

[2020 Gib LR 205]

**POPELY, OAK FOREST LIMITED and CASTERBRIDGE
PROPERTIES LIMITED v. PHELAN**

SUPREME COURT (Restano, J.): July 9th, 2020

Civil Procedure—settlement of proceedings—Tomlin order—order represents agreement between parties—may only be avoided on usual contractual principles (e.g. mistake, misrepresentation or other vitiating factor)

The defendant applied for an order on the terms of an attached consent order and pursuant to a notice of discontinuance.

The claim arose from a longstanding dispute between the claimant and his brother, which had resulted in proceedings in various jurisdictions including a claim in the High Court of Justice in London. The defendant (who was a qualified lawyer) formerly acted for the first claimant and related companies. In 2016, a claim was brought in Gibraltar which resulted in a compromise embodied in a *Tomlin* order and schedule dated January 26th, 2017 (“the *Tomlin* order”). As a result the claim was stayed except for the purposes of enforcing that order. Enforcement proceedings were commenced on April 3rd, 2017 as it was alleged that the defendant had not provided documents as required. Following an order made on September 13th, 2019, the enforcement proceedings only proceeded on behalf of the first claimant. The defendant applied on July 28th, 2017 for the proceedings to be dismissed insofar as they were pursued by the third claimant.

The defence to the enforcement proceedings contained a series of denials, including a denial that the defendant was required to provide the documents. However, the defendant subsequently provided the first claimant with the documents and did not object to a judgment being entered to the effect that the documents were covered by the terms of the *Tomlin* order, for damages to be assessed, and for costs to be awarded against her on the indemnity basis together with an interim payment, and inquiry as to damages.

Despite the court order on September 13th, 2019 that the claim should proceed only on behalf of the first claimant, the defendant proceeded with her 2017 application, arguing that the third claimant should not have brought the claim in the first place as a fraud had come to light in relation to the first claimant’s conduct insofar as he had purported to have authority to act on behalf of the third claimant. At a hearing on October 29th, 2019, the defendant submitted that her obligations were owed principally to the third claimant and that evidence had emerged which

showed that the first claimant was not authorized to act on behalf of the third claimant. The first claimant submitted that whilst the defendant expressed concerns about the first claimant's ability to represent the third claimant as long ago as December 2016, she had nevertheless agreed to the terms of the *Tomlin* order.

The court found that the defendant could not object to the third claimant when she had agreed to the terms of the *Tomlin* order despite her concerns about the third claimant's position at that point, and had then not availed herself of the correct procedure to impugn the agreement embodied in the *Tomlin* order. The court ordered that judgment be entered for the first claimant in relation to the claim to enforce the *Tomlin* order, with damages to be assessed, and that the defendant pay the first claimant's costs of the claim to enforce on an indemnity basis if not agreed and a payment on account of costs be made in the sum of £35,000. The court dismissed the defendant's 2017 application. Although the position of the third claimant had become academic at that point as the enforcement claim was being pursued only by the first claimant, the court ordered that the third claimant's claim to enforce the terms of the *Tomlin* order be stayed for 30 days, whereupon it would stand dismissed with no order as to costs if no application had been made to restore it. No such application was made, and the third claimant's claim stood dismissed.

In January 2020, the parties entered a consent order agreeing to stay the claim and the assessment of damages claim, with the parties agreeing that the defendant pay the first claimant the additional sum of £65,000 in full and final settlement of his claim for damages and the balance due on the order for the payment of indemnity costs.

In June 2020, the defendant filed an application seeking an order in the terms of an attached consent order and pursuant to a notice of discontinuance which was stated to have been filed by the official receiver and liquidator of the third claimant.

The notice of discontinuance stated:

"1. The defendant is released from the *Tomlin* order dated 26 January 2017 and the Schedule thereto and from her undertakings given in the proceedings on 14th December 2016 insofar as the same or any of them concern or endure with respect to the Third Claimant.

2. There be no order as to costs in this action between the Third Claimant and the defendant."

The official receiver and liquidator submitted that to the extent that these proceedings were brought by the third claimant, they were brought after his appointment and without his knowledge and consent.

The defendant submitted that discontinuance of the third claimant's claim should follow from the agreement she had entered into with the official receiver and liquidator which in effect released her from any obligations under the *Tomlin* order and would mean that there was a record that these proceedings were at an end. The defendant pointed out that an identical notice of discontinuance had been filed by the joint liquidator of the second claimant in 2018 for the same reason. The

defendant submitted that the first claimant should have no interest in the matter.

The first claimant submitted that (a) the proceedings were in fact at an end and, as there was nothing left to discontinue, the purported discontinuance was invalid and futile; and (b) the court had no power to release a party to a *Tomlin* order which was a binding agreement between the parties to that agreement. In respect of the documents filed by the second claimant in 2018 which were in similar terms, the first claimant had decided not to object at the time but that did not mean that the steps were valid or could assist the defendant in the present application.

Held, dismissing the application:

The official receiver and liquidator of the third claimant had failed to explain why he was seeking the discontinuance of the claim in circumstances where the claim as brought by the third claimant stood dismissed by virtue of the court's order of October 29th, 2019 and where the proceedings were generally stayed under the terms of the *Tomlin* order. The purported discontinuance was not only futile but might give the wrong impression as it would suggest that there were ongoing proceedings which could be discontinued, which was not the case. The notice of discontinuance did not therefore have any validity. An order would not be made to the effect that the defendant was released from the *Tomlin* order and from her undertakings given in the proceedings in December 2016 in so far as they concerned the third claimant. There were further reasons why the application to release the defendant from the *Tomlin* order should be dismissed. The *Tomlin* order represented an agreement between the parties and it was not appropriate for an application to be made in the way that it had been for what was in effect a claim by the defendant to vitiate an agreement contained in the *Tomlin* order. The *Tomlin* order, like any other agreement, could only be avoided on the usual contractual principles such as mistake, misrepresentation or some other potentially vitiating factor. The defendant had missed various opportunities to challenge the third claimant's standing to enter into the *Tomlin* order and could not do so now, when the proceedings were at an end. The defendant's application would be dismissed (paras. 16–19).

K. Moran for the first claimant;

The third claimant did not appear and was not represented;

The defendant appeared in person (by telephone).

1 **RESTANO, J.:**

Introduction

On June 3rd, 2020, the defendant filed an application asking for an order to be made in the terms of an attached consent order and pursuant to a notice of discontinuance dated June 2nd, 2020 which was stated to have been filed “by the official Receiver and Liquidator” of the third claimant.

The defendant asked for this application to be dealt with without a hearing. When the application was referred to me, I saw that s.9 of the application notice (where parties who need to be served with the application should be named) as originally filed was blank and I asked the registry to find out whether the first claimant agreed to the order being sought. When this was raised by the registry, the defendant said that she had completed s.9 in the version of the application notice which she had later sent and further stated that she was not aware that the first claimant had any right to object to the discontinuance of the proceedings by the court-appointed official receiver and liquidator of Casterbridge Properties Ltd. (in liquidation) against her. The notice of discontinuance referred to in the application was signed by Mr. Hannon who is described as “Official Receiver and Liquidator (acting without personal liability).” The consent order signed by the defendant and Mr. Hannon states as follows:

- “1. The defendant is released from the *Tomlin* order dated 26 January 2017 and the Schedule thereto and from her undertakings given in the proceedings on 14th December 2016 insofar as the same or any of them concern or endure with respect to the Third Claimant.
2. There be no order as to costs in this action between the Third Claimant and the defendant.”

2 The defendant filed the above application herself but it was pointed out by the first claimant’s lawyer, Ms. Moran of Litigaid Law, that she was previously represented by Stephen French Davis and that no notice of change of solicitors had been filed. As a result, the requisite notice of change of solicitors was sent to the registry on June 12th, 2020. Another notice of change of solicitors was served by Mr. Hannon on June 15th, 2020 which states that Litigaid Law no longer acts for him and that he will act in person.

3 On June 17th, 2020, the first claimant’s solicitors, Litigaid Law, wrote to the registry and said that they did not consider that the notice of discontinuance was valid or applicable. It is therefore against this background that the defendant’s application and the dispute concerning the validity of the filing of the notice of discontinuance has come before the court. The defendant has filed a witness statement signed on June 30th, 2020 and Anthony Hannon has filed a witness statement dated June 25th, 2020 without a statement of truth attached to it. The first claimant and the defendant have also served skeleton arguments.

4 The defendant lives in the UK and has requested that she be given permission to join the hearing by telephone due to the ongoing difficulties with international travel as a result of the Covid-19 pandemic, which I have granted. Ms. Moran, who appears for the first claimant, appears in person. Mr. Hannon has neither attended the hearing in person nor has he instructed a legal representative to appear on his behalf.

Background to the claim

5 This claim arises from longstanding dispute between the claimant and his brother which has resulted in court proceedings in various jurisdictions including a claim in the High Court of Justice in London. The defendant, who is a qualified lawyer, formerly acted for the first claimant and related companies. In 2016, a claim was brought in Gibraltar which resulted in a compromise embodied in a *Tomlin* order and schedule dated January 26th, 2017 (“the *Tomlin* order”) and as a result the claim was stayed except for the purposes of enforcing that order. Proceedings were commenced to enforce the terms of the *Tomlin* order on April 3rd, 2017 as it was alleged that documents that the defendant was required to provide the claimants under the *Tomlin* order had not been provided. Further to an order which I made on September 13th, 2019, the enforcement proceedings only proceeded on behalf of the first claimant. The matter came before me on October 29th, 2019 together with an application made by the defendant dated July 28th, 2017 which asked for various items of relief, including the dismissal of the proceedings to the extent that they were being pursued by the third claimant as well as a number of other orders.

6 The defence in the enforcement proceedings contained a series of denials including a denial that the defendant was required to provide the defendant with the documents the first claimant alleged had to be provided under the *Tomlin* order. On October 9th, however, and contrary to the position that the defendant had taken in her defence, she provided the first claimant with the documents which she had not provided previously and she did not object to judgment being entered to the effect that the documents were covered by the terms of the *Tomlin* order, for damages to be assessed, and for costs to be awarded against her on an indemnity basis together with an interim payment and for an inquiry as to damages.

7 Even though I had ordered that the claim should proceed only on behalf of the first claimant on September 13th, 2019, the defendant insisted on proceeding with her application dated July 28th, 2017 arguing that the third claimant should not have brought the claim in the first place as a fraud had come to light in relation to the first claimant’s conduct insofar as he had purported to have authority to act on behalf of the third claimant. At a hearing on October 29th, 2019, the defendant through her counsel at the time, Stephen French Davis, further submitted that the defendant’s obligations were owed principally to the third claimant and that evidence had emerged which showed that the first claimant was not authorized to act on behalf of the third claimant.

8 The first claimant’s counsel at the hearing on October 29th, 2019, Mr. Owen-Thomas, submitted that whilst the defendant was expressing concerns about the first claimant’s ability to represent the third claimant as far back as December 2016, she had nevertheless proceeded to agree to the

terms of the *Tomlin* order. This is confirmed in the evidence which the defendant has filed in support of this application where she states that even though she did not “accept that Ronald Popely and his lawyers were validly authorised to represent Casterbridge, in the interests of settling the claim, I instructed Stephen French Davis to enter negotiations on my behalf,” and she then proceeded to agree to the *Tomlin* order. Further, it was submitted that the defendant’s complaints about the third claimant’s actions should have been raised in her defence to the enforcement claim, probably a counterclaim in the original claim or by way of an appeal.

9 At the hearing of October 29th, 2019, I found that it did not lie in the defendant’s mouth to raise her objections about the third claimant when she had agreed to the terms contained in the *Tomlin* order despite her concerns about the third claimant’s position at that point, and had then not availed herself of the correct procedure to impugn the agreement embodied in the *Tomlin* order. I then ordered that judgment be entered for the first claimant in relation to the claim to enforce the *Tomlin* order, with damages to be assessed, and that the defendant pay the first claimant’s costs of the claim to enforce on an indemnity basis if not agreed and that a payment on account of costs in the sum of £35,000 be made. I also dismissed the defendant’s application dated July 28th, 2017. Even though the position of the third claimant had become academic at that point as the enforcement claim was only being pursued by the first claimant, I went on to say that the position of the third claimant needed to be resolved and that its claim could not just be left in abeyance. I therefore ordered that the third claimant’s claim to enforce the terms of the *Tomlin* order be stayed for a period of 30 days whereupon it would stand dismissed with no order as to costs if no application to restore was made by November 28th, 2019. No such application was made and as a result, the effect of my order of October 29th, 2019 is that the third claimant’s claim dated April 3rd, 2017 stands dismissed.

10 On January 20th, 2020, the parties entered a consent order agreeing to stay the claim and the assessment of damages claim, which was resolved with the parties agreeing that the defendant pay the first claimant the additional sum of £65,000 in full and final settlement of his claim for damages and the balance due on the order for payment of indemnity costs.

Submissions

11 Discontinuance of claims is governed by CPR Part 38 which provides that a claimant may discontinue all or part of a claim at any time but the court’s permission is required if the court has granted an interim injunction or if any party has given an undertaking to the court.

12 Mr. Hannon who has purported to file the notice of discontinuance with the defendant’s assistance has not appeared today but has filed a

witness statement in support of what he describes as “the Defendant’s application to discontinue Casterbridge Properties Limited as a Claimant in this matter.” This is clearly not correct and he appears to misunderstand the position as it is not the defendant but Mr. Hannon on behalf of the third claimant who is seeking the discontinuance.

13 Mr. Hannon states that he was appointed as public interest official receiver attached to the High Court in London on September 1st, 2016 and that the third claimant was wound up in the High Court on the petition of the Secretary of State for Trade and Industry on August 1st, 2000. Further, he states that the public interest official receiver attached to the High Court was appointed as liquidator of the third claimant upon the making of the winding-up order which meant that only the liquidator was authorized to act for and on behalf of the third claimant. On December 11th, 2017 a further winding-up order was made by the St. Vincent and the Grenadines High Court on the petition of a creditor and, as a result, he contends that the first claimant (and Paul Gould) were not authorized to act for the third claimant. He states that to the extent that these proceedings were brought by the third claimant, they were brought after his appointment and without his knowledge and consent. He also says that to the extent that it is alleged that the third claimant was restored to the registry in St. Vincent and the Grenadines and then re-domiciled to Nevis, this was also done without his knowledge and consent.

14 Although the defendant is not entitled to request the discontinuance of the third claimant’s claim, she submits that this should follow from the agreement she has entered into with Mr. Hannon which in effect releases her from any obligations under the *Tomlin* order and would mean that there is a record that these proceedings are now at an end. Further, she points out that an identical notice of discontinuance was filed by the joint liquidator of the second claimant on January 15th, 2018 for the same reason. She has also referred to a consent order dated January 8th, 2018 which is drafted in similar terms to the order being sought today and which was signed by David Ingram in his capacity as joint liquidator of the second claimant and Stephen French Davis who was at the time acting for the defendant. It does not appear that this order was ever approved and I have only been referred to a draft order as approved by the parties. The defendant also states that the hearing which took place on October 29th, 2019, where the dismissal of the third claimant’s claim was an issue, arose in a different context, notably, that there was no agreement with Mr. Hannon at that point. Further, she submits that the first claimant should have no interest in a matter which is solely between her and Mr. Hannon. She contends that at the time this claim was commenced and the *Tomlin* order was entered into on January 26th, 2017, the first claimant improperly held himself out to be the sole shareholder and sole director of the third claimant.

15 Ms. Moran for the first claimant submits that the proceedings are in fact at an end and as there is nothing left to discontinue, the purported discontinuance is therefore invalid and futile. As regards the order sought, Ms. Moran points out that the defendant's application is in identical terms to one which was already determined on October 29th, 2019. Further, she says that the court has no power to "release" a party to a *Tomlin* order which is a binding agreement between the parties to that agreement and that any variation to any such agreement is a matter for the parties. As regards the documents filed by the second claimant in 2018 which were in similar terms, she says that the first claimant decided not to object to the steps taken by the second claimant at the time but that does not mean that they were valid or can assist the defendant for the purposes of this application.

Analysis

16 Mr. Hannon has failed to explain why he is seeking the discontinuance of the claim in circumstances where the claim as brought by the third claimant stands dismissed by virtue of my order dated October 29th, 2019 and where the proceedings are generally stayed under the terms of the *Tomlin* order. The purported discontinuance appears not only futile but might give the wrong impression as it would suggest that there are ongoing proceedings which can be discontinued, which is not the case. I do not therefore consider therefore that the notice of discontinuance which Mr. Hannon has purported to file has any validity. I cannot say whether the position of the second claimant was materially the same when it filed its notice of discontinuance, as there was some doubt in the course of today's hearing as to whether there were any ongoing proceedings at the time that it filed that document. In any event, even if there were no ongoing proceedings, the fact that the notice of discontinuance was filed at the registry by the second claimant in those circumstances does not mean there is any virtue in continuing a bad practice or that it can confer validity to an otherwise invalid act.

17 The defendant and Mr. Hannon also ask for an order to be entered pursuant to the notice of discontinuance to the effect that the defendant is released from the *Tomlin* order dated January 26th, 2017 and the schedule thereto and from her undertakings given in the proceedings on December 14th, 2016 insofar as the same or any of them concern the third claimant. As I have said, I do not consider that the notice of discontinuance is valid and, as such, this application falls away. In any event, there are further reasons why the application to release the defendant from the *Tomlin* order should be dismissed.

18 As I said in my *ex tempore* judgment of October 29th, 2019, the *Tomlin* order represents an agreement between the parties and it is not appropriate for an application to be made in the way that it has for what is

in effect a claim by the defendant to vitiate an agreement contained in a *Tomlin* order. The *Tomlin* order, like any other agreement, can only be avoided on the usual contractual principles such as mistake, misrepresentation or some other potentially vitiating factor.

19 The defendant has had various opportunities to set aside or vary that agreement. In particular, in the proceedings to enforce the *Tomlin* order, the defendant did not impugn the validity of the *Tomlin* order either in her defence or by way of counterclaim. Further, she did not appeal my order of October 29th, 2019 entering judgment against her with damages to be assessed. Indeed, she proceeded to enter a consent order agreeing to the costs and damages payable as outlined above. The defendant has even accepted that she had concerns about the first claimant and his lawyers' ability to bind the third claimant before she entered into the *Tomlin* order but nevertheless proceeded to agree to its terms. The defendant has therefore missed various opportunities to challenge the third claimant's standing to enter into the *Tomlin* order and in effect seeks to do so now when proceedings are now at an end, which is clear from the evidence which she has filed in support of this application. Although the defendant is now seeking to achieve the same ends by reference to an agreement she has entered into with Mr. Hannon, the fact is that the *Tomlin* order has the effect of staying the enforcement proceedings except for the purposes of enforcing the terms set out in the schedule to the order. The defendant is clearly not seeking to enforce any aspect of the *Tomlin* order but is asking for the court's blessing for a variation in the contractual position between her and the third claimant. That, however, is not an application which falls within the exception to the stay ordered on January 26th, 2017 nor is it a matter which has been appropriately brought before the court. Accordingly, I dismiss the application.

Conclusion

20 For the reasons set out above:

(i) The notice of discontinuance dated June 2nd, 2020 purportedly filed by Anthony Hannon for and on behalf of the third claimant has no validity.

(ii) The defendant's application dated June 3rd, 2020 filed by the defendant is dismissed.

21 I will hear the parties on any ancillary matters arising from this judgment.

Costs

22 Following the handing down of this judgment, Ms. Moran confirmed that she had been instructed to seek an order for costs against both the defendant and Mr. Hannon and for an order that Mr. Hannon be added as

a party to the proceedings for the purposes of costs only. Further, she produced a statement of costs totalling £5,600 which she had served on the defendant earlier on in the day. As Mr. Hannon is not before the court today, I adjourn the application for costs following the handing down of this judgment for at least seven days to enable Mr. Hannon to respond to it.

Order accordingly.
