st February 2008), or to Barwys, which, as noted earlier, was a company owned by Mr Wijsmuller and which was incorporated on 23rd March 2005. In particular, on 23rd March 2005, Mr Wijsmuller in his capacity as director of Reserve Trust, wrote letters to SGI and to STAL giving formal notice on behalf of Reserve Trust that their services were no longer required and calling for all files and documentation to be handed over at the earliest opportunity.

35 Fourthly, and crucially, during the six or seven weeks prior to Mr Wijsmuller's resignation from SGI, three events of particular note had occurred:-

(i) Mr Wijsmuller had arranged for SGI's IT expert, Mr Blampied to copy the entirety of SGI's electronic-form records onto a new disc and to purchase a lap-top for Mr Wijsmuller's use.

(ii) Reserve Holdings Limited ("Reserve Holdings") had granted Mr Wijsmuller a loan facility of £500,000 against the security of a mortgage over two properties owned by Mr Wijsmuller and his wife. On 21st February 2005, having discovered this, Mr Sinel

had written to Mr & Mrs. Wijsmuller asking for an explanation. Two days later he had also written to Mr Bender expressing his concern and asking for an explanation from him, too. In reply he had received a letter from Bailhache Labesse, acting on behalf of Mr Wijsmuller, dated 23rd February 2005 saying (in response to Mr Sinel's letter to Mr and Mrs Wijsmuller) " *This transaction is entirely private to the parties concerned.* You are not entitled to any information concerning this transaction and my client has a duty of confidentiality in this regard" and (in response to Mr Sinel's letter to Mr Bender) " *Please note that the information contained therein is incorrect [without specifying in what respect(s)].* Please refrain from any further similar action and my client reserves all his rights in this regard should you fail to do so."

(iii) On 12th March 2005, Mr Wijsmuller and Mr Parker-Garner had purported to hold a board meeting of SGI on the common at Les Landes and (a) to pass resolutions to the effect that the management of the Poseidon and Bentley Trusts should be transferred from SGI to Whitmill on payment of an exit fee of £1,000 per trust, (b) to execute deeds of retirement and appointment by which Whitmill replaced SGI as trustee of these trusts. No notice of this meeting was given to Mr Sinel.

36 In fact, it emerges very late in the day with the service of Mr Wijsmuller's fourth affidavit on 18th March 2008 (following an order by this court in the course of the hearing on 12 th March 2008 requiring a fuller explanation of this transaction, Mr Begg having been unable to provide it) that the claim that the £500,000 facility granted by Reserve Holdings to Mr Wijsmuller was a purely private matter between the two was, on any view, a little wide of the mark to say the least. In Mr Wijsmuller's own words (paragraph 5 of that affidavit), "The circumstances of the intended loan go to the heart of Advocate Sinel's complaints and allegations and I should explain them." The ensuing explanation is, in short, as follows. Mr Bender had for some time been concerned about Mr Sinel's role in connection with SGI, but Mr Wijsmuller had managed to persuade him to stick with SGI. However, in early 2005 Mr Bender - in common with a number of other SGI clients — became keen to sever relations with SGI as " *Mr Sinel's agitations grew louder and more public"*. Mr Bender's association with Mr Wijsmuller went back to the time when the latter had worked for ING: he had followed Mr Wijsmuller to SGI when the latter had moved there some years previously. The offer to lend Mr Wijsmuller money had come about because Mr Bender " *wished me, but not Advocate Sinel, to continue to be involved as professional manager of a trust company in charge of the trusts in which he had interests*" (paragraph 9). It was Mr Sinel's own letter of 21st February 2005 to Mr and Mrs. Wijsmuller, copied to Mr Bender, that had finally brought things to a head: as recorded in a long e-mail letter from Mr Bender to Mr Sinel some weeks later on 29th March 2005:-

" *Either way your letter of February 21st made it very clear to the board that a continuing association with SGI would not be in RTCL's best interests.* Thus it was your own action (the writing of a letter that appeared to accuse your own partner of fraud) that precipitated RTCL's decision to fire SGI and seek administrative services elsewhere."

Thus it was that Mr Bender had expressed his hope that " *Whitmill can step in and provide the administration services that we need while we make permanent arrangements for new*

service providers in Anguilla and Jersey" (paragraphs 9 and 12 and referenced quotations).

37 He was happy, continues Mr Wijsmuller, to have the facility as it would strengthen his hand in his negotiations with Mr Sinel (paragraphs 11 and 16) and:-

> " *As a final resort, I believed that I could set up a new office to service the requirements of [Reserve] its associated holdings and whichever other clients left SGI and followed me.* The facility would demonstrate the backing and support of a major client and give confidence to any other clients, who might wish to join me, that I had sufficient resources and infrastructure" (paragraph 11).

Over the years, Mr Bender had told Mr Wijsmuller on a number of occasions that he would be happy to give him money to set up a trust company to manage his trusts, but Mr Wijsmuller was not keen to "put all his eggs in one basket" and wanted to maintain a degree of commercial independence from Mr Bender:-

> " *To that end, it was I who suggested to Mr Bender that he merely lend me money to set up a new trust company and further, it was I who suggested that he take a charge over my wife's and my properties so that we would both recognise the commercial reality of the loan" (paragraph 10 and 13)*.

38 A contemporary glimpse into what was happening at that time is also provided by an e-mail from Mr Wijsmuller to Mr Bender dated 13th March 2005 as follows:-

> " *Dear John, Spoke to Don again and he would be delighted to assist.* He asked that you send him a mail asking that Whitmill provide sub-contract admin and other associated services for RTC [that is, Reserve] instead of SGI due to unsatisfactory situation at SGI. This is so that he has something to reply to. His details are below. I'd like to (re-)introduce Don to you as soon as possible as there may be a brief period when your usual contacts are not immediately available. I have spoken with Joe Brice and he concurs with the plan. He and Alex [Richardson] will act upon your request. Their respective email addresses are ....."

In the event, says Mr Wijsmuller (in his fourth affidavit, paragraph 19), the litigation intervened and " *it proved impossible to effect our plan to set up a new trust company"*.

39 Whether and to what extent money was ever actually advanced to Mr Wijsmuller under the facility provided by Reserve Holdings is unclear. Mr Wijsmuller says not. But, at this point in the discussion, it is the arrangement of the facility in February 2005 and its purpose that matter most: the fact that, while still employed by SGI as its Managing Director Mr Wijsmuller *appears* (I say no more) to have been involved, not just in implementing a client's desire to change the arrangements for the management of his family trusts, but in making plans for the establishment, if necessary, of his own trust company that could take on that client's affairs in place of SGI, and helping to make arrangements, in the meantime,

for that client to be looked after by a trust company run by his brother.

40 Now, Mr Wijsmuller strenuously denies that he was instrumental in causing any of SGI's former clients to desert it. He asserts that, in varying degrees, they had all become unhappy with Mr Sinel, with the direction that SGI was taking, or with the increasingly public quarrel between Mr Sinel and Mr Wijsmuller, and that they had all reached their own independent decisions to leave. And there is certainly affirmative evidence, supporting this claim, in the form of an affidavit from Mr Zimmer and the long e-mail dated 29th March 2005 from Mr Bender previously mentioned (though untested in cross-examination). Perhaps Mr Wijsmuller is right and, if the matter had proceeded to trial, it would have been established that all or most of the clients who left or tried to leave SGI at this time would have done so in any event, irrespective of anything Mr Wijsmuller said or did.

41 But the point, for present purposes, is that *at a time of seriously-strained relations between the two men and when Mr Wijsmuller was still the Managing Director of SGI*, he engaged in a series of actions which, individually and more so collectively, were almost bound to engender suspicion. To have made arrangements at that point in time for the wholesale copying of SGI's records without informing Mr Sinel what he was doing and why was always liable to mis-interpretation (even if, as Mr Wijsmuller claims, it was in truth merely a "back-up" measure). To have held a board meeting of SGI on 12th March 2005 in the circumstances and for the purpose described above (even if it was intended to do no more than give effect to Mr Zimmer's wishes) was asking for trouble. And to have engaged with Mr Bender and others in the sort of planning described above appears, on the face of things, difficult to reconcile with Mr Wijsmuller's fiduciary obligations to SGI. Add to these unsettling events, the undisputed fact of a substantial exodus of clients from SGI in the wake of Mr Wijsmuller's departure with the intention, in some cases at least, of moving to companies associated in one way or another with Mr Wijsmuller and you have naturally fertile ground in which inference of wrongdoing is liable to take hold. As George-Creque J. observed in giving judgment on an application for security for costs in the High Court in Anguilla in January 2006:-

> " ***Whilst I am not making any determination as to whose conduct is responsible for STAL's business failure, I do find it strange that the flight of business, (including the Trust's business which admittedly a lucrative source of income) away from STAL at the time when the 13th and 14th Defendants [Messrs. Brice and Richardson] were its directors happen to have found a ready home in Barwys, a recently established trust company in which Messrs. Wijsmuller and Mr Brice (though not Mr Richardson) are the directors" (paragraph 12)***.

42 All in all, and giving Mr Wijsmuller the benefit of the doubt for present purposes as regards his true intentions, this appears to me to be a classic example of a defendant inviting the institution of legal proceedings against him by behaving very foolishly. If there were no more history to the matter than this and application for leave to discontinue had been made eighteen months or two years or so ago, the case for a simple order of " *no order as to costs*

either way" might, therefore, have been compelling. As it is, things are not quite as simple as that and it is necessary to take account of the subsequent history of the action as a whole.

The slow progress of the action

43 Let me deal first of all with certain issues regarding the progress of the action, once it had started, which can be disposed of fairly shortly in the light of the review contained in earlier passages of this judgment. Certainly, Mr Wijsmuller's failure, until faced with the threat of contempt proceedings, to comply with the terms of the original orders requiring him to surrender various equipment and make disclosure of his assets, appears to have been inexcusable, though its impact on the subsequent course of the litigation may not have been great. On the other hand, looking at the matter in the round, I do not think that Mr Wijsmuller can be blamed more than any of the others for the failure of mediation to get off the ground: all three of the main protagonists adopted, at varying stages and in different ways, stances that made progress in this direction difficult. Mr Sinel was certainly the chief proponent of mediation - so often, indeed, that one begins to wonder whether this was indicative of a reluctance to fight the action; but one of the reasons for the process stalling on at least one occasion was an unrealistic expectation on his part that the proposed mediation should encompass the Anguillan allegations as well as those raised by the Jersey proceedings. Nor do I find Mr Wijsmuller's approach to his discovery disproportionately more unsatisfactory than that of the plaintiffs to theirs. In both cases, there were, on the face of things, serious shortcomings. And, for all their complaints about Mr Wijsmuller's discovery, the plaintiffs never seem to have compiled a list as required by the court order of 18th May 2005, and they only served their own affidavit of documents when faced with the threat of an 'unless' order by Mr Parker Garner.

44 Nor, again, do I accept that the undoubted delay in clarifying the position as regards Mr Wijsmuller's representation on legal aid was of his deliberate making (assuming for present purposes that his financial circumstances were, indeed, such as to warrant his application in the first place), although it may be that the matter was hampered at some stage by concerns on the part of the Batonnier about the adequacy of the information supplied by Mr Wijsmuller concerning his assets. Mr Wijsmuller's primary concern, back in 2006, was to try to get legally aided representation as a defendant in the *UCC v Bender* ([2006] JRC 068A and JRC 150A) litigation that was then proceeding towards trial: the desirability of his being represented had, as I recall (as the prospective trial judge) been mentioned by the learned Deputy Bailiff at one of the interlocutory stages and had been repeated by me on at least one other occasion. That application was eventually granted and it was only after that case had settled in July 2007 that it became apparent that there were unresolved uncertainties as to whether Mr Wijsmuller's legal aid certificate also extended to the current proceedings brought by SGI and Mr Sinel. On the other hand, while there is no doubt that Mr Sinel made vociferous representations to those concerned with the administration of the legal aid system opposing Mr Wijsmuller's application, the full account of the history of this matter given by Advocate Thacker, as Batonnier, in his e-mail letter to Mr Begg on 12th February 2008 makes it plain that the delays encountered by Mr Wijsmuller in 2006/07 were, in

Advocate Thacker's view, the result of difficulties in finding a firm to represent him rather than any intervention on the part of Mr Sinel opposing the grant of legal aid. And, while Advocate Thacker says that he is unable to speak for the decision by Advocate Matthews to suspend public funding for a time in 2007, I have no doubt that the latter was well capable of taking a robust decision uninfluenced by such intervention.

45 Apart from the difficulties caused, for a time, by uncertainties over Mr Wijsmuller's legal representation, and the periods when the action was stayed with a view to mediation, the chief reasons for the slow progress of the action appears to me to have been the liquidation of SGI, the resultant quandary in which Mr Sinel must, in truth, have found himself as to how to best to preserve and advance the claims against Mr Wijsmuller, his hesitation in applying for leave to substitute Norglen for SGI, and, almost certainly, a degree of pre-occupation with the other set of proceedings in Anguilla. One way or another, I am left with the distinct impression that for much of the time after November 2005 the plaintiffs had little appetite for pressing on with the action as opposed to trying to move the dispute into a process of mediation.

46 I turn now to Mr Sinel's claim in his affidavit of 20th February 2008 that it was at heart the late disclosure, in January this year, of a significant change in Mr Wijsmuller's financial circumstances that led to his decision to seek leave to discontinue the action. The point revolves largely around a property known as Verclut Farm, previously owned by Mr Wijsmuller's parents. In his original affidavit of means Mr Wijsmuller had included, among other things, an item reading " *Whitmill Properties Limited - potential interest as discretionary beneficiary.* (Location) Verclut Farm, St Martin - (Value) £250,000 estimated - (Other) Interest in shares of the company." In November 2005, this property was sold for £1,500.000. On 6th June the following year, Carey Olsen wrote to Mr Wijsmuller noting that the property had been sold, expressing concern that they had not been informed of the sale at the time, suggesting that there might have been a breach of the still-current asset-freezing injunctions obtained against Mr Wijsmuller, and asking for full details of the sale and also for an up-dated affidavit of means. In his reply on 15th June 2006 Mr Wijsmuller said that he would consider up-dating his affidavit and, as regards Verclut Farm, wrote:-

> " *As you correctly state, I have disclosed that I am potentially a beneficiary of a trust which I believe owned a company which owned the above property.* The property was sold for £1,550,000, which is public knowledge. As to your other questions, I cannot supply you with the answers as I do not have that information."

From time to time thereafter Carey Olsen continued, intermittently, to press Mr Wijsmuller for a revised affidavit of means but none was forthcoming. When in late 2007 Carey Olsen issued a draft summons seeking an order, Andrew Begg & Co. replied saying that in the absence of any reason to believe that there had been a material change since the filing of Mr Wijsmuller's original affidavit, there was no justification for such an order.

47 Eventually, on 11th January this year Andrew Begg & Co. wrote to Carey Olsen concerning Verclut Farm quoting from an affidavit sworn by Mr Wijsmuller in connection

with his application for legal aid in order to show that their client had " *nothing to hide*":

> " *This was a property which my parents purchased when they originally came to Jersey in the early 1960s.* They originally arrived in Jersey as "(1)(1)(j)" immigrants but subsequently transferred to (1) (1)(k) status. I believe that, because of this category of Housing consent, my parents purchased Verclut Farm in the name of a Jersey company (Whitmill Properties Limited), the shares of which were owned by [an] (already existing) Dutch Foundation...(also formed, I assume, in the early 1960s). However, any enquiries which I have made about Verclut Farm have been unsuccessful. Whitmill Properties Limited is a company that has the same registered office as that of Whitmill Trust Company, of which my brother, Don, is the Managing Director and sole beneficial owner. According to Don, the two companies are not in*common ownership.* He named his Trust Company after Whitmill for sentimental reasons and because it is the Anglicised version of our surname, Wijsmuller. [On the directions of the Acting Batonnier, prompted by Mr Sinel drawing attention to the sale of Verclut Farm] I wrote to my brother seeking confirmation whether the property had been sold and, if so, for how much, and to enquire whether, if it had been sold, I was entitled to participate in the proceeds of sale. My brother replied, confirming that the property had been sold for £1.5 million (gross), since that was a matter of record. However, he maintained that I was not entitled to any further information, since otherwise the matter was confidential. I reported back to the Acting Batonnier (in fact Advocate Cadin, who was standing in for the Acting Batonnier at the time) and that position was accepted by him".

48 Commenting on this in his affidavit of 20th February 2008 (his first in connection with the present application, Mr Sinel said that he had known Mr Wijsmuller and his brother for some forty years, that he had visited Verclut Farm on many occasions, and that he had believed the figure given in Mr Wijsmuller's affidavit to be a significant undervalue — by which he appears to have meant the figure of £250,000. (The brevity of the description is in fact ambiguous as to whether that figure was intended to represent the value of the property itself or the estimated value of Mr Wijsmuller's projected interest as a beneficiary; but, given that it appears to have been put on the market at an asking price of £2 million only a matter of months after Mr Wijsmuller had sworn his affidavit and had sold for £1.5 million, £250,000 as an estimate of value of the property would certainly have been unrealistic). But faced, in January 2008, with the information contained in Andrew Begg & Co.'s letter of 11th January, Mr Sinel said that, whatever his doubts about Mr Wijsmuller's veracity, he has no alternative but to take Advocate Begg's word at face value and accept that his client has " *nothing to hide*". The result of this, together with the further charge taken over Mr Wijsmuller's own properties to support his legal aid funding, means that he is no longer worth pursuing in Jersey:-

> " *It is now certainly not cost effective to do and I can no longer afford to fund this litigation and the litigation in Anguilla in circumstances where nothing will be gained in Jersey in doing so.* Were judgment awarded in my favour (or indeed in favour of [SGI]), I now consider it highly unlikely that I (or SGI) would be able to recover from the limited assets which Mr Wijsmuller would now seem to have

located within Jersey. This information, which is contrary to the information originally, and throughout the proceedings, provided by Mr Wijsmuller has only recently been disclosed by Mr Wijsmuller. Had Mr Wijsmuller acceded to my requests to update his affidavit of means (which he swore on 10th May 2005) then I believe I would have decided to seek discontinuance of this action much sooner" (paragraph 6).

49 The position, submits, Mr Kelleher, is akin to that in the English case of *Everton v WPBSA (Promotions) Limited* 13 December 2001 in which Gray J. held that it would be wrong to penalise a discontinuing plaintiff where he had in effect been compelled to abandon his claim against a defendant because, as he put it, " ***The reality is that the claimant's claim against the fourth defendant has become worthless through no fault of his own but rather by reason of the supervening bankruptcy of the fourth defendant"***. The facts of the present case, as in *Everton*, are to be distinguished, submits Mr Kelleher, from those of *In re Walker Wingsail Systems plc* [2006] 1 WLR 2194, where the defendants' circumstances had remained unchanged but the plaintiff liquidator had decided to discontinue simply because he had re-evaluated the situation.

50 Mr Begg submits that the real reason for Mr Sinel's decision to discontinue has nothing to do with this and everything to do with the invalidity of the Assignment to Norglen and the absence of any basis for personal claims by Mr Sinel. And I would agree that what Mr Sinel suggests as the main reason would have carried more weight had it been articulated at the time when Carey Olsen gave notice on 22nd January 2008 of his intention to discontinue or at the first court hearing in early February 2008, instead of waiting until service of Mr Sinel's affidavit and skeleton argument two weeks later. I can see that news of the further charge over Mr Wijsmuller's properties by way of security for his legal aid funding might have been one additional factor of relevance and that disclosure of the extract from Mr Wijsmuller's legal aid affidavit concerning Verclut Farm set out in Andrew Begg & Co.'s letter of 11th January 2008 might well have served to point up afresh the difficulties likely to be encountered in trying to enforce any judgment against Mr Wijsmuller.

51 But the idea that that letter involved the belated revelation that Mr Wijsmuller's " *true financial position*" is significantly different from what he had previously suggested it was and that, had it been disclosed at the time of the sale of Verclut Farm in November 2005, Mr Sinel would have abandoned the proceedings at that point, involves, I suspect, a degree of wishful thinking. In the first place, to speak of the 11th January 2008 letter as disclosing the "true" situation is ironic, to say the least, given that Mr Sinel plainly does not believe a word that Mr Wijsmuller says about his assets and that, so far as Verclut Farm is concerned, the information supplied *reveals* nothing at all except that discovering the precise position as regards the extent of any potential beneficial interest that Mr Wijsmuller may have had in the past, or may now have, remains elusive. Mr Sinel says that at the time when the litigation was first launched he had " *anticipated that we would attach a significant portion of the proceeds of sale of Verclut Farm*"; but when it came to the property being put on the market the autumn of 2005 - something of which he was well aware - no move to try to obtain an injunction of the kind threatened in Mr Sinel's letter to Mr Don Wijsmuller of 3rd

October 2005 or to try to "attach" the proceeds of sale (in whatever way Mr Sinel may have had in mind) was ever made. Nor did Mr Sinel move to terminate the litigation following receipt of Mr Wijsmuller's unsatisfactory letter of 15th June 2006.

52 It is difficult, in fact, to believe that Mr Sinel did not recognise from the outset that, even if he were successful in obtaining judgment against Mr Wijsmuller, the prospects of ever being able recover anything in Jersey were slim: a potential beneficial interest in a discretionary trust hardly represents a readily accessible asset. And Mr Sinel will have been well aware that Mr Wijsmuller, if minded to make himself judgment-proof, would have known how best to set about this (noting in this connection, as I do, paragraphs 49, 50 and 52 of Mr Sinel's twelfth affidavit and page 2 of Mr Wijsmuller's letter to Mr Sinel dated 18th January 2005). Re-iteration of his (supposed) inability to provide any informative details about the ultimate beneficial ownership of the proceeds of sale of Verclut Farm may have served to hammer home the difficulties that would be likely to attend enforcement of any judgment against Mr Wijsmuller, but the basic position cannot, in my view, be said to have changed in any real sense, other than as regards the further loan by way of legal aid obtained by Mr Wijsmuller and the related security over his properties. What had changed was that Mr Sinel had failed in his attempt to enlarge the Jersey proceedings so as to incorporate the Anguillan allegations, which had meant conducting litigation in two jurisdictions with all the attendant expense and practical complications; SGI had gone into liquidation and the liquidators were in no position to continue the action themselves; rightly or wrongly, Mr Wijsmuller had finally been successful in obtaining legal aid; the Assignment had been revealed to be ineffective; the claims against Mr Parker-Garner were being discontinued; a substantial chunk of SGI's claims had, in any event, fallen away; and if Mr Sinel himself had wanted to have any chance of pursuing any personal claims against Mr Wijsmuller he was going to have to seek leave to undertake a radical re-amendment of his case or possibly even to start new proceedings, pleading a cause of action of the kind recognised by the English Court of Appeal in *Giles v Rhind* [2002] EWCA Civ 1428, [2003] Ch. 618 (shareholder entitled to recover for the loss of the value of his shares in circumstances where the wrong done to the company had rendered it impossible for it to pursue its own remedy). Any outside observer, presented with the evidence before this court, would be bound to conclude, in short, that the Jersey proceedings were in bad order and could only be rescued, possibly, at considerable effort and expense; that the chances of successfully enforcing any judgment against Mr Wijsmuller remained remote; and that it made more sense for Mr Sinel to consolidate his efforts on the proceedings in Anguilla. Mr Sinel's later, 5th March 2008 affidavit (at paragraphs 64 and 65) is, perhaps, a little more realistic than his first in acknowledging that a number of factors had a bearing on his decision to discontinue, including in particular that " *my reflective loss claims became live from the demise of SGI, but the claims have been assigned to Norglen, which assignation I now recently discovered is ineffective until we discontinue these proceedings*".

53 Mr Sinel's real grievance, as portrayed on a reading of his twelfth affidavit as a whole, is not that it was only in January this year that Mr Wijsmuller's " *true financial position*" has been disclosed, but that the true position (as he, Mr Sinel, alleges) has been successfully buried; that in spite of his skills as a litigator Mr Sinel has been unable to find the burial site; and that, as a result, Mr Wijsmuller has been successful in a wholly unmeritorious

application for legal aid funding. Whether there is any substance to these serious accusations is not something that I can determine on this application: there is nothing in the material currently in evidence that would justify such a finding. Mr Wijsmuller is entitled to say that he has gone on affidavit as to his financial means on more than one occasion and has nothing to hide; that there has been no application to cross-examine him on his affidavits; and that the merits of his application for legal aid funding have been scrutinised and accepted by those responsible for administering the system. Mr Sinel's claims are, he insists, no more than the product of his " *over-active imagination*".

54 Nevertheless, on two particular counts (in addition to what has already been said about Verclut Farm), Mr Wijsmuller's evidence on the present application is less than satisfactory.

55 The first concerns an amount of US$746,632-62 apparently billed by Mr Wijsmuller to Barwys in respect of services rendered and expenses incurred in 2005/2006. The figure comes from a schedule ("JB2") exhibited by Mr Brice to an affidavit sworn in his capacity as a director of Barwys in proceedings in Anguilla between Mr John Koonmen and Mr Gareth Philips as recently as 12th November 2007. At paragraphs 8 and 9 of that affidavit Mr Brice says:-

> " *8. The second spreadsheet attached hereto and identified as "JB" relates to additional fees incurred [sic] by Bart Wijsmuller who acted as director of Barwys from 27th April 2005 until 8th February 2006. I am aware that he also conducted work on behalf of various Koonmen entities and in relation to legal proceedings in Jersey in which companies affiliated with Barwys (such as Whitmill Trust Company .....).*
>
> *9. The first and second spreadsheets show a total of US$2,085,189-50 incurred to date. This figure is therefore due and payable by the Claimants" (i.e. Mr Koonmen and Mr Phillips).*

56 The schedule at " *JB2*" is headed " *BTA Limited respect of "Fees and Disbursements claim re Bart Wijsmuller*" and lists some 27 items totalling £746,632-62. On 10th December 2007 Carey Olsen wrote to Andrew Begg & Co. asking for an explanation of this in the light of Mr Wijsmuller's oft repeated assertion that he has been unable to find work since proceedings were started against him in Jersey in April 2005. Replying on 11th January 2008, Advocate Begg wrote " *My client has received no money in relation to the invoices for work raised between 27th April 2005 and 8th February 2006 and those fees have all been waived as part of the settlement of the UCC action":* that was all.

57 The matter was pursued further by Carey Olsen in an affidavit by Mr Kellick of Carey Olsen dated 20th February 2008 and also in a faxed letter dated 27th February 2008 to Mr Begg in which Mr Kelleher pointed out that there was no reference to any such waiver in the UCC settlement agreement. Mr Begg replied bluntly declining to answer any of the questions raised (which covered other matters, as well as the one immediately in issue here), adding that they were none of Mr Sinel's business. But in his third affidavit dated 4 th March 2008

Mr Wijsmuller gave the following explanation:-

> " *38. Barwys did, indeed, produce a statement of expenses incurred by various parties who were indemnified by Mr Bender and Mr Koonmen under a Settlement Agreement made in 2003 (in an action in this Court:Koonmen v. Bender*). *I have always believed that they were liable under the terms of that Settlement Agreement to pay for work which Barwys and I undertook in defence of the claim brought by UCC.* I gave the statement to Mr Koonmen to let him know that there were, in my view, expenses to which [sic] I expected him to pay or to which I expected him to make a contribution. However, I have never been paid anything on this invoice and never sought to enforce it in any way; and last year, Mr Koonmen insisted that I disclaim, and waive, any claim to fees from Barwys as part of the settlement which I made with him and Mr Bender in the UCC litigation. My advocate was involved in those negotiations and, to the extent that Advocate Sinel does not believe me (and he appears not to .....) I am happy to waive privilege and allow my Advocate to confirm personally to the Court that I did indeed waive those fees last year.
>
> *39. What I did was hardly "employment", but rather, piecemeal assistance which they later said they never wanted carried out.....[Advocate Sinel] knows full well, but I can repeat it for him: I have never held a job nor had any sort of employment since I left SGI on 16th March 2005. He knows that because he has been instrumental in ensuring that I have stayed unemployed."*

58 When it came to the hearing of the present application Mr Begg informed the Court that Mr Wijsmuller had indeed waived his right to receive the fees and expenses in question and Barwys had, correspondingly, waived any claim for re-imbursement. But this, with all due respect to Mr Begg, is not a satisfactory way for an issue such as this to be dealt with. Any litigant in Mr Sinel's position would be entitled to feel that too many loose ends remain unanswered and that it is not right that the matter should be closed out simply by an assurance from the other party's Advocate. Apart from anything else (including how fees and expenses on this scale were generated by mere "piecemeal assistance"), waiver of a claim of this size, in the context of the settlement of highly contentious litigation, would ordinarily be recorded in writing somewhere. But nothing of that kind has been produced, let alone on affidavit, and the circumstances and manner of the waiver remain unparticularised. Nor is any explanation offered as to how it is that, although the UCC litigation was settled in early July last year, as recently as November 2007 Mr Brice was asserting, on behalf of Barwys, a claim against Mr Koonmen and Mr Phillips based on Barwys's liability to Mr Wijsmuller in an amount of US$746,632-62, or how, if this substantial (alleged) debt was indeed waived, that was thought to be compatible with the restraint on disposal of assets imposed by the orders arising from service of the Order of Justice.

59 The second matter concerns the loan facility of £500,000 granted to Mr Wijsmuller by Reserve Holdings in (it seems) February 2005: not, at this point, the granting of this facility but Mr Wijsmuller's insistence that, in the event, he never drew down or borrowed against it

because the intervention of the litigation prevented him from setting up a new trust company and, in any event, the terms of the injunctions contained in the Order of Justice barred him from drawing on it.

60 The actual terms of the order were that Mr Wijsmuller should " *make no further drawings*", reflecting Mr Sinel's information and belief that US$100,000 had already been drawn down under the facility, the immediate source of the funds being Rising Star Limited, " *another Bender Family Trust company*" (Sinel first affidavit, paragraphs 179 and 180).

61 Responding to Mr Sinel's affidavit, Mr Wijsmuller says:-

> " *I should make clear that the US$100,000 paid by Rising Star Limited to my American account with Charles Schwab & Co. was not a drawdown on the RHL facility.....This was made the day after I resigned from SGI.* By the time of making my schedule and Affidavit of Means in early 2005, about $45,000 of that sum was in my Jersey RBS account .....and the balance remained in the Charles Schwab account..." (fourth affidavit, paragraph 23).

But beyond this he says and produces nothing to substantiate this assertion. No explanation is given for this US$100,000 payment (and it is not denied that Rising Star Limited was a Bender Family Trust company), let alone any supporting documentation demonstrating that it had nothing to do with the £500,000 facility. No reference is made to the minutes of the board meeting of RTCL on 1st February 2005, which record the agreement of "the shareholder" (i.e. Mr Bender) to a loan of US£500,000 by Reserve Holdings to Mr Wijsmuller and the resolution of the board (Mr Wijsmuller abstaining) approving the loan on "commercial terms" to be recorded in a memorandum or side letter between Mr Wijsmuller and Mr Bender. No such document recording the terms of the loan has been exhibited. And no explanation is given of how and where "it was agreed that the Board of RTCL would have to be approve [sic] each and any drawdown on the facility" as claimed by Mr Wijsmuller in paragraph 15 of his 4th affidavit (no mention of which is to be found in the RTCL board minutes).

62 Nor is it unreasonable to suppose that at some point in the course of the three years that have elapsed since February 2005 - during which time the related charges over Mr Wijsmuller's properties in Jersey have, it seems, remained in place — there would have been some form of correspondence between Mr Wijsmuller and Mr Bender making reference to the fact that the original facility had never been drawn on. Indeed, Mr Wijsmuller says that, although, he has not applied to have the charge released because his assets remained frozen until 29th January this year, he has in the past asked Mr Bender whether he would object to releasing the charge but he considered that he could not do so " *whilst he was under the terms of the freezing injunction over his own assets in the UCC action*" (displaying a touching concern on the part of Mr Bender for court orders that was not, as I recall, much in evidence at the time). He adds:-

> " *I have not recently asked him whether he would consent to the release of the charge: I am taking matters one step at a time.* For my part, I cannot see how he

could oppose the release, given that I did not borrow against it" (affidavit paragraph 21).

On the other hand, the very limited correspondence actually exhibited by Mr Wijsmuller includes an e-mail from Mr Bender to Mr Sinel dated 29th March 2005 in which he delivers a lengthy, detailed rebuttal of complaints made by Mr Sinel some days earlier but notably takes no exception to the suggestion that Mr Wijsmuller had borrowed money from him. Mr Sinel had objected to Mr Wijsmuller's "overly close relationship with you, the clients" and had written:-

" *The fact that he has borrowed money from a client is a matter of concern to the Regulators both here and in Anguilla and it is simply inappropriate at every level*."

In reply, Mr Bender stoutly defended Mr Wijsmuller from the charge of having done anything inappropriate, adding:-

" *You may feel that it is wrong for a fiduciary to be close to his clients, but I think many clients prefer it that way.* I can't imagine being a good trustee for a family trust without being fairly close to the family."

He did not, however, take issue with Mr Sinel's charge that he had lent Mr Wijsmuller money.

63 The impression given by Mr Wijsmuller's treatment of these two items in his affidavits is one of determined minimalism so far as the provision of information and supporting material is concerned: an approach that is, whether by design or by accident, decidedly unhelpful, particularly in the case of the second item above, given that Mr Wijsmuller had been specifically required to swear a further affidavit (his fourth) in order to deal with this matter. In other circumstances, I might have felt it right to allow Mr Sinel an opportunity to probe these matters further, but in the wider context of things I think it better to let matters rest where they are rather than prolong this litigation further. Whether those responsible for administering the legal aid vote feel the need to take them further is a matter for them (only part of the information supplied to them has been disclosed in these proceedings, and for all I know these things have already been fully explored in that context).

64 Complaint is also made on behalf of Mr Sinel about one further aspect of Mr Wijsmuller's assets. This concerns the sum of £224,341-43 payable to Mr Wijsmuller under the terms of the agreement reached by him with Mr Bender and Mr Koonmen in connection with the settlement of the UCC litigation in July last year (under Clause 2 of the "Release and Discharge Agreement" dated 4th July 2007). This was to be paid into the client account of Baker Platt on terms that it was to be transferred to Andrew Begg & Co, for the account of Mr Wijsmuller on satisfaction of certain conditions, as, in the event, they were. According to Andrew Begg & Co.'s letter dated 11th January 2008, following receipt of this amount it was applied in part (£23,862-50) to settle the outstanding fees of Appleby/Bailhache Labesse (Mr Wijsmuller's previous legal advisers), in part (£181,681-41) towards reimbursing the legal aid vote, and as to the balance (£18,797-52) in settlement of the fees of Andrew Begg

& Co. In his response to this point Mr Wijsmuller said that he did not understand Carey Olsen's complaint: the money had never been under his control and in any event it was simply the re-imbursement of debts that he had incurred in defending himself in the UCC case (third affidavit, paragraph 37); and in a belated affidavit tendered by Mr Begg himself after the 12th March hearing he says that although they did come into his firm's client account, " *they had already been allocated and it was known and agreed, in advance, that none of these funds would be payable to [Mr Wijsmuller] nor held to his order"* (second affidavit, paragraph 3).

65 But the point made on behalf of Mr Sinel is that it is in the nature of things that money in such an account is the property of the client and that this sum was, accordingly, caught by the terms of the injunctions contained in the Order of Justice of 27th April 2005 and should not have been dispersed without prior sanction of the court in the form of a variation of those injunctions (as happened on a later occasion towards the end of last year when Mr Begg sought and was granted a variation authorising the granting of security over Mr Wijsmuller's properties in order to enable him to obtain further funding from the legal aid vote). On the face of things the complaint appears to be well founded and the fact that the court might have been ready to have grant a variation, so as to allow distributions in the way that actually occurred, had an application been made (which it might well have done), is no answer to the charge that a regrettable breach of the injunction appears to have occurred. But, in the interests of finality, and as the matter has not been fully explored, I propose to leave the matter there unless either party wishes to take it further.

66 So far as concerns costs, that leaves for consideration Mr Wijsmuller's complaint that on a number of occasions in the course of the litigation Mr Sinel wrote, not only to the legal aid authorities, but also to the JFSC, in terms designed to damage his credibility and his standing in the financial services community. In the former case a number of letters have been exhibited including letters to the Batonnier dated 18th January 2007, to the Treasury Minister dated 16th February 2007, and to the Deputy Judicial Greffier dated 31st July and 15th November 2007. In varying ways but to substantially similar effect, they contain express assertions of dishonesty on the part of Mr Wijsmuller in terms which, to an uninformed reader, would suggest that these charges were established facts rather than allegations yet to be proved: assertions that Mr Wijsmuller had " *defrauded*" Mr Sinel; had " *looted*" and " *embezzled*" money from SGI and STAL; had " *shuffled off*" inherited wealth into a discretionary trust and " *defrauded*" the legal aid vote. In the case of the JFSC, the correspondence itself was not in evidence, but Mr Sinel admits that he repeated allegations of this kind to the JFSC.

67 The question whether a litigant who believes that his opponent is applying for legal aid when, in truth, he could well afford to pay for his own representation is entitled to make representations to the legal aid authorities, and, if not, whether he should be so entitled and how any such representation should be handled procedurally, was not something that was argued before me: I therefore express no view on the matter. But, assuming for present purposes, that it was not illegitimate for Mr Sinel to oppose Mr Wijsmuller's application, it remains the case that, as an Advocate of the Royal Court, Mr Sinel should have been well

able to make his point without resorting to the sort of fevered tone and pejorative language of some of the material found in these letters. The same goes for his correspondence with the JFSC and the financial services regulators in Anguilla, as well as the Attorneys General of Jersey and Anguilla (see paragraphs 6 and 7 of Mr Sinel's affidavit of 25th May 2005), assuming that these followed the same pattern.

68 Not that Mr Sinel, was alone in giving full vent to his perceived grievances outside the four corners of the litigation itself. On 16th October 2006 Mr Wijsmuller wrote to Mr Sinel's new partner in Sinels in terms that accused Mr Sinel, in effect, of destroying or removing "*sensitive data directly relevant to active litigation matters"*, with copies to, among others, the liquidators of SGI, the Batonnier, the JFSC, the Joint Financial Crimes Unit and Carey Olsen (under cover, in the last case, of a letter headed " *Carey Olsen - conspiracy to pervert the course of justice - Preservation of data and records*"). And in a lengthy e-mail letter on 27th November 2006 referring to events earlier in the year concerning STAL, Mr Wijsmuller accused Mr Sinel, together with another Jersey Advocate and Leading Counsel at the English Bar, of fraudulent conduct, and then broadcast these allegations by copying his e-mail to more than fifty other lawyers, regulators, bankers and others.

69 Both sets of correspondence are sadly illustrative of the bitterness that has engulfed the relationship between these former close friends and colleagues. In neither case is it likely to have advanced the writer's cause on any front: certainly not so far as this court is concerned. As regards Mr Wijsmuller's specific complaints as to the effect of Mr Sinel's interventions, I have already said that they appear to me to have had little if any adverse effect on his application for legal aid funding. And although Mr Wijsmuller has repeatedly claimed that Mr Sinel's correspondence with the JFSC has effectively barred him from ever again working in the financial services industry in Jersey, there is nothing beyond this assertion that would justify any such finding in the current proceedings.

Conclusions on costs

70 What then, are the appropriate orders to make as regards costs, as between the plaintiffs and Mr Wijsmuller, having regard to the principles summarised in *Watkins v Egglishaw* [2002] JLR 1 and the observations of this Court in *JFSC v Black* [2007] JLR 1 at 20. Given that the action is being discontinued short of trial, the starting point is to ask whether there is any good reason not to make an award of costs in the defendant's favour. In short, my answer is most certainly that there is as regards the early stages of the action, in as much as it is hardly surprising that Mr Sinel and SGI felt obliged to start it in the first place. On the other hand, there unquestionably came a time when the "credit balance" represented by that initial justification was exhausted, the steam went out of the proceedings and their usefulness became questionable; from that point onwards there ceases, in my view, to be any justification for depriving Mr Wijsmuller of his costs. It seems to me that there also came a further point, later in time, when the futility of further pursuit of the action as constituted was, or should have been, so evident that it would be right for Mr Wijsmuller's costs to be paid on an indemnity basis. Looking at the matter as whole, the fair orders to my mind

would, accordingly, be as follows:-

(i) As regards the period from inception of the action up until 31st August 2006: no order as to costs of the action (leaving each party to pay his/its own costs).

(ii) As regards the period from 1st September 2006 to 31st August 2007: Mr Wijsmuller's costs of the action to be paid by SGI and by Mr Sinel on the standard basis.

(iii) As regards the period from 1st September 2007 until service of their respective formal notices of discontinuance on 4th January 2008 (SGI) and 22nd January 2008 (Mr Sinel): Mr Wijsmuller's costs to be paid by SGI and by Mr Sinel on the indemnity basis (including all costs of and associated with the hearing on 13th December 2007).

(iv) The foregoing to be subject in each case to the qualification that pre-exiting costs orders remain undisturbed.

(v) Mr Wijsmuller's application for an immediate order for a payment on account of costs to which he is entitled under the foregoing orders is adjourned, with liberty to restore in the event of any undue delay in taxation.

71 Everything that I have seen suggests that the driving force behind the litigation at every stage has been Mr Sinel and it is for that reason that I make no distinction between him and SGI for the purpose of these orders.

72 I have taken 1st September 2006 as the first break-point, because it was at about that time that the plaintiffs conducted a substantial review of the case for the purpose of making a report to the Court (as Carey Olsen did in their letter dated 7th September 2006). By then, the action had been running for some sixteen months. SGI was in liquidation and the liquidators were disinclined to pursue the litigation. Mr Sinel and those representing him at that stage may, in practice, still not have realised that the Assignment was ineffective to vest SGI's claim in that company, but there had been more than enough opportunity for this to have become evident. Carey Olsen were complaining about the deficiency of Mr Wijsmuller's discovery, but their own clients' discovery was also woefully inadequate, particularly as regards SGI documents. There was no sign of any draft amended pleading to substitute Norglen for SGI. Momentum had been lost and, despite the serious nature of the allegations and the subsistence of freezing injunctions, the action was not making the progress that it should have been, not least, almost certainly, because of the demands being made on Mr Sinel's time and finances by the proceedings in Anguilla (as recognised in paragraphs 31 and 32 of his affidavit of 5th March 2008 and is evident to some extent from the chronological summary of those proceedings exhibited to Mr Sinel's affidavit as 'PCS5').

73 As regards the second break-point, I have taken 1st September 2007 because, having at last sent Andrew Begg & Co. a draft summons for directions on 19th July 2007, which

included an application for leave to substitute Norglen for SGI and to amend the Order of Justice accordingly, one would have expected the plaintiffs to have pressed ahead full steam, in which case the problem with the Assignment would have come to light very quickly. Instead, what appears to have happened was an exercise in procrastination (largely unexplained), with sight of the Assignment being denied to Andrew Begg & Co. until some months later and no draft amendment to the Order of Justice either to substitute Norglen or to plead reflective loss claims by Mr Sinel personally ever being produced right up until the end. If it was not incontrovertibly clear by 1st September 2007 that the action as constituted had no future, it should have been.

74 Mr Begg also contends that there should be an order against the Joint Liquidators, Mr Rabet and Mr Boylan of Moore Stephen, personally that they pay his client's costs since 16th November 2005 when they first indicated that SGI could not afford to continue the action. In advancing this case, Mr Begg is critical in particular of the Liquidators' failure to take their own advice on the Assignment and their admission that they relied on Mr Sinel and the discussions that he said he had with (English) Leading Counsel, in circumstances where Mr Sinel represented, in effect, the counterparty in the transaction. On the face of things the point looks, in principle, a fair one (as does Mr Begg's criticism of the assertion by Mr Clive Barton, senior partner of Moore Stephens, in an e-mail to Mr Parker-Garner on 16th February 2007 that all the actions taken by the Liquidators had been "reviewed, considered and approved by their legal advisers"). On the other hand, it is not difficult to see how this might have happened and be thought to have been justifiable.

75 Of greater concern is the overly-passive attitude that appears to have been adopted by the Liquidators following the execution of the Assignment. They say, perfectly fairly, that they were entitled to assume that Mr Sinel would take the necessary steps to have Norglen substituted for SGI and would from then on "drive the litigation". But anyone who starts legal proceedings, particularly proceedings involving allegations as serious as those involved here, assumes responsibility to some extent for its conduct, and remains so responsible as long as he/she/it continues to be a named party to the litigation. It follows that if the Liquidators wanted to be relieved of those responsibilities it was for them to satisfy themselves that appropriate steps had in fact been taken to effect the substitution of Norglen for SGI. The liquidation of SGI and its subsidiary Delta Management Services Limited may have been more than usually complex and onerous (Liquidators' affidavit of 22nd February paragraph 4); but one might reasonably expect the matter of substitution to have been addressed within six months or, at the very latest, by 24th October 2006 when, according to the Liquidators, they had " *first confirmed the fact of the assignment*" to Mr Wijsmuller at a meeting that day. In fact, it is evident from Mr Wijsmuller's e-mail to the Liquidators on 29th September 2006, that he had already been told something of what had happened and, moreover, was rightly challenging its validity, albeit not for the right reason:-

> " *Please note that I do not consider the sale of your claim against TPG and myself to Norglen Too Limited to be valid and that you continue to be in litigation against me.* The purported sale of a claim of such magnitude to a related party *would surely be subject to the consent of the creditors committee and I am not aware that such consent has been sought nor [sic] obtained."*

The suggestion made in Mr Hanson's skeleton argument on behalf of the Liquidators that no issue as to efficacy of the assignment was made at that time by Mr Wijsmuller is not, therefore, entirely correct. Be that as it may, the Liquidators left the conduct of the litigation to Mr Sinel and, as we have seen, it was only on 19th July 2007 that Carey Olsen actually took out a draft summons seeking leave to make the substitution and only on 3rd December 2007 that they supplied Andrew Begg & Co. with a copy of the Assignment. Moreover, as at the time of abandonment of the substitution application there was still no draft Amended Order of Justice. In the intervening period the Liquidators also appear to have been as reluctant to provide a copy of the Assignment as Carey Olsen had been: Andrew Begg & Co. had first written to them asking for a copy on 24 th August 2007, and had sent chasing e-mails on 8th and 24th October 2007, only to be told, eventually, that a copy should be requested from Carey Olsen.

76 On any view, this passivity on the part of the Liquidators was regrettable. Had they insisted on the matter of substitution being tackled more promptly, there is a good chance that the problem with the assignment and the inevitability of discontinuance would have come to light much earlier than it seems to have done. But these are the only respects in which I regard the Liquidators as open to criticism: they cannot, I think, be held responsible generally for the lack of progress of the action. Nor do I consider that their conduct in the respects criticised was such as to warrant any costs order against them personally. In the absence of any reported Jersey precedent for such an award (as I was informed is the case), the closest guidance is to be found in the English Court of Appeal decision in *Metalloy Supplies Ltd. (in liq.)* v MA (UK) Ltd [1997] 1 WLR 1613, [1997] 1 BCLC 165. Waller LJ, giving the leading judgment summarised the proper approach to the matter as follows:-

> " ***I think .....that there is jurisdiction to order a liquidator as a non-party to pay the costs personally; but it will only be in exceptional cases that the jurisdiction will be exercised, and impropriety will be a necessary ingredient, particularly having regard to the fact that the normal remedy of obtaining an order for security for costs is available; the caution necessary in all cases where an attempt is being made to render a non-party liable for costs will be the greater in the case of a liquidator in the case of a liquidator having regard to the public policy considerations" (at 1618)***.

And Millett LJ (as he then was) spoke of it being rarely appropriate for a costs order to be made against a non-party, such cases being confined for the most part to cases where the third party was the real party interested in the outcome, or:-

> " ***where the third party has been responsible for bringing the proceedings and they have been brought in bad faith or for an ulterior purpose or there is some other conduct which makes it just and reasonable to make the order against him" (at 1620)***.

He then considered the position of company directors and the inappropriateness of

personal costs orders in the absence of " ***some impropriety or bad faith***": otherwise " ***the doctrine of the separate liability of the company and the principle that such orders should be exceptional would be nullified***". The position of a liquidator was, in his view, " ***a fortiori***" (at 171,172). Butler-Sloss LJ agreed. The conduct of the Liquidators in the present case falls, in my view, well short of the threshold of impropriety discussed in *Metalloy* that would justify a costs order against them personally. This particular application therefore fails.

Other conditions

77 The only remaining matters are Mr Wijsmuller's submissions that, as conditions of being permitted to discontinue the present action, (i) Mr Sinel should be restrained by order of this Court from repeating " *any of the allegations made in this action outside Court to any person whether in Jersey or anywhere else in the world, whether invited to do so or not save under compulsion of law*"; and (ii) there should be orders barring SGI and Mr Sinel (as a director or officer, or controlling mind of Norglen) from seeking to assign any cause of action that they may have against Mr Wijsmuller to any other party and barring Mr Sinel himself from causing Norglen to bring any proceedings against Mr Wijsmuller based on any purported assignment of a cause of action from SGI or Mr Sinel.

78 At root, the basis for these submissions is that Mr Sinel has in the past shown himself to be ready to make allegations of fraud and the like against Mr Wijsmuller to a number of people; that he has had the opportunity to have those allegations tried in court but has chosen to discontinue the action after two and three-quarter years; that notwithstanding such discontinuance there have been hints, during the course of these current applications, that Norglen may at some future date try to pursue a fresh action against Mr Wijsmuller concerning substantially the same matters. Although conditions of this kind were canvassed in general terms by Mr Begg in the course of the hearing itself, argument was limited and I therefore invited written submissions to be made, for which I am grateful to both Advocates.

79 So far as the first of these is concerned, while I prepared to assume that the jurisdiction to impose conditions on the grant of leave to discontinue an action is a wide one (RCR 6/31 (1) and *Baron Everlo v Fitel Ltd* [1987-88] JLR 687), I suspect that Mr Kelleher is right in submitting that any such jurisdiction would, today, have to take account of the Human Rights (Jersey) Law 2000 and Article 10 of the ECHR. However, even without reference to that body of jurisprudence, the imposition of a term of the kind sought would be a strong thing to do in any circumstances, and not one, to my mind, that could possibly be justified as a matter of discretion when Mr Sinel's complaints have not been shown to be false or malicious and when Mr Wijsmuller himself has not shrunk from publicising his own allegations of impropriety on the part of Mr Sinel in the way that he has. On reflection, both parties may think it wise to exercise restraint in what they say in future outside court.

80 As regards the imposition of conditions of the second kind, Mr Kelleher accepts that there

is jurisdiction to impose restrictions on the bringing of further proceedings by the discontinuing party, though not by a non-party; but, he submits - rightly in my view - that it is a jurisdiction that should be exercised sparingly.

81 At one stage it appeared that Mr Wijsmuller was looking for a blanket prohibition on any further claim, in any form, based on the current allegations. But Mr Begg's post-hearing skeleton argument emphasises that it is not intended to prevent either (a) Mr Sinel (after complying with any conditions of discontinuance as regards costs or otherwise) from bringing a claim for his own personal losses *qua* shareholder of SGI or otherwise (provided it is otherwise maintainable and not inconsistent with the reflective loss principle of *Johnson v Gore-Wood* [2002] 2 AC 1), or (b) the Liquidators of SGI (after complying with any conditions of discontinuance as regards costs or otherwise) from pursuing any claim against Mr Wijsmuller. The rational for the orders sought is, he submits, that they would "strike a fair balance between permitting any further legitimate claims while prohibiting any unfair and potentially champertous other claims run from behind the scenes by Advocate Sinel with the protection of a limited liability vehicle". But that, of itself, is hardly a cogent reason, given that the court has power to award security for costs against a Jersey resident plaintiff if necessary in the interest of justice (*Les Pas Holdings Ltd v Receiver General* [2002] JLR N 27) and the courts are well capable of making costs order against a non-party where he is the real party interested, as recognised by Millett LJ in *Metalloy*; and if that is the sole point of objection and concern, the case for imposing conditions of the kind sought is tenuous. The only question that causes me to pause, is whether it would be right to make the institution of any fresh action subject to leave of the court; but on balance I think not. If any attempt to re-litigate the current allegations is made and can properly be shown by Mr Wijsmuller to be an abuse of process, then it will no doubt be stopped in its tracks; but that is something that would have to be addressed in the light of all the circumstances prevailing at the time.

Costs of this application

82 As regards the costs of the various issues that have been raised in connection the applications for leave to discontinue, I shall, if necessary, hear submissions that any party wishes to make; but my strong sense is that, looking at the matter in the round and in the interests of minimising the costs of any taxation, the fair orders would be as follows:

(i) as between Mr Wijsmuller on the one hand and SGI and Mr Sinel on the other, each party should bear his/its own costs (i.e. no order);

(ii) the Liquidators' costs of Mr Wijsmuller's application for costs orders against them personally should be paid by Mr Wijsmuller on the standard basis.

Generally

83 The Advocates for the parties are invited to endeavour to agree the precise terms of orders

resulting from this judgment for incorporation in an Act of Court, failing which I shall hear submissions at a convenient time to be fixed.

84 This dispute has, quite plainly, already taken a sad toll on both the principal protagonists. Difficult as it may be to accept, a negotiated end to hostilities could now, almost certainly, only be to the long-term advantage of each of them.