Case No: HC-2014-000732

Neutral Citation Number [2019] EWHC 872 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTYCOURTS OF
ENGLAND AND WALES
BUSINESS LIST (CH)

The Rolls Building,
7 Rolls Building, Fetter Lane, London,
EC4A 1NL

Thursday, 4 April 2019

BEFORE:

DEPUTY MASTER BOWLES

BETWEEN:

NIRAV SHAH Claimant

and

ASHOK SHAH Defendant/Part 20 Claimant

and

JAIVANT SHAH First Part 20 Defendant

and

BHARAT SHAH Second Part 20 Defendant

MR THOMAS ROWE QC appeared on behalf of the Part 20 Claimant

MR ROSEMAN appeared on behalf of the First Part 20 Defendant

JUDGMENT
(As Approved)

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(Official Shorthand Writers to the Court)

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

THE DEPUTY MASTER:

1. This is a further judgment arising out of the business activities, transacted over many year,s by three brothers: Ashok Shah ("Ashok"), the Part 20 Claimant; Jaivant Shah ("Jaivant"); and Bharat Shah ("Bharat"), the Part 20 Defendants.

2. The background to this matter and the circumstances leading to this prolonged litigation are set out in extenso in my judgment upon what has been termed the Second Issues ([2017] EWHC 2693(Ch)).

3. Following the handing down of that judgment, in November 2017, a number of issues were left open for determination. Two of those issues were resolved in a judgment handed down by me on the first day of the present hearing ([2019] EWHC 535 (Ch)). This judgment pertains or relates to two further issues flowing from the judgment on the Second Issues.

4. The first of those issues stems from paragraph 245 of my judgment in the Second Issues trial, in which I indicated, among other things, that there would need to be a determination as to the interest payable (period, rate and type), in respect of the sums for which each of the parties to the proceedings had been directed by my judgment to account, or to contribute.

5. That indication was reflected in my order of 1 November 2017, at paragraph 5(d), which provided that there should be put over for further consideration the interest to be awarded on the sums identified in the schedule to the order, or which were otherwise the subject of accounting.

6. The relevant sums as identified in the schedule to my order were these:

(1) Ashok's share of the proceeds of sale of a flat, referred to in these proceedings as the Bombay flat, which had been sold in October 2012. Ashok's share of those proceeds, at the rate of exchange prevailing in October 2012, was £468,905, from which, however, my order indicated that there was to be deducted £72,333, as reflecting (a) a payment of £25,000 which had been made to Ashok in 2013 from the proceeds; and (b) £57,333, being Ashok's share of a payment made to a Mr and Mrs Deepak Shah and which, albeit indirectly, had been made by Jaivant/Bharat out of those proceeds.

(2) Ashok's share in the rents which had been paid to Bharat/ Jaivant, in the period 2001 to 2012, in respect of the Bombay flat and for which they had not accounted to Ashok. The sum generated, over the period for which I found Jaivant and Bharat were accountable, was £24,000.

(3) Ashok's share in the proceeds of sale of a plot of land at Surat ("the Surat plot"). The land had been sold, in 2003, and Ashok's share expressed in sterling at that date was

£151,934.

(4) Ashok's share in the proceeds of sale of a building plot ("Plot 96"), in Bangalore, which had been sold in August 2016. Ashok's share in the proceeds of that lot, expressed in sterling as at that date and for which Jaivant is accountable to Ashok, was £37,999.99

(5) Ashok's share in the value of two shops in a complex at Gopipura, Surat and in a flat in the Rajul Building in Surat. The amount for which Jaivant is accountable to Ashok in respect of these properties is 5.2M rupees, that valuation being derived from a valuation report dated October 2016.

7. Additionally to the foregoing, the schedule identified a number of areas where Ashok was either liable to account or was liable to make equitable contribution. In regard to accounting, Ashok was, as I found, accountable to each of Jaivant and Bharat for one third of the proceeds of a Bombay stockbroking account held by Ashok on behalf of himself and his brothers, together with a third of all and any monies drawn from that account other than the fees, taxes and costs relating to the account. That accountability was reduced, as regards Jaivant, by the sum of 233,000 rupees already paid out to Jaivant, but, on the face of my order , as regards Jaivant and Bharat, by a sum of about 156,000 rupees, lent from the account to a Beej Shah, save and unless that lending had been authorised by Jaivant and Bharat.

8. In regard to contribution, the schedule identified a number of amounts, due from Ashok to Jaivant, to reflect his share of joint debts, owed by the three brothers, but paid by Jaivant.

9. The issue of interest on these scheduled sums and matters was picked up again in my directions order, made after a lengthy directions hearing on 7 and 15 June 2018, which identified, as issue (4) for further determination, the interest on the sums identified in the schedule to the 1 November 2017 order and, in particular, in respect of each sum in respect of which a party needed to account, whether interest should be awarded on a compound or a simple basis, the rate of that interest and the period over which interest should be paid. It is issue (4) which by this judgment is now for determination.

10. In regard to the subject matter of the issue, one matter has, as I understand it fallen away. No determination is sought in respect of the Bombay stockbroking account, or in respect of any monies for which Ashok might have been accountable, arising from the loan to Beej Shah. Those matters have, as I have been told, been agreed between the parties.

11. Reverting to the substance of the issue and somewhat surprisingly, given that the issue has been foreshadowed since, at least November 2017, it is now submitted on behalf of Jaivant that no interest should be awarded upon any of the sums for which the parties are accountable, as identified in the schedule to the 1 November 2017 order, because all and any claims for interest are precluded by the absence of any prayer for interest in the original Part 20 Claim and Part 20 Particulars of Claim, or in any amendment thereto, which are at the source of this account. By this analysis the issue of interest, although

raised in my judgment on the Second Issues and identified for resolution, both in the 1 November 2017 and 15 June 2018 orders, is entirely otiose.

12. It is right to record that at no stage when my judgment on the Second Issues was handed down, nor at the lengthy hearings in November 2017 and June 2018, was any suggestion, or submission, made that interest was not recoverable; this in the context of clear findings of breach of fiduciary duty and failure to account going back to 2003 and which in the usual course of equity proceedings of this nature would be likely to result not merely in an award of interest but in the award being compounded and set at such a rate as to ensure that the defaulting fiduciary should not profit from his trust.

13. In this context, I acquit Jaivant, or his advisors, of knowingly standing by at the earlier stages when the interest issues had been discussed and identified for determination. I see no reason to believe that there has been a deliberate silence upon their part, such as to intentionally lead Ashok and his advisors into the false belief that interest upon the sums due to Ashok was an available remedy, when, because of a pleading defect it was not.

14. Conversely I am wholly satisfied that, up until the point being now taken by Mr Roseman on Jaivant's behalf, all parties had acquiesced in the understanding that issues of interest were at large between the parties and were to be determined. There is no question, here of Jaivant being taken by surprise, nor (as Mr Roseman, effectively, accepted in the course of argument) were the arguments advanced by Mr Rowe, for Ashok, as to interest anything other than those which an experienced Chancery practitioner, such as Mr Roseman, would have expected to be advanced. As appears later in this judgment, Mr Roseman has had no difficulty in dealing with Mr Rowe's argument and in properly advancing his client's case.

15. It remains to consider, however, whether, even if raised late in the day and perhaps adventitiously, Mr Roseman's point is a good one and whether the absence of a formal prayer for interest has, notwithstanding all the other circumstances, the effect of precluding claims for interest and therefore rendering this issue otiose.

16. I am satisfied that it does not and, further, that, if the point were to prevail, a serious injustice would be done to Ashok, who, on my findings in the Second Issues trial, has been kept out of substantial monies to which he is entitled, going back, in the case of the Surat plot, some 16 years and, in the case of the Bombay flat, over six years.

17. It is rightly accepted by Mr Rowe that no claim for interest is to be found in the relevant pleadings, which, I add, antedate by some years his and his junior's involvement in this case. He does, however, point out, by way of a further addition to the occasions where the court and the parties have identified interest as an issue for determination, that, in his client's schedule of accounting, prepared for the Second Issues trial, Ashok's claim for interest, in respect of the amounts for which Jaivant and/or Bharat have been held to be accountable to him, are fully set out.

18. In that context and generally, his submission is that the procedural defect, occasioned by the lack of a plea for interest in the original prayer, is one which, at any stage, had the

matter been raised, could and would have been cured by a pro forma amendment and, therefore, that, if necessary, such a pro forma and a retrospective amendment should now be allowed. An alternative approach, discussed in argument, would be for the court to direct that the error in the original pleading be waived pursuant to CPR 3.10.

19. The effect of a failure to plead a claim for interest was discussed by Blair J in *Starbev GP Ltd v Interbrew Central European Holdings BV* [2014] EWHC 2863 (Comm). He held that where, as here, something more than interest under section 35 of the Senior Courts Act 1981 is sought, then that claim must be pleaded. In that case, where a post-judgment application to amend was made, the application was refused. He contemplated that where the dispute as to interest was of substance, it might be important for the dispute to be properly defined in the pleadings and dealt with at trial.

20. That case was, with respect, wholly different to this case. The claim for interest does not arrive late in the day and takes no one by surprise. It has been identified as an issue by the court since November 2017 and, albeit not in a formal pleading, plainly raised, as between the parties, as an issue in the account, in Ashok's schedule of accounting preceding the Second Issues trial. As already set out, the claim for interest does not raise issues of the kind apparently contemplated by Blair J in *Starbev*, which might require pleading out. The issues are everyday issues of Chancery and equity practice and, as demonstrated in his argument, were well understood by Mr Roseman for Jaivant. There was no question of Jaivant being prejudiced, or disadvantaged, by the lack of any formal prayer or pleading.

21. In the result, my clear conclusion is that it would be wholly unjust to preclude Ashok from pursuing his claim to interest. Pleadings are not a technicality. They are an important and usually the key part of the process in both defining the issues and in forewarning an opposing party as to the issues. In this case, however, the absence of a pleaded claim for interest has caused no prejudice or disadvantage to Jaivant in dealing with the question of interest, and the refusal to allow Ashok, in the context of this case, to advance his claim for interest would, by contrast, give Jaivant a substantial and unjust advantage. What is, in this case, a wholly technical error of procedure should not be allowed to have that effect.

22. The right course, and the one I take, is to waive, pursuant to CPR 3.10, Ashok's failure to plead interest and to determine, as has, since 2017, been contemplated as between the parties, the substance of the issues as to interest which arise for determination. I do not regard those issues as being of any great difficulty.

23. There are four instances, arising from my judgment on the Second Issues, where it is established that Jaivant and, in the case of the Bombay flat, also Bharat acted in blatant breach of fiduciary duty in failing to account to Ashok for his share in the proceeds of sale, or rents received, in the respective properties in which he had an interest. The four instances pertain to the sale of the Surat plot; the sale of the Bombay flat; the sale of Plot 96; and the rental income emanating from the Bombay flat.

24. In all of those instances, I have no doubt (and Mr Roseman did not dissent in argument) that the proper order is that Jaivant and (as relevant) Bharat should pay interest on the

compound basis. In relation to the three properties sold, that interest should be payable from the date of sale until date of judgment compounded with annual rests. As regards the rental income generated between 2001 and 2012, the parties sensibly agreed that the income should be regarded as being spread equally across the years over which rents were received, so that in year one (2001) interest would be payable upon £2,000; in year two interest would be payable upon that £2,000, together with the interest accrued upon that money in year one and together with the additional £2,000, treated as being received in year two. That process would then be repeated for each year to 2012 and, thereafter, the whole then accumulated amount would carry interest compounded with annual rests until date of judgment.

25. For all these purposes, I regard the date of judgment as being 1 November 2017. After that date, all the sums with which I am concerned carry Judgment Act interest at eight per cent, simple.

26. A different position as to interest arises in respect of those assets where Jaivant has to account but where his liability to account does not arise out of any breach of fiduciary duty. The relevant assets here are the two businesses and the flat in Surat.

27. As to these, I agree with Mr Roseman that Jaivant's obligation to account arises as part of the general winding up of the three brothers' businesses and that there is no basis for any interest being charged to Jaivant on the compound basis.

28. I further agree that Jaivant's liability in respect of these assets should not carry any interest other than the Judgment Act interest accruing since the date of my 1 November 2017 order. Although the valuation which I have relied upon was an October 2016 valuation, that valuation was used by me as the best approximation of the value of the property as at the date of the Second Issues trial and my judgment following that trial.

29. Turning to the rate of interest payable in respect of those sums where I have directed that compound interest be paid, Mr Rowe sought to persuade me that I should award interest at the rate of 8% above current base rate, arguing that interest at that rate, which, as he pointed out, bears comparison with the Judgment Act rate and the rate payable under the Late Payment of Commercial Debts (Interest) Act 1998, should be awarded as part of the process to be adopted by a court of equity in ensuring that the defaulting fiduciary should not benefit from his breach of trust.

30. There is no doubt that, in respect of the award of interest against a defaulting fiduciary, the court will move to ensure that the defaulting fiduciary will not benefit from his misconduct and, at least to an extent, to send out a signal to fiduciaries that their misconduct will not be profitable. Against that, however, it is clear that the award of interest is not intended to be penal but rather should reflect and, in effect, remove from the defaulting fiduciary the profits that might have been made from the misapplied funds. The court will also, from the claimant's perspective, direct interest at a rate that compensates him, or her, for the loss of the use of the money of which he, or she, has been deprived.

31. In this case I am satisfied that 8.5%, across the period over which interest is to be awarded would be penal. For the last ten years, interest rates have been very low and, while interest of 8.5%, compounded, would undoubtedly ensure that Jaivant would not have profited from his trust, in the sense that he had achieved the use of funds at a lesser rate than that which he could have obtained commercially, interest of that magnitude would, in my view, veer far too far the other way. It would, or could, in an age of low interest rates, overcompensate Ashok.

32. Mr Roseman took me to *Wallersteiner v Moir (No 2)* [1975] 1 QB 373 and to the relatively modern Commercial Court case of *Fiona Trust & Holding Corporation & 75 Ors v Yuri Privalov & Ors* [2011] EWHC 664 (Comm). In *Wallersteiner*, decided forty four years ago, compensatory interest was awarded at 1% above base rate. In *Fiona Trust*, although there was a discussion as to a commercial practice of awarding interest at 1% above base, subject to an uplift for what were termed small borrowers, where because, borrowing rates for such borrowers are usually higher, a higher compensatory rate might be required, in fact interest was awarded at 2.5% above US LIBOR rate.

33. I do not think that I am bound by a 1% rule, or any other rule. I think that, within the proper parameters of principle that I have outlined, I have a complete equitable discretion.

34. In exercise of that discretion, I think that the appropriate rate of interest in this case, both to ensure that Jaivant has not profited from his trust and to compensate Ashok for being put out of his money, in circumstances where, if he had had to borrow, he would I think have been regarded as a small borrower, a proper rate of interest is 3% above base rate. That will mean, I am told, that in respect of the earlier part of the period with which I am concerned, interest will be payable rising, in circa 2007, to some 8.5%, but, after the events of 2008/2009 will reduce to 3.25 per cent or, latterly, 3.5 per cent.

35. The final question arising, on the interest issue, is as to the proper treatment of the sums which Ashok has to contribute as his share of monies paid out by Jaivant in respect of the joint business debts of the brothers.

36. Mr Rowe submits that his client should pay simple interest on those amounts, as from the date, he says, that Ashok was asked to make contribution. Mr Roseman submits that the better approach is to deduct the relevant sums to which Jaivant is entitled, by way of contribution, from the monies for which in breach of duty he has failed to account, as from the date that the relevant payment was made, such that, thereafter, the compound interest, that I have directed, accrue only upon the reduced sum.

37. I agree with Mr Roseman. It seems wrong to me to charge Jaivant with compound interest at a tolerantly high rate on the totality of monies that he has wrongly appropriated in circumstances where some of those monies, or equivalent monies of his own, have in fact been used to pay down Ashok's share of the brothers' joint indebtedness, particularly where, as Mr Roseman pointed out, the pleaded purpose as set out in paragraph 8 of Ashok's amended Part 20 claim, for which monies arising on the sale of any of the business assets were to be put (albeit subject to the consent of Ashok/Bharat) was the very purpose of paying out the debts of the joint business to which the appropriated

monies may well have been put. I am satisfied that the right course is that the compounded interest should only be paid upon that part of the misappropriated amount held, or deemed to be held, by Jaivant which has not been used to pay down Ashok's own liabilities and, therefore, that the amount upon which the compounded interest rate should be paid should be reduced by the amount paid out by Jaivant in payment of Ashok's share of such of the joint debt which have been paid off by Jaivant, as from the date of each of those payments.

38. I add, for completeness, that had I not been satisfied as to the approach that I have just set out, my alternative would have been to direct that Ashok pay simple interest upon his contribution payments as from the date when Jaivant was entitled to seek contribution, namely the date of payment. I do not see why, in this instance, Jaivant should be held out of interest upon money applied to paying joint debts simply because the contribution had not been demanded. The obligation to contribute is not dependent upon demand. Ashok would have had the benefit of Jaivant's payments and the right course would, in that context, be to award Jaivant interest upon the money Jaivant was out of pocket as from the date that he became out of pocket.

39. Be that as it may, my direction is that the proper way to factor in the payments that Jaivant has made, and for which Ashok is liable to contribute, is as I have just set out earlier in this judgment.

40. I turn next, therefore, to the second issue to which this judgment relates, or more specifically the cost relating to that issue.

41. The issue itself, listed for resolution, relates to Plot 94 of the same Bangalore development as Plot 96, to which I have already referred.

42. In the Second Issues trial, I determined that that property was owned beneficially by the three brothers and, in my order of 1 November 2017, I declared, accordingly, that the legal owner of the plot, Mrs Pushpabhen Gudka (Mrs Gudka), held the property upon trust for the three brothers and directed that the property be sold under the direction of the court and that one third of the proceeds of sale be credited to each of the brothers. Unbeknownst to me, the property had, in fac,t been sold by Mrs Gudka on 23 October 2017, nine days before my judgment was handed down, but, relevantly, some time after the draft of my judgment was placed in circulation to the parties.

43. Because Mrs Gudka had not been a party to the proceedings, or previously served with the proceedings under CPR 19(8)(a), I directed (a) that she should be served with the order of 1 November 2017 and (b) that, other than with her consent, no steps should be taken in respect of the sale of Plot 94 until March 2018.

44. My order was apparently served on Mrs Gudka in early December 2017. There is some question as to whether this service satisfied CPR 19(8)(a). The reality, however, is that, as from that date, Mrs Gudka has been aware of these proceedings and of the declaration as to the ownership of Plot 94 that I have made in these proceedings. Her position, namely that the property was beneficially hers and that the sale of the property was

effected quite independently and in ignorance of these proceedings, was made clear to the parties, most particularly, for these purposes, Ashok, no later than early May 2018.

45. Accordingly, at the directions hearing in June 2018, the position as to Plot 94 was one of the matters in debate. My primary direction, given my findings as to ownership, was that Mrs Gudka should pay the proceeds of sale into court. My contingent order, which was to take effect if such a payment in did not take place, was that there should be determined the issue, in respect of Plot 94, as to whether Jaivant should account to Ashok for a one-third share in the proceeds of that sale. Pursuant to that direction and to that issue, should it come into play, I gave directions as to points of claim, points of defence and disclosure. Ashok's points of claim were to be served by 27 July 2018. Jaivant's points of defence were to be lodged by 7 September 2018. This order, as was my order of 1 November 2017, was directed to be served on Mrs Gudka under and pursuant to CPR 19 (8)(a), and it is not in doubt but that it was so served on, or about, 24 July 2018.

46. The intention underlying these directions was this. If, following service of the order of 15 June, the monies were paid into court and if Mrs Gudka, following service of my order had not taken steps to acknowledge service and set aside my order, as it related to Plot 94, then the monies would and could simply have been divided between the three brothers. Likewise, if the monies had been paid in but Mrs Gudka had elected to challenge my order, then the position as between the brothers and Mrs Gudka could have been determined by trying out the issue of the ownership of the funds in court.

47. In the absence, however, of a payment in, and in the event of either no, or no successful, proceedings by Mrs Gudka, Ashok would have been left with an entitlement to one third of the proceeds of sale of Plot 94 but with no remedy to secure that entitlement, other than by way of new proceedings against Mrs Gudka, save and unless he could procure an order for Jaivant's account for Ashok's share of the proceeds. Such an order would only be available if it were established that Jaivant had been complicit in the misappropriation by Mrs Gudka of monies which she held on trust for the three brothers and it was that question, therefore, as to Ashok's actionable complicity in that misappropriation which would have fallen to be resolved had the contingent issue contemplated by the June 2018 directions order come to be determined.

48. In the event, Ashok has not, however, sought the determination of that issue, and the question for me, as foreshadowed earlier in this judgment, is whether, the issue having been listed for determination at this hearing, points of claim and points of defence having been served, steps having been taken by Jaivant in respect of disclosure and it only having become clear, at earliest, on 7 March 2019 that the issue was not to be determined, Jaivant should have his abortive costs, Ashok's position is that the costs should lie where they fall.

49. The reason for Ashok's change of position is that he has reached a settlement with Mrs Gudka, whereby he is to receive £24,000 from the proceeds of sale of Plot 94. In consequence, there is, from his perspective, no longer any sufficient need for a determination as to whether Jaivant was complicit in the sale of Plot 94, or whether he should account to Ashok for one third of the net proceeds of that sale.

50. The position, as regards Mrs Gudka, is that, on service, in July 2018, of my June order, she took steps to stay my order for payment in and also, as was her right, to apply to set aside my order and my declaration as to the ownership of Plot 94. Her position, reinforced by evidence that she submitted in support of her stay application, was that Plot 94 had been purchased for the building of a holiday home but that that project had not been pursued, that she had been seeking to sell the property for some six years prior to its eventual sale in October 2017, that its sale was nothing whatsoever to do with Jaivant and that the property itself was nothing to do with the business carried on by the brothers.

51. Her application for a stay was dealt with by an order of Deputy Master Lloyd in August 2018, which joined her as a Part 20 defendant in these proceedings, in respect of Plot 94, and stayed my order for payment in, on Mrs Gudka's undertaking that some £46,000 be passed to and retained by her solicitors, pending the outcome of her application to set aside, and her further undertaking to retain the balance in her account at the Union Bank of India, again pending the outcome of her application. The reason that the entire proceeds could not be passed to her UK solicitors lay in Indian exchange control regulations.

52. In regard to the merits of her position, Mrs Gudka, by her daughter, Lina, put in evidence which appears to show that steps had been taken to sell the property as early as 2013 and to identify, in some detai,l the costs both of purchase and sale. The sale price was shown to be, in sterling terms, £133,000, of which some £11,000 had been transferred to Mrs Gudka's brother and the balance retained.

53. To complete the picture, by a consent order in September 2018, I had directed, in effect, that the directions as to Mrs Gudka's application to set aside my order, in respect of Plot 94, should run in parallel to the directions relating to Jaivant's involvement in the sale, such that both matters would, had they come to trial, come to trial together and as part of the current hearing.

54. In the event and as already stated, Mrs Gudka has settled with Ashok for £24,000. So far as I am aware, no payment, notwithstanding my declaration as to ownership, has been made either to Jaivant or to Bharat. I am told by Mr Rowe, on instructions, that this settlement only emerged in early March. In his witness statement of 7 March 2019, Ashok averted to the settlement and to the fact that there was no practical purpose in pursuing the issue against Jaivant. He continued to assert, however, that his claim as to Jaivant's actionable complicity was well founded and that that fact should be taken into account, therefore, in reaching Jaivant's claim for the costs of and in respect of the issue.

55. Although Mr Roseman submitted that Ashok's witness statement did not unequivocally make clear that the complicity claim was not pursued, I am satisfied that, despite the absence of any formal discontinuance, the witness statement of 7 March 2019 did make it adequately clear that no trial of the complicity claim, as I have described it, was to be pursued.

56. There can be no dispute but that, in this case and even in the absence of a formal discontinuance, the approach to costs must be by way of analogy to the position which

would have arisen had a formal discontinuance been available and effected. Mr Rowe, very sensibly, did not challenge this proposition. His case in essence is that this is one of those unusual cases where, even had there been a formal discontinuance, the right costs order would not have been the usual one whereby the discontinuing party pays the costs and that, applying that approach to this case, the right costs order is no order.

57. Mr Roseman and Mr Rowe both took me, very helpfully, to *Brookes v HSBC Bank Plc* [2012] 3 Costs LO 285 and to the useful statement of the principles which are to be applied, in determining whether the presumption that the discontinuing party or its equivalent pay the relevant costs can be rebutted. The fact of potential success is not by itself a sufficient reason to rebut the presumption, albeit that the fact that the claim would fail, unsurprisingly, supports and reinforces the presumption. The fact that a decision to discontinue is pragmatic and practical does not suffice to displace the presumption. To displace the presumption, there will usually have been a change of circumstances, to which the discontinuing party has not contributed, and even that change of circumstances is unlikely to suffice unless it has been brought about by some unreasonable conduct of the party against whom the claim has been discontinued.

58. The application of those principles, on the facts of this case, seems to me to render Ashok and Mr Rowe's task in seeking to rebut the usual presumption a hard one. As Ashok's own evidence indicates, his motivation for not proceeding with his claim to render Jaivant accountable was pragmatic and practical. The sum achieved by way of settlement, £24,000, against a gross sale price of £133,000, is not too far away, once allowance is made for costs and taxes, than that which would have been achieved by way of a successful claim and recovery against Jaivant. That, however, is not a good reason for rebutting the usual presumption as to costs; nor can it be said that the change of circumstances is not one to which Ashok has contributed. It is his conduct, in settling with Mrs Gudka, that leaves the resolution of the issue, as against Jaivant, otiose. Likewise, there is no basis upon which Jaivant can be stigmatised as being responsible, by way of unreasonable behaviour, for the change of circumstances which have had that effect. All this material points strongly against the rebuttal of the usual presumption. Mr Roseman wishes to pray, further, in aid his submission that the complicity claim was doomed to failure. Mr Rowe says not so.

59. I do not think, given the other considerations, that this case requires, or calls for, a detailed consideration of the merits, or of the pleadings. I am prepared to assume that the case set out at paragraphs 21 to 25 of Ashok's points of claim could, if made out, give rise to Jaivant's accountability to Ashok, either on the footing of his dishonest assistance in Mrs Gudka's conduct, in misappropriating the proceeds of property she held on trust, or on the footing that Jaivant became the constructive trustee, on behalf of the three brothers, of such part of the proceeds of Plot 94 as came into his hands.

60. As regards the facts, I agree with Mr Rowe that, given the pattern of behaviour indulged in by Jaivant and his family (Mrs Gudka is his mother in law), as detailed in my judgment at the Second Issues trial, and given also that my findings, as to the ownership of Plot 96, where Jaivant has not challenged my determination that the plot, notwithstanding its legal ownership, was an asset of the brothers' business and that Jaivant is accountable in respect of its sale, derive from the same factual subset as my findings in respect of Plot 94, it is not intrinsically implausible that Jaivant was involved in the sale of Plot 94 and

is accountable upon the sale of that property in the same way as he is in respect of Plot 96.

61. Whether that case would have been made out at the trial of the complicity issue is of course a matter which will not now be resolved. What I think can properly be said, however, is that Ashok has been in a position to advance a plausible claim that Jaivant was involved in the sale of Plot 94 and, further, that the fact, that Mrs Gudka has elected to settle her claim as to the ownership of Plot 94 for the payment of a not inconsiderable sum, at the least, suggests that her claim as to ownership was not so hard and fast as Jaivant, by Mr Roseman, has suggested.

62. None of that, in my view, however, assists Mr Rowe, to any great extent, in rebutting the presumption. It goes no further than affording some resistance to Mr Roseman's suggestion that the weakness of Ashok's case strengthens the presumption. One is left with the fact that Ashok has had a plausible case which, for pragmatic reasons not shown to be connected with any misbehaviour or unreasonable conduct by Jaivant, he has elected not to pursue. That material is nowhere near sufficient to rebut the presumption.

63. Mr Rowe sought to attach weight to an unreported decision of the Administrative Court, in public law proceedings, *Regina v Bassetlaw District Council* (17 April 2000) and to a proposition that, he says, arises from that case, namely that where proceedings have become academic a party should not be deterred from bringing them to a close by the risk of costs. *Bassetlaw* was, with respect, quite different. The issue there was not whether the party discontinuing should pay costs but whether, because the respondent to the claim had thrown his hand in, resulting in the discontinuance, the discontinuing party should have his costs. In this case, it is not Jaivant who has, in the vernacular, thrown his hand in, but Ashok, and the fact that he has done so for pragmatic reasons does not, in my view, alter his responsibility to pay costs.

64. The position is, as Mr Roseman submitted, very close to that discussed in *Brookes* and which arose in *Messih v McMillan Williams* [2010] EWCA Civ 844, namely the situation where a claimant, having settled, or succeeded, against one defendant, discontinued against the other, in circumstances where the settlement has not provided for the other defendant's costs. In such a case, bearing close similarities, as I see it, to this one, the Court of Appeal took the view that the saving of costs, arising from the discontinuance, was not a good reason for making an order for costs, on discontinuance, other than the usual order.

65. As explained by Moore-Bick LJ in *Brookes*, the reason why the rule works in this way is that a person who takes up litigation takes up, also, the risk of litigation, such that upon a failure to pursue the litigation to a successful conclusion, justice will require that he bear the costs of the proceedings which he has forced upon the other party. In this context, it is to be noted that the court's view was that, even where the opposing party had brought the litigation upon himself, it would be unlikely that that fact would, of itself justify, an exception to the usual costs order. In this case, while as already indicated Ashok had a plausible case to pursue against Jaivant, it cannot be said, on the materials before me, that Jaivant brought this litigation upon himself. In the result I am satisfied that Jaivant must have his costs of this issue.

66. There has been a debate, also, as to the basis of such costs, if ordered. Mr Roseman submits that the costs should be indemnity costs on the twin grounds, firstly that, in light of Mr Gudka's undertakings, the proceedings were unnecessary; and secondly that indemnity costs should follow a discontinuance of a claim raising issues of dishonesty.

67. I do not accede to that submission. In regard to the undertakings, I agree with Mr Rowe that the protection afforded by the undertakings was not equivalent to that which would have been provided by a payment in and, therefore, that the proceedings were not, as from the date of the undertakings, otiose.

68. In regard to the fact that the claim asserted dishonesty against Jaivant, I was taken, correctly, by Mr Roseman to an ex tempore judgment of David Richards J (as he then was) in *Clutterbuck and Paton v HSBC Plc & others* [2016] 1 Costs LR 13, in which he took the view that, because indemnity costs are ordinarily awarded, where dishonesty is asserted at a trial and where the claim fails, so also, ordinarily, should indemnity costs follow on the discontinuance of such a claim.

69. David Richards J was, understandably, however, at pains to point out, at paragraph 16 of his judgment, that, whether at a trial, or on a discontinuance, the court retains a complete discretion and that circumstances may well exist to render indemnity costs inappropriate.

70. The rationale of an award of indemnity costs, when dishonesty has been advanced and has either not been established or not pursued, is, as explained by David Richards J in *Clutterbuck*, that such allegations are so serious that a person against whom they are made has no option but to defend his position and, in effect, his reputation.

71. The sad fact here is that, in their conduct of this litigation, both Ashok and Jaivant have squandered their reputation. In the First Issues trial, Ashok ran, until forced to face facts, an entirely concocted defence. In the Second Issues trial and in the conduct elucidated by the Second Issues trial, Jaivant was shown both to have acted dishonestly and to have given dishonest evidence. Neither, with respect, come to this court with a reputation to protect and neither can, where dishonesty is alleged against one or other of them, sensibly assert that reputation requires that they be entitled to meet and defend the allegations in question. Put simply, the rationale, underlying the court's usual practice in cases of dishonesty, has no application here.

72. In those circumstances, while Jaivant must have his costs of the Plot 94 issue, I decline to order indemnity costs.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the Judge