

Judgment 24/2005

**IFS Investments Limited v. Manor Park
(Guernsey) Limited et al – Royal Court (Civil
Action File 817) – 26 April, 2005**

Royal Court Civil Rules, 1989 – defendants’ applications for award of ‘wasted’ costs in respect of revised cause – costs to be on recoverable, not indemnity, basis.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

26th day of April, 2005 before Andrew Christopher King Day, Esquire, Lieutenant Bailiff; sitting alone.

IFS INVESTMENTS LIMITED

Plaintiff

v.

MANOR PARK (GUERNSEY) LIMITED

First Defendant

MANOR PARK GUARANTEED INVESTMENTS
FUNDS LIMITED

Second Defendant

ALAN DAVID WILLIAMS

Third Defendant

GILLIAN SARAH DINNING

Fourth Defendant

WHEREAS on the 14th April, 2005 the Lieutenant Bailiff considered applications by the Defendants for their respective “wasted” costs in relation to the Plaintiff’s application to amend its Cause and heard thereon Advocates G.S.K. Dawes, R.I.C.E. Harris, P. Richardson and R.J. Collas, Counsel for the Plaintiff, First and Third Defendants, Second Defendant and Fourth Defendant respectively;

The Lieutenant Bailiff this day handed down judgment in the terms attached hereto and ORDERED:-

1. The Plaintiff to pay the Fourth Defendant, the Second Defendant and the First and Third Defendants their respective costs as were strictly necessary, adequately to consider the revised

- Cause, including an allowance for that time spent in Court purely to consent to the granting of leave. Those costs together to be minimal;
2. The Plaintiff pay one half of the First and Third Defendant's costs in respect of the further and better particulars;
 3. Those costs to be on the Standard recoverable basis;

And in respect of the costs of these applications, that is relating to both leave to amend and wasted costs, the Lieutenant Bailiff ORDERED that each party should bear its own costs.

S. M. D. ROSS
Her Majesty's Deputy Greffier

**IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION**

Between:

IFS INVESTMENTS LIMITED

Plaintiff
(Mr. Dawes)

v.

MANOR PARK (GUERNSEY) LIMITED

First Defendant
(Mr. Harris)

**MANOR PARK GUARANTEED
INVESTMENTS FUNDS LIMITED**

Second Defendant
(Mr. Richardson)

ALAN DAVID WILLIAMS

Third Defendant
(Mr. Harris)

GILLIAN SARAH DINNING

Fourth Defendant
(Mr. Collas)

“Wasted” costs applications by the Defendants in respect of the revised Cause

Hearing date: 14th April, 2005

Judgment of Day LB: 26th April, 2005.

1. This is my decision with regard to the Defendants’ applications for their respective costs in relation to the Plaintiff’s application to amend its Cause (dated 14th October, 2004), which I granted on the 3rd February, 2005. Any consequent question of costs was to be addressed separately. I now do so. I have been much assisted by the helpful and full submissions of Messrs. Harris, Richardson and Dawes. This Judgment is necessarily extended to do justice to them.

The legal principles

2. Our statutory provisions relating to the amendment of pleadings and costs are contained in the Royal Court Civil Rules, 1989. Rule 35 provides:-

“35. No party to an action may amend his pleadings except with the consent of all other parties or by leave of the court.”

3. Rule 48 provides:-

“48. (1) The Court may in any action

(a) *make such order as to the cost of the proceedings, or of any stage of or application in the proceedings;*

(b) ...*(this relates to security for costs),*

as the Court thinks just.”

(2)... *(relates to security for costs)*

(3) *Notwithstanding the provisions of the Royal Court (Costs and Fees) Rules, 1981 or of any other Rule of Court or enactment, the Court may, in the circumstances mentioned in paragraph (4), order that costs or security for costs shall be paid on a full or partial indemnity basis.*

(4) *The circumstances referred to in paragraph (3) are as follows –*

(a) *where, in the special circumstances 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 , 1981; or*

(b) *where any party has pleaded or otherwise pursued or defended an action, claim or counterclaim unreasonably, scandalously, frivolously or vexatiously, or has otherwise abused the process of the Court.*

(5) ...*(relates to taxation).”*

4. The law in England and Wales prior to the introduction of the CPR is to be conveniently found in the commentary on Order 20 of the RSC (White Book 1999). The statutory provisions in that jurisdiction relating to amendment and the associated matter of costs are far more extensive than our own. The consistent thrust of Order 20 (which relates to Amendment) is that amendment to pleadings must be subject to such terms as to costs or otherwise as may be just. As Bramwell L.J. said as far back as 1878 (in Tildesley v. Harper (10 Ch.D 393 at 396), cited at para 20/8/6 in the White Book):-

“My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise.” (my emphasis).

5. Moreover, the White Book states (at para. 20/8/52):-

“The usual penalty imposed as a term for giving leave to amend is that the parties seeking the amendment should pay in any event all the costs incurred and thrown away by the

amendment and the costs of any consequent amendment This is what is meant by...”the usual terms as to costs”... “costs thrown away.....”.

6. In my view the passages to which I have referred in the White Book are of strong persuasive authority, and should be adopted generally as the proper practice in Guernsey. What is at the heart of the matter is the causal link between the amended pleadings and the costs which are directly incurred thereby, or which can be shown to have been unnecessarily incurred previously. The normal position, therefore, would be to make an order on the “*usual terms as to costs*”, the resolution of arguments about causation being left to taxation. It must, of course, be emphasised that it is a matter of discretion, to be exercised judicially.

The litigious background

7. It is necessary, albeit very briefly, to review the course of the litigation between these parties, and to note particularly the matters relevant to the present applications. At the end of January, 2004, the Plaintiff issued injunctive proceedings against the First and Second Defendants, basically seeking to restrain them from allegedly interfering unlawfully with its business activities as fund managers, and specifically in relation to its dealings with NUIL. Those injunctive proceedings themselves followed proceedings which had been instituted by the First and Second Defendants against the Plaintiff (to put the matter simplistically) in the middle of 2003 and settled in November of that year. It was the events following that settlement which gave rise to the institution of the injunctive proceedings, based as they were on allegations in respect of the conduct of the first two Defendants (including that of their controlling mind – Mr. Williams – and their advocate – Miss Dinning, not as then parties).
8. Following a number of hearings, the injunctive proceedings came to a halt when the Bailiff ruled (on the 6th February, 2004) that they had been improperly instituted; the correct starting point was to file a substantive Cause. It is fair to say that the Plaintiff’s understandable perception (whether correct or not) was that a Cause had to be lodged (and served) within five days, or so, of the Bailiff’s ruling. It is also fair to say that the original Cause clearly would have benefited from less hasty drafting. It should be noted that during the course of the injunctive proceedings, much affidavit evidence was filed, not least by Mr. Williams and Miss Dinning. Clearly all that evidence helped to inform the drafting of the Cause. For obviously contrasting reasons and purposes both sides have made much, in various proceedings to date, of the other parties’ knowledge at that early stage. In any event, all four Defendants were then included as parties.
9. The Fourth Defendant proceeded to fire off a salvo of applications. These have all now been dealt with, including the position as to costs. The only point worthy of noting for present purposes is

that, as a result of her strike out application, the allegation of defamation against all Defendants, as drafted, was struck out on the 11th June, 2004.

10. The Second Defendant limited itself to another strike out application. That application was generally dismissed on the 1st October, 2004, save for the reservation that one part of the Cause (generally described as “the first conspiracy”) would be struck out unless an appropriate application for leave to amend the Cause was filed within the stated time. That led to the application, with revised Cause, dated the 14th October, 2004, to which this costs dispute relates. In relation to the Second Defendant’s unsuccessful strike out application, costs were reserved, the Plaintiff’s application therefor being judged to be premature at that time.
11. During all those months the First and Third Defendants kept a low profile, at least as far as the Court was concerned, though Mr. Harris was present throughout both the strike out hearings as an interested observer. His clients did, however, sometime during that period, make application to the Plaintiff for further and better particulars of the original Cause. I have not seen any details of that request, but it is certainly not denied by Mr. Dawes.
12. I would also add that (again on the 11th June, 2004), I ordered, arising from Mr. Harris’ application on behalf of the First and Second Defendant, that two-thirds of the costs of the aborted injunctive proceedings be reserved in the cause – the costs of the injunctive hearings themselves and one-third of the costs of preparation being awarded to the first two Defendants on the standard recoverable basis. The basis for that decision was that the majority of the work undertaken would not have been “wasted”; it would have been required in any event for what became the substantive proceedings.
13. The revised Cause is undoubtedly very different, in form, from the original one, in that it is far lengthier and more happily drafted (and clearly less hurriedly). In substance, however, little has changed. As I have said before (in the Judgment of the 1st October, 2004), it was plain and obvious to me that the original Cause revealed a sufficiently good case in law to justify it going forward, the basic complaint as to the Defendants’ conduct in December, 2003, and January, 2004, being clear (illuminated further, as far as the Defendants were concerned, by the aborted injunctive proceedings). My real criticism of the original pleadings was that they were sloppily drafted. Hence, the striking out, both of the one-line allegation of defamation, as being woefully inadequate, and of the “first conspiracy” allegation as far as the Fourth Defendant was concerned. Hence, also, the opportunity afforded to the Plaintiff (on the 1st October, 2004) to amend the “first conspiracy” allegation, which failed in terms to establish any causal link between damage and the alleged impugned conduct (the “*unless order*”).

14. What is new in the revised Cause is a clearer statement of the various legal consequences of the alleged impugned conduct - only one conspiracy, defamation, malicious falsehood, and breach of contract. They all, however, allegedly arise from the same conduct. It is factual allegations which are at the heart of pleadings, as Mr. Dawes says.

The applications and Counsels' submissions

15. The Fourth Defendant limits her application to costs on the standard recoverable basis and solely in respect of the time directly spent in relation to the new Cause – perusing and, no doubt, comparing it with the original one, and the time spent in Court on the 3rd February. A sensible limitation, in my view. Her application I granted on the 14th April. The applications of the First and the Third Defendants, and the Second Defendant, respectively, are far wider in their terms. Nevertheless, the greater including the lesser, those applications necessarily include the limited version granted to Mr. Collas' client. Accordingly, on the 14th April I also made an order in favour of Mr. Richardson's client (the Second Defendant) in like terms to that in favour of the Fourth Defendant. I now make an order in similar terms in favour of the First and Third Defendants.
16. Having disposed summarily of that straightforward matter, I must now turn to the applications by the first three Defendants, as they seek a more extended order than that already granted.
17. I briefly summarise Counsel's submissions.
18. The most extreme position advanced by Mr. Harris was that all the costs incurred by his clients on the substantive Cause to the 3rd February, 2005, should be payable, and on a full indemnity basis. In fairness to him, he did not pursue that aspect of his case with any real seriousness, and it finds no favour with me at all. That which deserves more serious consideration was the "middle course" which Mr. Harris advocated and Mr. Richardson adopted, namely in all the special circumstances of this case, and as they apply to their respective clients, a more extensive order than that in favour of the Fourth Defendant should be made.
19. I was urged to follow my own comments on indemnity costs in Thompson and Le Noury v. Masterton and Bourne (1st December, 2003, at para. 13), to the effect that I should not lose sight of the wider perspective and take an overall view as to how the parties, their Counsel and advisors have conducted themselves. As part of that perspective, I should give consideration to awarding any costs on an indemnity basis, whether full or partial. In that regard, Mr. Harris, supported by Mr. Richardson, prays in aid special circumstances identified in Rule 48(4)(a) and unreasonable conduct of the claim under (b), which sub-sections he says, rightly, are to be read disjunctively (though there may of course be conceptual overlap).

20. The grounds for seeking indemnity costs are, on the one hand, the defective nature of the original Cause – undue haste was no excuse as the Plaintiff had all the relevant evidence to hand arising from the injunctive proceedings, and in any event it did not subsequently pursue the request for interim relief which could be the only justification for excessive speed. On the other hand, the Plaintiff was guilty of unreasonable and undue delay in recognising the faults of the original Cause, and thus failed to seek rectification of them with due expedition. Indeed, as Mr. Richardson pointed out, the Plaintiff clearly gave some consideration to the question of amending the Cause in June, 2004, when one amendment, albeit extremely minor, was agreed by the parties and approved by the Court.
21. It was only the *unless order* (1st October, 2004), relating to amending the first conspiracy claim, taken in conjunction with the striking out of the defamation allegation and the comments contained in the judgment on the Fourth Defendant’s strike out application, which eventually prodded the Plaintiff into some constructive action. The conduct of the Plaintiff was such as to justify indemnity costs. (The question of punishment, in my view, may be pertinent to the question of whether indemnity costs should be ordered; it is not, of course, a material consideration as to whether or not to allow amendments to pleadings unless a party’s conduct has amounted to bad faith).
22. The truth was, the first three Defendants argued, that looking both at its length and contents, the revised Cause effectively constitutes a fresh action, and that the earlier one instituted in February, 2004, should be treated as having been discontinued, with consequences as to costs.
23. The area where the First and Third Defendants have particularly wasted costs was on the request for further and better particulars of the original Cause. The area identified by Mr. Richardson, as far as the Second Defendant was concerned, is the costs of its strike out application which, as previously indicated, were reserved.
24. Mr. Dawes’ primary submission is that all the relevant costs to date have been dealt with by the Court, and that there are no costs, or further costs, which have been thrown away. The general costs incurred - reading into the case, meeting with clients, obtaining evidence, and so on - were not thrown away but are costs in a cause still to be adjudicated upon. The Plaintiff’s case against the Defendants is substantially the same in the revised Cause as in the original one – a submission with which I have already expressed agreement.
25. So, argues Mr. Dawes, the argument advanced by these Defendants, that effectively a fresh action has replaced the former one, is a false premise for founding any claim for the payment of all costs previously incurred. That argument, says Mr. Dawes, is equally applicable to the criticisms of unreasonable delay levelled against the Plaintiff. Additionally, the Plaintiff should not be criticised

for failing to seeking any interlocutory relief on the back of the substantive proceedings, because by the time it had become incumbent to issue the latter, the “*moment had passed*”.

26. The Defendants, Mr. Dawes continued, should not have been surprised by the application for leave to amend the Cause, in view of their two strike out applications. Moreover, the revised Cause was helpful. Thus it would be illogical to punish the filing of the revised Cause by way of costs. The only costs that should arise at this stage are of the application for leave to amend itself, in respect of which the Defendants should be punished for taking an unreasonable and unjustified stance in not acceding to it without recourse to this Court.

Conclusions

27. This is not a matter which calls for the imposition of indemnity costs of any kind. There are neither special circumstances nor unreasonable conduct to warrant that.
28. Nevertheless, it would have been helpful to all concerned, not least the Court, if the Plaintiff had grappled at an earlier stage with the problems which its own original Cause presented. Its revision was highly desirable, to the point of necessity, despite the revelation of the basic complaints. That should have been self-evident by the 11th June, 2004 (judgment given on the Fourth Defendant’s strike out application). It was also at about that time that one, albeit extremely minor, amendment had been approved by the Court with the consent of the Defendants. It seems to me, therefore, that by about the end of July, 2004, the Plaintiff should have filed an application to revise the Cause. In reaching that conclusion I take into account the lengthy amendments which in due course the Plaintiff considered appropriate, as also that it had been or was engaged on other matters with the Fourth Defendant generally (unrelated to the pleadings). The Plaintiff has not given any satisfactory explanation for the further delay, other than, in effect, to say that the revised Cause was not really necessary but is helpful. The overall delay in seeking to amend the Cause is not to be condoned.
29. I am satisfied that the usual order as to costs (“costs thrown away”), on the standard recoverable basis, is appropriate in this case. Resolution of all further issues relating to their amount could be left purely to discussion and, if necessary, taxation. I do not think that is the appropriate course in this case. Those costs require careful definition, as Mr. Dawes submitted. As I have had the benefit of full argument as to the particular, and limited, areas of allegedly “wasted” costs, they can be defined now.
30. There are no future costs immediately consequential upon the revision to the Cause; for example, there are no defences which require amendment. Moreover, most of the work done by these three Defendants, prior to the filing of the application for leave to amend the Cause, has not been wasted. As in relation to costs in the injunctive proceedings (the one-third allowed for preparation for the

actual hearings reflecting the particular injunctive aspect of those proceedings), costs incurred for the most part to date by these three Defendants are general costs in the cause - factual investigations, the taking of evidence, consideration of the law and potential legal consequences of the complaints made, etc. This is so in respect of all three Defendants, whether or not they have been directly involved in Court proceedings. It is not unlikely, as Mr. Dawes intimated, that these Defendants have been working with some cohesion. Indeed, I think one can say with certainty that they have, in view of who they are.

31. Are there any remaining costs which can now be shown to have been incurred unnecessarily?
32. As far as the Second Defendant is concerned, one turns immediately to the costs of the strike out application. They were previously reserved, or at least deferred; the position is now sufficiently clear for resolution. The Second Defendant was, for much the greater part, unsuccessful in its application, and indeed should not have pursued it in view of the comments in my judgment of the 11th June on the Fourth Defendant's strike out application (being grounds, in Mr. Dawes' view, for indemnity costs). On the other hand, the original Cause clearly still needed tidying up. If the Plaintiff had acted more expeditiously in that regard, the hearing of the application (filed in April, 2004), would not, certainly should not, have taken place. It seems to me that there is fault on both sides. Accordingly my decision is that in respect of the Second Defendant's strike out application each party should bear its own costs. That is the only matter on which the Second Defendant might have been entitled to a wasted costs order, as indeed Mr. Richardson essentially accepted.
33. I turn to the position of the First and Third Defendants. Mr. Harris may have found it helpful to observe the other two Defendants' strike out applications, to give him a better understanding of the original Cause. However desirable he and his clients considered that to be, it was not strictly necessary, and cannot fall within the proper causal parameters for a wasted costs order. The costs which Mr. Harris' clients may have incurred by his attending those hearings are not properly chargeable to the Plaintiff.
34. The matter, in my view, to which a wasted costs order could properly apply, in relation to these Defendants, is that of the further and better particulars which were sought of the original Cause by Mr. Harris. As I have already said, I have no idea what those requests amounted to, or when, or what responses were received, if at all. The work necessarily involved in preparing such requests must have included an analysis not just of the Cause as drafted, but more widely of the complaints being made against the relevant Defendants. In the latter regard, therefore, one could say that the work involved formed part of the general costs in the cause. Bearing in mind, also, my criticisms of the Plaintiff's delay, I conclude that the First and Third Defendants should be entitled to recover one-half of the costs specifically and directly incurred on the further and better particulars. Save

for that matter, there are no other costs which these two Defendants have incurred which are not generally in the cause.

35. I summarise my orders as to “wasted” costs.
36. The Plaintiff is to pay the Fourth Defendant, the Second Defendant, and the First and Third Defendants, their respective costs as were strictly necessary adequately to consider the revised Cause, including an allowance for time spent in Court purely to consent to the granting of leave. These costs together can only be minimal. In addition, the Plaintiff is to pay one half of the First and Third Defendants’ costs in respect of the further and better particulars. All these costs are on the standard recoverable basis.

Costs of these applications

37. All parties seek their costs of these applications, that is, relating to both leave to amend and wasted costs.
38. This is another area where the clear bitterness between the parties has been unhelpfully reflected in attitudes taken to consideration of legal issues. My general impression is that all parties have been at fault so as to require the intervention of the Court. I suspect that Mr. Dawes in this regard has been slightly more sinned against than sinning, but again one cannot gainsay the Plaintiff’s failure to deal with its pleadings more expeditiously, thus putting itself under further time constraints in early October, 2004. Not for the first time during the course of this litigation, I have come to the conclusion that, save for the very limited order already made (see para 36), each party should bear its own costs relating to these applications.
39. All of the costs hereby ordered now fall for sensible and co-operative quantification - the Court will be disappointed if taxation of any of them is requested – and will be paid forthwith thereafter.