IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
ARBITRATION LIST

Not Restricted

S CI 2015 00978

GIEDO VAN DER GARDE BV and GIEDO GIJSBERTUS GERRIT VAN DER GARDE — Applicants

v

SAUBER MOTORSPORT AG — Respondent

JUDGE:	CROFT J
WHERE HELD:	Melbourne
DATE OF HEARING:	25 March 2015
DATE OF JUDGMENT:	27 March 2015
CASE MAY BE CITED AS:	Giedo van der Garde BV v Sauber Motorsport AG (No 2)
MEDIUM NEUTRAL CITATION:	[2015] VSC 109

PRACTICE AND PROCEDURE – Application to set aside final orders by consent – Whether inherent jurisdiction – *Supreme Court (General Civil Procedure) Rules* 2005, r 66.14 – *Permanent Trustee Co (Canberra) Ltd (Executor estate of Andrews) v Stocks & Holdings (Canberra) Pty Ltd* (1976) 15 ACTR 45 – *Lollis v Loulatzis (No 3)* [2008] VSC 231.

ARBITRATION – Whether final orders for recognition and enforcement of foreign arbitral award may be set aside by consent – Grant of stay until further order – *International Arbitration Act* 1974 (Cth) – *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Article III.

APPEARANCES:	Counsel	Solicitors
For the Applicants	Mr T. Clarke	King & Wood Mallesons
For the Respondent	Mr R. Garrett QC with Ms C. Van Proctor	Hall & Wilcox Solicitors

HIS HONOUR:

Introduction

1 By its summons filed 24 March 2015, the Respondent, Sauber Motorsport AG ("Sauber"), seeks an order by consent that paragraphs 1 and 2 of the Orders of the Court made 11 March 2015 ("the Orders") be vacated or, alternatively, discharged or permanently stayed. The Respondent observes that, in form and substance, the Orders impose obligations on it for the entire 2015 Formula 1 Season. The Applicants adopt the Respondent's submissions in this respect.

2 The Orders were made pursuant to the provisions of the *International Arbitration Act* 1974 (Cth) ("the *IAA*") by way of recognition and enforcement of a foreign arbitral award in the following terms:

> 1. The First Partial Award handed down by Mr Todd Wetmore on 2 March 2015 in SCAI Case No 30031ER-2014 be enforced as if it were a judgment or order of this Court.
>
> 2. The Respondent refrain from taking any action the effect of which would be to deprive Mr van der Garde of his entitlement to participate in the 2015 Formula One Season as one of Sauber's two nominated race drivers.

Background

3 On 14 March 2015, the parties entered into agreements which were executory in nature, pursuant to which each party agreed to undertake certain steps ("the Settlement Agreements").[1] On the same day, the Court, by consent, granted leave to the Applicants to withdraw their summons of 13 March 2015, which was a summons seeking orders with respect to contempt and freezing orders and made an order expressed as "[t]he proceeding is otherwise discontinued with no order as to costs."[2] Although expressed in terms of discontinuance of the proceeding, it was only the contempt application that was on foot at that time, as the Originating Application to Enforce Foreign Award filed on 5 March 2015 had been heard and determined, and

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1 Affidavit of Graydon Francis Dowd made 24 March 2015 ("the Dowd Affidavit") at [2].

2 Dowd Affidavit at [3], [4].

was the subject of the judgment at first instance delivered on 11 March 2015;[3] a judgment which was affirmed on appeal by the Court of Appeal on 12 March 2015.[4]

4 Between 14 and 17 March 2015, Sauber undertook the steps that it was required to take pursuant to the Settlement Agreements. As a consequence, Sauber discharged the whole of its obligations under the relevant driver agreements and the relevant driver agreements were terminated with no further force or effect.[5]

5 The Respondent submits that, as a result of the discharge of its obligations under the relevant driver agreements and the termination of those agreements, the basis for paragraphs 1 and 2 of the Orders has, by virtue of events subsequent to the making of the Orders, ceased to exist.

6 The position with respect to the First Partial Award, to which reference is made in paragraph 1 of the Orders is, as was confirmed by senior counsel for the Respondent, that it remains extant and has not been the subject of proceedings, nor annulled, by the courts of the seat of the arbitration; namely, the courts of Switzerland.

The power of the Court to vacate, discharge or stay orders

7 The Respondent submits that the Court has the inherent power to discharge or suspend any order where there is a change of circumstances that renders it just and proper that further continuance of that order should be discharged. In this respect, reference is made to a decision of the New South Wales Court of Appeal in *Tyneside Property Management Pty Ltd v Hammersmith Management Pty Ltd*, where Basten JA said:[6]

> [4] In *Hutchinson v Nominal Defendant* [1972] 1 NSWLR 443 (Hutchinson), a case concerned with an application to vary a stay order with respect to a second action, conditional upon the plaintiff paying the costs of the first action or giving security for those costs, Isaacs J stated at 447–8:
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> A judge has power to vary, discharge or suspend any order made

3 *Giedo van der Garde BV v Sauber Motorsport AG* [2015] VSC 80.
4 *Sauber Motorsport AG v Giedo van der Garde BV* [2015] VSCA 37.
5 Dowd Affidavit at [5].
6 (2014) 103 ACSR 201 at 203-4 [emphasis added by the Respondent].

> by any other judge where, for example, the order was conditional and the conditions have been fulfilled, necessitating some formal order, or circumstances arise which warrant in the judge's view a cessation of the continuance of the order as earlier made. Such power is an inherent power of the court or judge and any such variation, discharge or suspension is not in any sense an appeal from the order made by an earlier judge, because it does not proceed upon any supposed error in the initial making of the order. It predicates the validity of such an order and deals solely with the question as to whether there is established such change of circumstances that it is just and proper that the further continuance of the order should be varied, suspended or discharged.
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> …
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> [6] Limitations on the power of a court to set aside or vary orders once they have been entered do not apply to judgments and orders which do not determine any claim for relief or dismiss proceedings: r 36.16(3) of the Uniform Civil Procedure Rules 2005 (NSW) (the UCPR). The rules would not, in any event, override the power given by s 46(4) which reflects the inherent power of a court identified by Isaacs J in Hutchinson.

8 The Respondent also made reference to the judgment of Cavanough J in *Booth v Ward*.[7] Reference was made to a part of a paragraph in that judgment, with that part of the paragraph relied upon by the Respondent emphasised by underlining, as follows:[8]

> 39. As to the *power* of a judge of the Trial Division, sitting as such, to discharge or vary the orders of the Chief Justice, I very greatly doubt the correctness of Mr Evans' submission on that point. It seems to me that the proposition in Williams, to the effect that orders to which objection is made on the ground of error can only be varied or set aside on appeal, relates only to orders that are final or effectively final, as distinct from procedural. The cases cited by the learned author are all cases relating to orders that were final or effectively final. By contrast, there is no suggestion by the learned author that the discharge or variation of procedural orders is limited by any such proposition: see [36.07.10] and the cases there cited. Indeed Williams states, in relation to orders generally (not just interlocutory or procedural orders) that "[t]he court has inherent jurisdiction to declare void and to set aside a judgment given in a proceeding so irregular as to amount to a nullity", citing, among other cases, *Cameron v Cole*,[9] which seems to bear out this statement. I note also the decisions of the Federal Court relied on by Mr Santamaria — especially *E I Du Pont De Nemours v Commissioner of Patents*,[10] and

7 (2007) 17 VR 195.
8 (2007) 17 VR 195 at 204-5, [39].
9 (1941) 68 CLR 571 at 589.
10 (1987) 16 FCR 423 at 424, 432-433 and 435.

> *Wilkshire and Coffey v Commonwealth of Australia*[11] — which indicate that courts have inherent[12] power to set aside procedural orders, including orders of that kind made by consent.[13] Further, it has been said that, even in relation to final orders, a court has an inherent jurisdiction to vary, modify or extend its own orders where the interests of justice so require: see Williams [36.07.5] and cases there cited. It might well be thought that, if Mr Santamaria's underlying point, though emerging only recently, were clearly a good one, the interests of justice would require that the interlocutory procedural orders presently in place be discharged or modified accordingly.

It should be noted in the present context that Cavanough J made this statement in the course of an appeal by one party from an order made by the Listing Master to vary what were procedural consent orders. Moreover, the thrust of the propositions examined in the paragraph of Williams, *Civil Procedure Victoria*, to which reference is made, is that the general rule is that, except on appeal, a judgment or order, once authenticated, cannot be amended other than to correct the mistake or clerical error, subject to three classes of exceptions, as stated by Brennan J in *Permanent Trustee Co (Canberra) Ltd (Executor estate of Andrews) v Stocks & Holdings (Canberra) Pty Ltd*, as follows:[14]

> … those which are founded upon the inherent jurisdiction of the court to ensure that its procedures do not effect injustice; those which are authorized by statute; and those which override the general rule in order to give relief where the judgment is obtained by fraud or by an agreement which is void or voidable.

9 On the basis of these authorities, it is submitted that in circumstances where the parties have agreed that Sauber has discharged all of its obligations under the relevant driver agreements and the relevant driver agreements have been terminated by agreement, the basis for the continuation of an injunction restraining Sauber from "taking any action the effect of which would be to deprive Mr van der Garde of his entitlement to participate in the 2015 Formula One Season as one of Sauber's two nominated race drivers", has been removed by events subsequent to the judgment and the Orders. In these circumstances, it is submitted that the interests of justice

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11 (1976) 9 ALR 324, 330. Mr Santamaria also referred to *Torrac Nominees Pty Ltd v Karabay* [2007] NSWCA 96 at [50].

12 In addition to the express power conferred on the Federal Court by Order 35 r 7(2)(c) of the Federal Court Rules.

13 *R D Werner & Co Inc v Bailey Aluminium Products Pty Ltd* (1988) 18 FCR 389 at 392.

14 (1976) 15 ACTR 45 at 48.

require the lifting of the permanent injunction so that Sauber can continue the 2015 Formula 1 Season with its two nominated drivers, Messrs Ericsson and Nasr, without acting in contravention of an order of this Court.

10 It is further submitted that the orders now sought are sought by consent and that it appears uncontroversial that the Court may act by consent of the parties to vary or set aside a judgment. Thus, reference is made to the judgment of Coldrey J in *Tolmie Nominees Pty Ltd v Dextrone Pty Ltd*[15] where it was said:

> I was referred to the decision of Brennan, J in *Permanent Trustee Co (Canberra) Ltd v Stocks and Holdings (Canberra) Pty Ltd* (1976) 28 FLR 195. That was a case where, following terms of settlement arrived at between the parties to an action in the court, judgment, by consent, was entered for the plaintiff. Subsequently, the defendant gave notice of motion to set the judgment aside. This was consented to by the plaintiff new terms of settlement having been arrived at between the parties. His Honour reviewed the various authorities and stated (at 198):
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> > "The general rule is that a perfected judgment cannot be recalled or varied, for the public interest requires the judgment when it is entered should conclude the litigation: ... Until the final judgment is entered, the court retains the power to reconsider the matter, but when entered the jurisdiction to reconsider is gone ... There are some exceptions to this general rule. The exceptions fall into three classes: those which are founded upon the inherent jurisdiction of the Court to ensure that these procedures do not effect injustice; those which are authorised by statute; and those which override the general rule in order to give relief where the judgment is obtained by fraud or by an agreement which is void or voidable."
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> His Honour went on to give examples of the various classes. At 201, his Honour observed: "... the court has jurisdiction to set aside a regular judgment if the parties to the judgment consent to the court doing so. But it further appears that the Court should decline to make the order if a third party would suffer particular injury by the making of the order." In the instant case there is no question of any injustice to a third party.
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> A similar conclusion was reached by the Full Court of the Supreme Court of Queensland in *Spann v Starwell Pty Ltd, Negus third party* (1982) 1 Qd R 29.
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> I see no reason not to follow the authorities to which I have referred.

11 Reliance is also placed on a decision of Pepper J sitting in the New South Wales Land and Environment Court in *Wollongong City Council v Frames & Trusses (NSW) Pty*

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15 VSC, No 5244/93, 13 August 1993, unreported, BC9300749 [emphasis added by the Respondent].

Limited, where his Honour observed:[16]

> 14. … [a]t common law, where both parties consented, and the rights of third parties were unaffected, a court could set aside a final judgment or orders (*Permanent Trustee Co (Canberra) Ltd (Executor estate of Andrews) v Stocks & Holdings (Canberra) Pty Ltd* (1976) ACTR 45 at 50 per Brennan J and *Hardie v Milling* [2013] NSWSC 310 at [11] per Lindsay J).

Moreover, in *Hardie v Milling*, a case referred to by Pepper J, Lindsay J said:[17]

> 11. I proceed on the basis that, an order having been made by the Court, it cannot be set aside merely at the will of a party, but the Court has power to set aside any judgment or order if the parties to the proceedings consent. An express power to that effect can be found in the Uniform Civil Procedure Rules 2005 NSW, rule 36.15(2). Independently of that rule, the court has jurisdiction to set aside a regular judgment if the parties to it consent to its doing so, provided, at least, that the making of an order setting aside the judgment would not cause a third party to suffer particular injury: *Permanent Trustee Co (Canberra) Ltd (Executor estate of Andrews) v Stocks & Holdings (Canberra) Pty Ltd* (1976) 15 ACTR 45 at 50.

12 Reference has already been made to the judgment of Brennan J in *Permanent Trustee Co (Canberra) Ltd (Executor estate of Andrews) v Stocks & Holdings (Canberra) Pty Ltd*[18] with respect to the jurisdiction to ensure that the procedures of the Court do not effect injustice. His Honour also considered the position with respect to a judgment obtained by consent, by reference to longstanding authority:[19]

> In *Hammond v Schofield* []1891] 1 QB 453] the reasons for judgment did not deny the existence of the jurisdiction to set aside a regular judgment by consent of the parties to it. Indeed, Wills J appeared to acknowledge the jurisdiction (at p 455) saying that, as between the parties to the judgment, "it could only be set aside by consent". There was a dictum of Romer J in *Ainsworth v Wilding* [1896] 1 Ch 673 at 677, which has been cited as acknowledging a jurisdiction to set aside a regular judgment by consent. His Lordship said (at p 677) after referring to the limitations upon the court's jurisdiction to interfere after the passing and entering of a judgment: "I am not now speaking of cases where the court acts by the consent of the parties; I think that with consent of the parties I should have had jurisdiction, but on the authorities that is not free from doubt." This dictum was referred to without dissent by Lord Atkinson in delivering the opinion of the Judicial Committee in *Firm of RMKRM v Firm of MRMVL* [1926] AC 761 at 772, and by Higgins J in *Ivanhoe Gold Corporation Ltd v Symonds* (1906) 4 CLR 642 at 670. In

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16 [2014] NSWLEC 60, [14] [emphasis added by the Respondent].
17 [2013] NSWSC 310, [11].
18 (1976) 15 ACTR 45.
19 (1976) 15 ACTR 45 at 49, 50.

> *Re Caithness; Leslie v Caithness* (1892) 36 Sol Jo 216, Chitty J said that he thought that the parties who had obtained the order could waive it by consent though it had been passed and entered. He granted the relief sought with the consent of all parties observing, however, that they must take the risk of anyone saying that he had no jurisdiction.
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> The better view appears to be that the court has jurisdiction to set aside a regular judgment if the parties to the judgment consent to the court doing so. But it further appears that the court should decline to make the order if a third party would suffer particular injury by the making of the order. It appears from an elliptical phrase in the affidavit of Mr Guild that there may be debenture holders of the judgment debtor whose interests may be affected by the making of the order now sought by the consent of the parties. He deposes to information given by his Sydney principals that, because of delay in finalizing the release of moneys from the solicitors who held the deposit paid under the contract "the amount of $3500 payable to the plaintiff remains unsatisfied and … this may prejudicially effect [*sic*] certain debentures entered into by the defendant".

13 The position with respect to the vacation or setting aside of orders by the Court was considered in detail, with extensive reference to authority, by Kaye J in *Lollis v Loulatzis (No 3)*.[20] In the course of considering the authorities, particularly High Court authority, his Honour concluded that the Court does not have power, either by way of inherent power or under r 66.14 of the *Supreme Court (General Civil Procedure) Rules* 2005, to vary or rescind an order which had been authenticated in the circumstances of that case — an application by one of the parties, absent consent of the other parties. In relation to inherent jurisdiction, Kaye J said:[21]

> 12. It is convenient first to consider whether this Court has an inherent jurisdiction to vary or set aside orders in circumstances such as those which exist in this case. In my view, the short answer to that question is that this Court does not have any such power. It is a well established principle that once an order of a Court has been perfected in a form which accurately expresses the intended form of the order (such as by being authenticated under the Rules of the Supreme Court), the Court which made that order has no jurisdiction to alter or rescind it, save in particular exceptional circumstances. Those exceptions are, in general, confined to circumstances which involve clarification of the recorded judgment, or to making minor alternations to a judgment which do not affect the operative and substantive part of the judgment, and to circumstances (such as fraud and breach of natural justice) which impeach the obtaining of the judgment or order.
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> 13. That principle was stated, in the clearest terms, by the High Court in

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20 [2008] VSC 231 ("*Lollis*").

21 [2008] VSC 231, [12]-[15].

Bailey v Marinoff.[22] In that case the New South Wales Court of Appeal had made a self-executing order, by which an appeal was dismissed by the subsequent failure of an appellant to deliver appeal books in the time fixed by that order. Subsequently, after the effluxion of that time, the Court of Appeal made a second order extending the period of time within which the appellant might deliver the appeal books. The respondent in the appeal then brought an appeal to the High Court from that order. The High Court unanimously held that the New South Wales Court of Appeal did not have any power, inherent or otherwise, to further deal with the appeal which had already been dismissed pursuant to the first order made by it. Menzies J stated the relevant principle as follows:

> "This appeal is not concerned with the power of a court to alter orders in pending litigation. It is concerned with the power of a court to make an order in litigation which, without any error or lack of jurisdiction, has been regularly concluded and is no longer before the court. To recognize the problem is, I think, to solve it. However wide the inherent jurisdiction of a court may be to vary orders which have been made, it cannot, in my opinion, extend (to) the making of orders in litigation that has been brought regularly to an end. … As I read the judgments, however, there is clear recognition that a court cannot, by a further order, get rid of the operative and substantive part of its judgment."[23]

Similarly, Barwick CJ, who agreed with Menzies J (and Walsh J), stated:

> "Once an order disposing of a proceeding has been perfected by being drawn up as the record of a court, that proceeding, apart from any specific and relevant statutory provision, is at an end in that court and is in its substance, in my opinion, beyond recall by that court. It would, in my opinion, not promote the due administration of the law or the promotion of justice for a court to have a power to reinstate a proceeding of which it has finally disposed. In my opinion, none of the decided cases lend support to the view that the Supreme Court in this case had any inherent power or jurisdiction to make the order it did, its earlier order dismissing the appeal having been perfected by the processes of the court."[24]

14. Gibbs J, who dissented in the result, stated the applicable principle in the following terms:

> "It is a well settled rule that once an order of a court has been passed and entered or otherwise perfected in a form which correctly expresses the intention with which it was made the court has no jurisdiction to alter it … The rule rests on the obvious principle that it is desirable that there be an end to litigation and on the view that it would be mischievous if there were jurisdiction to rehear a matter decided after a full hearing. However, the rule is not inflexible and there are a number of

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22 (1971) 125 CLR 529.

23 (1971) 125 CLR 529 at 531 to 532; see also 535 (Walsh J).

24 (1971) 125 CLR 529 at 530 to 531.

> exceptions to it in addition to those that depend on statutory provisions such as the slip rule found in most rules of court. Indeed, as the way in which I have already stated the rule implies, the court has the power to vary an order so as to carry out its own meaning or to make plain language which is doubtful, and that power does not depend on rules of court, but is inherent in the court … Further it has been held that a court may amend a part of a judgment or an order which is 'not the operative and substantial part' … Similarly the rule that a court may review an order made ex parte has been said to be 'a rule of natural justice' … or 'an elementary rule of justice' … and this can only mean that the power is traceable to the inherent jurisdiction. Moreover, it has been held that in certain cases circumstances occurring since the judgment may warrant the making of a supplemental order … and this seems to be another example of the inherent power."[25]

15. Similar views were reiterated by the High Court in *Gamser v The Nominal Defendant*.[26] …

In terms of power under the *Supreme Court (General Civil Procedure) Rules* 2005, Kaye J said:[27]

> 35. The next question is whether I have power to make any such an order pursuant to Rule 66.14. That rule states:
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> > "The Court may stay execution of a judgment, or make such order as the nature of the case requires, on the ground of matters occurring after judgment."
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> …
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> 37. In my view, both as a matter of authority, and on its proper construction, Rule 66.14 does not empower me to make the orders sought by the plaintiff. In particular, I consider that the decision of the High Court in *Gamser v Nominal Defendant*[28] is binding authority for the proposition that a rule, such as Rule 66.14, does not entitle this Court to set aside a judgment which has been regularly entered.
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> 38. In *Gamser*, the plaintiff appellant based his appeal, in the alternative, on Part 42 Rule 12(1) of the Rules of the Supreme Court of New South Wales, which provided:
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> > "A person bound by a judgment may move for a stay of execution or some other order on the ground of matters occurring after the date on which the judgment takes effect and the Court may on terms make such order as the nature of the case requires."
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> Aickin J (with whom Barwick CJ, Gibbs and Stephen JJ agreed) held that that rule did not empower a Court to set aside a judgment which

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25 (1971) 125 CLR 529 at 539 to 540, citations omitted.
26 (1977) 136 CLR 145; see also *DJL v The Central Authority* (2000) 201 CLR 226, 245.
27 *Lollis v Loulatzis (No 3)* [2008] VSC 231, [35]-[38].
28 (1977) 136 CLR 145.

had already been regularly entered.[29] Murphy J[30] came to the same conclusion, noting that "very clear language" would be required before a rule could be construed to enable a Court to reopen a decision after judgment had been entered. Similarly, in *Permewan Wright Consolidated Pty Ltd v Attorney-General for the State of New South Wales*,[31] Reynolds JA referred to Pt 42 r 12 and stated:

> "It has been held that neither this power nor the inherent power of the court extends so far as to allow the changing or dissolution of an order regularly made and entered as this order was: *Gamser v Nominal Defendant* … ."

14 Reference was also made by the Respondent in its submissions to the decision of Vickery J in *Hodgson v Amcor (No 8)*[32] and, particularly, to the judgment of Spigelman CJ in the New South Wales Court of Appeal decision in *Newmont Yandal Operations Pty Ltd v J Aron Corporation and Goldman Sachs Group Inc*[33] as authority in favour of a more liberal approach. I am not, however, satisfied that those authorities are inconsistent with the authorities to which reference has been made or which might be said to mark a more 'liberal' approach. Moreover, I do not accept that the position as considered in great detail by Kaye J in *Lollis* is to be regarded as constrained to the particular type of case which was then before the Court, or the type of matters or circumstances which that case raised. In any event, it is not necessary to take these matters further in light of the reasons which follow.

15 There is also nothing inconsistent with the authorities to which reference has been made with respect to the supervisory jurisdiction of a court of equity in relation to an order requiring the specific performance of a contract.[34] The distinction in this respect follows from the nature of the equitable jurisdiction with respect to an order for specific performance – its ongoing nature – as is made clear in *Morrow v Tucker (No 2)*, where Biscoe AJ said:[35]

> [21] … In principle, where an order for specific performance has been made, whatever its precise form, the rights and obligations of the parties come under the control of the Court, or, looking at the other

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29 (1977) 136 CLR 145 at 153.
30 (1977) 136 CLR 145 at 150.
31 (1994) 35 NSWLR 365, 367 ("*Permewan*").
32 [2012] VSC 162.
33 (2007) 70 NSWLR 411 at 417, especially at [18].
34 See *Respondent's Outline of Submissions* (25 March 2015), [12]-[14].
35 [2006] NSWSC 1358, [21].

> side of the coin, the working out of the order of specific performance comes under the control of the Court. … This is supported by the authority of *Pratt v Hawkins* (1991) 32 NSWLR 319 where an order was made by consent that a contract for the sale of land "*be specifically performed according to its terms*". This was similar in form to the order made in the present case. Subsequently a further order was made by consent that the contract "*be rescinded*".
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> ...
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> Thus, his Honour contemplated that after judgment for specific performance, where the decree was in similar terms to the order in the present case, the appropriate procedure for further relief was by way of notice of motion in the same proceedings.

Similar considerations apply with respect to the equitable jurisdiction as it applies to injunctions, a jurisdiction supplemented by statutory provisions introduced in Lord Cairn's Act (the *Chancery Amendment Act* 1858 (UK), s 2) and reflected now in the *Supreme Court Act* 1986, s 38 whereby a court of equity may award damages in addition to or in lieu of an injunction.[36]

16 The critical point in the present circumstances is that even if one were to characterise the Orders as an exercise of equitable jurisdiction, the equitable jurisdiction with respect to specific performance or injunctions is not operating at large, so to speak, as would be the usual position. Rather, it is, in my view, operating constrained by the nature and context of an international arbitral regime which is given the force of law in this jurisdiction by the *IAA*. The same considerations apply with respect to the possibility of supplemental orders – whether supplementing the equitable jurisdiction, or more generally.[37]

17 The Respondent submits that in addition to the inherent powers of the Court to vacate, discharge or stay the Orders, reliance may be placed on the provisions of r 66.14 for the purpose of staying a judgment of the Court. In this respect, reference is made to the decision of the Court of Appeal in *Lawstrane Pty Ltd v Ruttmar*:[38]

> [24] … The New South Wales Court of Appeal in *Permewan Wright*

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36 See Williams *Civil Procedure Victoria*, [I 38.01.60].

37 As to the power to make supplemental orders, see *Respondent's Outline of Submissions* (25 March 2015), [18]-[21].

38 (2013) 37 VR 320 at 326, [24] ("*Lawstrane*").

> *Consolidated Pty Ltd v Attorney-General*[39] did not doubt that it had power under the NSW equivalent provision to r 66.14 to grant a stay of judgment.[40] As Reynolds JA explained (Mahoney JA agreeing, Hutley JA not deciding on this point):[41]
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> > It has been held that neither this power nor the inherent power of the court extends so far as to allow the changing or dissolution of an order regularly made and entered as this order was: *Gamser v Nominal Defendant* (1977) 136 CLR 145. We can, however, stay or suspend its operation on the ground of matters occurring after its date for to stay or suspend the operation of an injunctive order is in my view analogous to staying the execution of a judgment …
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> [25] The phrase "to make such order as the nature of the case requires" when construed ejusdem generis amplifies the kinds of orders that the court can make on the ground set out.[42]
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> ...
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> [28] Under r 66.14 the court is given very broad powers.
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> …
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> [29] In our opinion, the trial judge was correct to hold that she had the power to order the stay of judgment under r 66.14.

18 The Respondent also submits that the decision of the New South Wales Court of Appeal in *Permewan*, which was referred to by the Court of Appeal in *Lawstrane*, involved an application to stay a judgment by which the applicant had been permanently restrained from undertaking various activities, as the statutory basis for the orders had subsequently ceased to exist. It is submitted that in the present circumstances, it is the discharge of Sauber's obligations under the relevant driver agreements and the termination of the relevant driver agreements which has removed the basis for the Orders restraining Sauber from depriving Mr van der Garde of his entitlement to participate in the 2015 Formula 1 Season as one of Sauber's two nominated race drivers. Thus, it is submitted that if the Court is not inclined to vacate or discharge paragraphs 1 and 2 of the Orders, an order should be made under these provisions of the *Supreme Court (General Civil Procedure) Rules* 2005 to stay the judgment.

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39 (1978) 35 NSWLR 365.

40 At 367. See also *Wentworth v Attorney-General* (1984) 154 CLR 518 at 526.

41 *Permewan Wright Consolidated Pty Ltd v Attorney-General for the State of New South Wales* (1994) 35 NSWLR 365 at 367.

42 *Lollis v Loulatzis (No 3)* [2008] VSC 231.

Effect of the international arbitral regime

19 In my opinion, the present circumstances are not properly characterised as a situation where it is open to all parties who seek to vacate, vary or discharge the Orders to do so by consent. Were this the position, then the authorities to which reference has been made would indicate that the orders sought in the summons might properly be granted. The reason for my characterisation of the position as not being simply one where parties seek by consent the orders presently sought is because of the nature of the Orders as orders recognising and enforcing a foreign arbitral award under the provisions of the *IAA*. It is not necessary to consider the provisions of the *IAA* in this respect in great detail, save to observe that its provisions mandate the enforcement of foreign arbitral awards in terms which mirror provisions of the *New York Convention*[43] and the Model Law[44] except in the circumstances set out in s 8 of that Act and the corresponding provisions of the *New York Convention* and the Model Law. Moreover, there is no provision in the *IAA*, the *New York Convention* or the Model Law for undoing recognition or enforcement, though no doubt it would be open to an enforcing court on the basis of its own procedures to stay enforcement in appropriate circumstances. Nevertheless, having regard to the nature and purpose of the *IAA*, the *New York Convention* and the Model Law, it would be expected that an enforcing court would only in very clear circumstances act to stay enforcement of a foreign arbitral award where that award was otherwise properly recognised and enforceable within the jurisdiction of that court.

20 This international arbitral regime does, however, provide some flexibility for circumstances such as those which drive the present application. Article III of the *New York Convention*, for example, would, within appropriate constrained limits – boundaries which allow for enforcement decisions and procedures consistent with the Convention, rather than in derogation of its operation – allow for orders

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43 United Nations Conference on International Commercial Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*IAA*, Schedule 1).

44 UNCITRAL Model Law on International Commercial Arbitration (As adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006) (*IAA*, Schedule 2).

'regulating' the process of enforcement. In this respect, I would regard an order staying enforcement until further order of the enforcing court as being consistent with the *New York Convention*, but not an order vacating, discharging or permanently staying an enforcement order.

21 Further support is provided for these views with respect to the international arbitral regime with respect to the present application by the provisions of s 39(2) of the *IAA*, which provides, with respect to the court exercising powers in relation to the broad range of matters specified in s 39(1) of that Act:

> (2) The court or authority must, in doing so, have regard to:
>
> (a) the objects of the Act; and
>
> (b) the fact that:
>
> (i) arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes; and
>
> (ii) awards are intended to provide certainty and finality.

I accept that it would be difficult to see how a refusal by the Court to order a stay of the Orders until further order would be consistent with these provisions of the *IAA* once satisfied that an order in this form is otherwise consistent with the international arbitral regime. This is particularly so when it is considered that refusal of such an order may involve parties incurring the delay and expense of an application to the courts of the arbitral seat – in Switzerland – and a further application to this Court. In this latter respect, reference should also be made to s 8(5)(f) of the *IAA* – a provision which also supports the view that neither the *IAA*, the *New York Convention* nor the Model Law contemplate an enforcing court undoing recognition and enforcement of a foreign arbitral award once ordered. These provisions do not, however, prevent 'regulation' of the enforcement process by the enforcing court in the manner I have indicated, as is appropriate in the present circumstances.

Conclusions and orders

22 In the present circumstances, as I have observed, the relevant award is extant and

has not been annulled or otherwise the subject of orders by any of the courts of the arbitral seat, Switzerland. Moreover, the Orders which were made at first instance have also been affirmed by the Court of Appeal.

23 For the preceding reasons it is, in my view, appropriate having regard to the agreements that have now been reached between the parties to stay the Orders in this jurisdiction. I am, however, of the view that it is only appropriate to stay the Orders until further order (and not permanently), having regard to the mandate under the provisions of the *IAA*, the *New York Convention* and the Model Law that foreign arbitral awards must be recognised and enforced subject only to the exceptions provided for in that legislation, the *New York Convention* and the Model Law.

24 Following the hearing of this application on 25 March 2015, orders were made on the basis that I would publish reasons for making these orders on 27 March 2015. The orders made did, as I have indicated, only stay the Orders until further order. Additionally, they provide, specifically, that there be no order as to costs – as was agreed by the parties – and that there be liberty to apply to the Court.