

**Judgment 2/2007**

**Chambers and Chambers v Gooch and Gooch –  
Royal Court (Civil Action File 366) – 5<sup>th</sup> February  
2007**

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**Claim and Counter-claim relating to repairs to boundary wall – judgment in favour of the defendants – Royal Court Civil Rules, 1989 (Rule 48) – defendants’ application for full or partial indemnity costs – review of the authorities – Advocates’ fees to be paid at recoverable rate plus 15% with effect from 3<sup>rd</sup> July 2001**

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 5th day of February, 2007, before Richard John Collas, Esquire, Deputy Bailiff; sitting alone.

Civil 366

In the matter of

Between:

ANDREW MAXWELL CHAMBERS  
and  
ANN CHAMBERS

Plaintiffs

- v -

PETER ERNEST GOOCH  
and  
ROSETTA EMILY GOOCH

Defendants

Whereas on 16<sup>th</sup> January, 2007, the Deputy Bailiff considered an application for costs by the Defendants and heard thereon Advocates P.T.R. Ferbrache and A.J. Ayres, Counsel for the Defendants and Plaintiffs respectively, the Deputy Bailiff this day handed down Judgment in the terms attached hereto and ORDERED that:-

- (i) With effect from July 2001 Advocates' fees shall be recovered by the Defendants on the basis of the recoverable rate plus 15%;
- (ii) The Plaintiffs shall pay all other costs and fees on a recoverable basis only.

S M D ROSS  
Her Majesty's Deputy Greffier

**IN THE ROYAL COURT OF GUERNSEY**

**ORDINARY DIVISION**

Judgment re Defendants' Application  
For Indemnity Costs

		<b>Plaintiffs</b>
<b>Between</b>	<u>ANDREW MAXWELL CHAMBERS</u>	
	and	
	<u>ANN CHAMBERS</u>	
	v	<b>Defendants</b>
	<u>PETER ERNEST GOOCH</u>	
	and	
	<u>ROSETTA EMILY GOOCH</u>	

**Judgment handed down: 5 February 2007**

Before: Richard John COLLAS Esq., Deputy-Bailiff

Advocate for Plaintiffs: Advocate A J Ayres  
Advocate for Defendants: Advocate P T R Ferbrache

**Cases & statute referred to:**

1. Hulme v Matheson Securities (Channel Islands) Limited (Judgment No. 2) 24GLJ80
2. Royal Court Civil Rules 1989, Rule 48(3) and (4)

**Introduction**

1. The Plaintiffs live next door to the Defendants in the Fosse André. Their properties are separated by a party wall. The wall was built more than 100 years ago and had fallen into a poor state of repair. The Plaintiffs caused some remedial works to be carried out to it in 1997 and further works are required to stabilise it. The Plaintiffs claimed half the cost of the 1997 works and the Defendants counterclaimed in respect of the cost of the further works needed. The claim and counterclaim were heard together in November 2006 and the Jurats found in favour of the Defendants in both actions. The Defendants have now applied for full or partial indemnity costs. This is my judgment on that application. The Plaintiffs acknowledge that they are liable to pay the Defendants' costs but on the

normal recoverable basis only. I am therefore required to decide the basis on which costs are to be paid.

### ***The Law***

2. Advocate Peter Ferbrache, on behalf of the Plaintiffs, applied under Sub Rules 3 and 4 of Rule 48 of the Royal Court Civil Rules 1989 which give the Court the power to order costs on a full or partial indemnity basis where either, in the special circumstance of the case it is the opinion of the Court that costs should be ordered otherwise than on the basis provided by the Royal Court Costs and Fees Rules, or any party has pleaded or otherwise pursued or defended an action, claim or counter-claim “*unreasonably, scandalously, frivolously or vexatiously, or has otherwise abused the process of the Court*”.
3. Advocate Ferbrache asked me to consider all the material provisions of the two Sub-Rules and, in particular, argued that:
  - (a) The Plaintiffs did not take a realistic attitude at an early stage in connection with the action.
  - (b) The Plaintiffs reneged on an agreement made in or about 2001, (the McCathie/Ashman scheme of works), which Advocate Ferbrache argues would have saved costs had it been implemented.
  - (c) There are special circumstances existing in this case to justify an award of indemnity costs in that the costs incurred are out of all proportion to what is involved.
4. In support of that argument, Advocate Ferbrache relies upon a passage in the Judgement of Southwell J A in the Guernsey Court of Appeal in *Hulme v Matheson Securities (Channel Islands) Limited (Judgment No.2)* 28 November 1997 in which Mr Southwell cited the English Court of Appeal’s decision in *Disney v Plummer* noted at (1991) Fleet Street Rep 165 summarising the correct approach in English cases as follows:-

*“The power to order taxation on an indemnity basis is not confined to cases which have been brought with an ulterior motive or for an improper purpose. Litigants who conduct their cases in bad faith, or as a personal vendetta, or in an improper or oppressive manner, or who cause costs to be incurred irrationally or out of all proportion to what is at stake, may also expect to be ordered to pay costs on an indemnity basis if they lose, and have part of their costs disallowed if they win. Nor are these necessarily the only situations where the jurisdiction may be exercised; the discretion is not to be fettered or circumscribed beyond the requirement that taxation on an indemnity basis must be “appropriate”.*”

Mr Southwell added:

*“This Court is here concerned with the application of Royal Court Rule 48. The discretion under this Rule is also not to be fettered or circumscribed, and is a*

*discretion to be exercised judicially in the light of the particular facts of each case.”*

5. The present proceedings pre-date the coming into force of the Royal Court (Costs and Fees) Rules 2000 but Counsel are agreed that the principles I must apply are the same in respect of the periods both before and after the introduction of those Rules. A much lower recoverable rate applied before the 2000 Rules came into force but Advocate Ferbrache accepted that is not a relevant factor for me to take into account.

#### The Oral Agreement – the Plaintiffs’ Claim

6. In 1997, Mr Chambers engaged the services of a stonemason to carry out repair works to the party wall. He did so in the belief that a few months earlier he and Mr Gooch had reached an oral agreement that the cost of the work would be shared equally between the two of them. When Mr Gooch refused to pay one half of the cost of the work, the Plaintiffs issued their claim against the Defendants. From the outset, the Defendants have defended the claim on the basis that they never agreed to pay half the cost. Both parties maintained their respective positions through to trial, thereby incurring considerable legal costs which Advocate Ferbrache argues are out of all proportion to the amount claimed (£4,789). The essential issue the Court had to resolve on the Plaintiffs’ claim was whether an oral agreement ever existed. That issue occupied only a small part of the trial where much of the time was taken up with expert evidence more relevant to the issues involved in the counterclaim.
7. In my view, the fact that the Plaintiffs lost on their claim does not by itself indicate that they had pursued it unreasonably or in any other circumstance envisaged by Rule 48(4). The manner in which Mr Chambers gave his evidence suggests that he genuinely believed the parties had reached an oral agreement. I do not consider that there are any special circumstances that make it appropriate to order costs on this issue other than on a recoverable basis.

#### The McCathie/Ashman Compromise

8. In August or September 2000, Mr Chambers and Mr Gooch agreed to try to resolve the question of what remedial works were required to the wall and to try to bring the litigation to a conclusion. They each appointed an engineer: Mr Ashman for the Plaintiffs and Mr McCathie for the Defendants. A meeting took place shortly before Christmas 2000, attended by the engineers, Mr Chambers and Mr Gooch. They had agreed not to invite their Advocates to the meeting. The atmosphere was initially acrimonious but after the meeting was brought under control they agreed to concentrate on finding an engineering solution, leaving the issues of costs and blame to be dealt with later, hopefully by mediation.
9. In due course, a solution was found to the engineering problems. The parties agreed to seek planning approval for the agreed scheme of works and a building permit was issued by the IDC on 3 July 2001. The Plaintiffs’ case was that their agreement to that scheme of works was always subject to receiving some payment from their insurers and to the Defendants agreeing not to pursue them for costs.

The Defendants denied those conditions were imposed. The Jurats were asked three questions about these arrangements. The questions and their answers are recorded in the Act of Court dated 8 November 2006:-

*“Question 3.1 Did the Plaintiffs and the Defendants agree in or about 2001, with their respective consulting engineers, a scheme of works?”*

***Jurats answered unanimously Yes.***

*Question 3.2 If so, was the same approved by the Island Development Committee in July 2001?*

***Jurats answered unanimously Yes.***

*Question 3.3 Was the scheme intended to settle all matters including the litigation and any legal costs the parties had incurred?*

***Jurats answered unanimously No.”***

10. If the answer to Question 3.3 had been “Yes” the Defendants might well have been entitled to full indemnity costs from July 2001 onwards. However the Jurats’ findings mean that further litigation was envisaged by the parties to enable the outstanding issues to be resolved unless they could be resolved through mediation as Mr Ashman had suggested at the meeting in December 2000.
11. Although full planning approval was obtained in July 2001, the scheme of works was not put in hand because the two conditions the Plaintiffs said they had imposed were not satisfied. The Defendants wanted the works to be carried out promptly and were evidently frustrated by the delay.
12. In the summer of 2002 the Plaintiffs’ insurers, through their loss adjusters, instructed a Mr Cowan of Robert Cowan Limited to investigate the claim which he duly did and he produced a report. My understanding is that the insurers never accepted responsibility for the claim. However the Plaintiffs decided to adopt Mr Cowan as their expert so he remained involved and the Plaintiffs disinstructed Mr Ashman. Unfortunately Mr Cowan’s opinions differed considerably from those of Mr McCathie. He also disagreed with the scope of the works that had been agreed between Mr McCathie and Mr Ashman. Consequently, the progress that had been achieved through the McCathie/Ashman plan was lost and this was a considerable set back in the parties’ attempts to compromise the litigation. Sadly, neither Mr McCathie nor Mr Cowan had much respect for each other and allegations of professional misconduct had to be referred to their professional body. Such allegations are irrelevant to the substantive issues in the action, but I refer to them in order to illustrate the difficulties that arose in the relationship between them, which clearly hindered any real prospect of achieving settlement.

13. A central issue in the Defendants' counter claim was the apportionment of responsibility for the damage to the wall. The views of Mr McCathie and Mr Cowan were in total conflict and they were not able to agree before trial, despite every encouragement from the court, where responsibility lay. A lengthy trial became inevitable. The Jurats' conclusions show that they preferred the opinion of Mr McCathie to that of Mr Cowan. The fact that they did not accept Mr Cowan's opinion is not a reason for awarding indemnity costs to the Defendants. Further, I do not know sufficient detail of the negotiations and discussions between the parties to decide whether either of them could be said to have acted unreasonably in failing to reach agreement on the key issues in the case.
14. The McCathie/Ashman agreement only dealt with the works required to stabilise and repair the wall. It did not resolve the question of responsibility for the damage to the wall and hence apportionment of the repair costs. Nor did it resolve who should bear the legal costs. It might be that those issues would have been resolved if Mr Ashman had continued to be involved but that is speculation. As those issues remained at large, I do not criticise the Plaintiffs for relying upon Mr Cowan's opinion on the issue of causation.
15. I do however take into account the fact that having reached an agreement on the engineering issues, having prepared an agreed scheme of works and having obtained planning permission to carry out that scheme, the Plaintiffs did not proceed with the works and instead relied upon Mr Cowan's criticism of the scheme of works. The court always encourages parties to negotiate a settlement of their disputes or, at least, of such issues as can be settled by agreement. It is commendable that the parties sought to agree an engineering solution through the good offices of Messrs McCathie and Ashman. It is regrettable that the Plaintiffs did not stick with their agreed recommendation.
16. I take into account that the costs incurred in this action were out of all proportion to the monetary value of what was at stake and to some extent both parties have to accept responsibility for that. Their professional advisers reminded them on several occasions that the costs of the action were disproportionate and yet both parties persisted.
17. In the light of the Plaintiffs' decision not to rely upon the scheme of works agreed between Messrs McCathie and Ashman, I consider it is appropriate to award costs other than in accordance with the Costs and Fees Rules. Advocate Ferbrache tells me that full indemnity costs would amount to approximately double the recoverable costs.
18. I have carefully considered Rule 48(3) and (4) and the passage from *Hulme v Matheson* cited above. I am not persuaded that there are grounds for ordering costs on a full indemnity basis but I am satisfied it is appropriate to order partial indemnity costs. It is impossible to say precisely how much the costs increased as a result of the Plaintiffs' decision to rely upon Mr Cowan's criticism of the McCathie/Ashman scheme of works but in my judgment it is appropriate to order that with effect from 3 Jul 2001 (the date when a building permit was issued for the scheme of works) Advocates fees shall be recovered by the Defendants on the

basis of the recoverable rate plus 15%. The Plaintiffs shall pay all other costs and fees on the recoverable basis only.