



**Braun as insolvency administrator of Walter Marketing GMBH & Co. KG & Brantridge Estates Limited & In the matter of an application for wasted costs between Braun as insolvency administrator of Walter Marketing GMBH & Co. KG & Mourant Ozannes**  
Royal Court  
29th May, 2014

**JUDGMENT  
24/2014**

**Application for costs.**

**Approved Text  
29.05.2014**

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

**Between:**

**DR EBERHARD BRAUN  
AS INSOLVENCY ADMINISTRATOR OF  
WALTER MARKETING GMBH & CO. KG**

**Plaintiff**

**-and-**

**BRANTRIDGE ESTATES LIMITED**

**Defendant**

**AND IN THE MATTER OF AN APPLICATION  
FOR WASTED COSTS**

**Between:**

**DR EBERHARD BRAUN  
AS INSOLVENCY ADMINISTRATOR OF  
WALTER MARKETING GMBH & CO. KG**

**Plaintiff /  
Applicant**

**-and-**

**MOURANT OZANNES (a firm)**

**Respondent**

**Hearing date: 3<sup>rd</sup> April 2014**

**Reasons handed down: 29<sup>th</sup> May 2014**

**Before: Richard James McMahon, Esq., Deputy Bailiff**

**Advocate for the Defendant: K M Le Cras  
Advocate for the Plaintiff/Applicant: C J Hay  
Advocate for the Respondent: A Lyall**

### **Cases & legislation referred to:**

The Royal Court (Costs and Fees) (Guernsey) Law, 1969

The Royal Court Civil Court Rules, 2007

The Royal Court (Costs and Fees) Rules, 2012

The Civil Procedure Rules

*Credit Suisse Trust Limited v Nemni* (unreported, 6 March 2012)

*Excelsior Commercial & Industrial Holdings Limited v Salisbury, Hamer, Aspden & Johnson* [2002]

EWCA Civ 879

*Hulme v Matheson Securities (Channel Islands Limited (No. 2))* (1997) 24.GLJ.80

*Ladbroke plc v Galaxy International Limited* (unreported, 10 November 2008)

*Jackson v Dear* (unreported, 8 July 2013)

*Credit Suisse Trust Limited v Nemni* (unreported, 18 November 2011)

The Judgments (Interest) (Bailiwick of Guernsey) Law, 1985

*Harley v McDonald* [2001] 2 AC 678

The Royal Court (Reform) (Guernsey) Law, 2008

*Havilland Estates Limited v Channel Island Ceramics Limited* (1993) 15.GLJ.51

*Gupta v Comer* [1991] 1 QB 629

*Myers v Elman* [1940] AC 282

*E v E* [2007-08] GLR 133

*Radford & Co v Charles* [2003] EWHC 3180 (Ch)

*Drake v Gouveia and Lemprière Whittaker Renouf* [2000] JLR 411

*Jackson & Powell on Professional Liability*, 7th ed.

*Brown v Bennett (No. 2)* [2002] 1 WLR 713

### **Introduction**

1. Following the substantive decision I handed down on 23 October 2013 dismissing the Plaintiff's application dated 30 July 2012 for the restoration of his action to the *Rôle des Causes en Preuve*, I heard the costs applications arising from that decision on 3 April 2014. At the conclusion of the hearing, I announced my decision on the applications, briefly outlining the reasons for it. The Defendant was awarded its costs of the action on the standard recoverable basis, rather than on the indemnity basis sought, save for the costs of its unsuccessful raising of an *Exception de Fond*, the costs of which were awarded to the Plaintiff on the standard recoverable basis. The costs of instructing German lawyers were also allowed in principle. There would not, however, be any uplift in respect of the hourly rate of the Defendant's Advocates' time. The application for pre-judgment interest on any costs previously paid by the Defendant to its Advocates was dismissed. In relation to the division of who should pay those costs to the Defendant, I identified the date at which the Plaintiff's action became *périmée* as being significant. Up to that date, the Plaintiff should pay the Defendant's costs but, after that date, his former Advocates, Mourant Ozannes, would be the paying party. In respect of profit costs, a similar division would apply, Mourant Ozannes having indicated to the Plaintiff that it would not charge for any work undertaken by the firm from February 2012 onwards. Accordingly, the Plaintiff's application for a wasted costs order was only partially successful. In circumstances where each party had achieved some success but also some failure, I decided to make no order in respect of the costs incurred by all parties in arguing the costs applications. I added that I would, when time permitted, hand down full reasons for those decisions and this judgment contains that reasoning.

### **Provisions on costs**

2. The jurisdiction of the Court in relation to costs is a broad one. Section 1(1) of the Royal Court (Costs and Fees) (Guernsey) Law, 1969 provides that:

*“The costs of and incidental to all proceedings in the Royal Court shall be in the discretion of the Royal Court and the Royal Court shall have power to determine by whom and to what extent the costs are to be paid.”*

By virtue of section 1(3) of that Law, the Court is empowered to make rules in respect of costs and fees.

3. Rule 82 of the Royal Court Civil Rules, 2007 permits the Court to *“make such order as to the costs of the proceedings, or of any stage or application in the proceedings ... as the Court thinks just”*. This provision creates a broad discretion, the principal constraint on its exercise being that it must be exercised judicially. The approach of the courts in England and Wales may offer guidance as to the type of order that might be considered to be just in the circumstances of any case, but it is important to remember that the costs regime there contains more detail than Guernsey’s Rules.
4. Full or partial indemnity costs may be awarded by the Court in any of the circumstances specified in rule 83(2) of the 2007 Rules, which are:
  - “(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 2000 Rules, 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.”*

(The reference to *“the 2000 Rules”* now needs to be read as a reference to the Royal Court (Costs and Fees) Rules, 2012.)

### **The applications**

5. At paragraph 83 of my substantive judgment, I intimated that *“I would be minded to award the Defendant its costs on the standard recoverable basis in respect of all the proceedings”*, but invited either party to make written application if it desired a different outcome. By an Application dated 6 November 2013, the Defendant sought costs on an indemnity basis for the whole action, alternatively on a partial basis running from 28 November 2009 onwards. The Application further sought an order relating to the costs incurred by the Defendant in instructing a firm of German lawyers being included within those recoverable from the Plaintiff and, in the event that the Court awarded costs on a recoverable basis, sought an uplift from the usual rate in respect Advocates’ fees prescribed by rule 2 of the 2012 Rules to £320 per hour. By an amendment to the Application made at the hearing, the Defendant sought an order that the Plaintiff should pay interest on such costs as the Defendant had actually paid prior to the judgment at 1% above the Bank of England Base Rate.
6. The Plaintiff opposed the Application for any form of indemnity costs and further raised the question of the appropriate disposal in relation to the costs of and incidental to the Defendant’s unsuccessful raising of an *Exception de Fond*. The Plaintiff did not oppose the element of Defendant’s Application relating to the costs of instructing German lawyers, but did oppose the other elements of the Defendant’s Application.
7. The Plaintiff also made his own Application for a wasted costs order against his former Advocates, Mourant Ozannes, arguing that the negligence of that firm in allowing the action to become *périmée* meant that all the costs incurred throughout the proceedings had been wasted. In support of his Application, he filed two Affidavits of Annerose Tashiro, sworn on 26 February and 26 March 2014 respectively.

8. The Plaintiff's Application against Mourant Ozannes for a wasted costs order was opposed. A Third Affidavit of Advocate Sharon McHugh sworn on 18 March 2014 was filed. By waiving privilege over the files of the firm, a full response has been provided. Insofar as it was appropriate for the Respondent to do so, it aligned itself with the Plaintiff's position in respect of the Defendant's Application.
9. Despite Advocate Hay, who appeared on behalf of the Plaintiff, suggesting that the Court should follow the procedure established under the Civil Procedure Rules (see, Section 53 of the Costs Practice Direction associated with Part 48), I preferred to hear all the parties during a single sitting to decide the basis of any costs to be awarded as between the Defendant and the Plaintiff and also whether the Plaintiff's wasted costs Application against the Respondent should lead to some or all of those costs being paid by the firm rather than the Plaintiff, as well as the costs position as between the Plaintiff and his former Advocates. In doing so, I noted that Section 53.5 of that Practice Direction stated that "*The court will give directions about the procedure that will be followed in each case in order to ensure that the issues are dealt with in a way which is fair and as simple and summary as the circumstances permit.*"

### Indemnity costs

10. Although paragraph 1 of the Defendant's Application sought full indemnity costs against the Plaintiff, at the hearing Advocate Le Cras abandoned that aspect of the Application and pursued instead only the alternative of an order for indemnity costs from 28 November 2009 or such other date as the Court might use for that purpose (paragraph 2). In doing so, she recognised that, had the Plaintiff's application to restore the action to the *Rôle* not been made, rule 86(a) of the 2007 Rules preserved the Court's power to make costs orders and that the Defendant could realistically only have sought costs on the standard recoverable basis at that point.
11. In support of this element of the Defendant's Application, Advocate Le Cras referred to various cases in which the test in rule 83(2)(b) of the 2007 Rules (or its equivalent elsewhere) had been explored. She acknowledged that the only aspect on which she was relying was unreasonableness and highlighted what Lieutenant-Bailiff Talbot QC had stated in *Credit Suisse Trust Limited v Nemni* (unreported, 6 March 2012, at para. 10):

*"The usual order in the Royal Court is for costs to be taxed on the recoverable basis, but an order for costs to be taxed on an indemnity basis may prove to be appropriate where "something in the conduct of the action or in the circumstances of the case takes it out of the norm in a way justifying such an order." It is also clear that there need be no lack of probity established; nor need there be conduct deserving of moral condemnation. If the litigation is conducted in a way which is unreasonable, particularly if that has led to some implicit expression of disapproval by the Court, then a costs award on an indemnity basis is justified."*

The quotation in that passage comes from the judgment of Waller LJ in *Excelsior Commercial & Industrial Holdings Limited v Salisbury, Hamer, Aspden & Johnson* [2002] EWCA Civ 879 (at para. 39). Reference was also made to the Court of Appeal decision in *Hulme v Matheson Securities (Channel Islands Limited (No. 2))* (1997) 24.GLJ.80 in which examples of those 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*" as being at risk of facing an award of costs on an indemnity basis were drawn from an analysis of the English law authorities.

12. Advocate Le Cras had founded the Defendant's claim on the overall conduct of the Plaintiff. He had commenced the proceedings against the Defendant on the very last day of the

applicable prescription period available under German law and had failed to prosecute the case with diligence. However, once the focus of this element of the Application was trained on the steps taken once the action had become *périmée*, the question that had to be addressed was whether anything in the conduct of the application to restore or the Plaintiff's opposition to the Defendant's application to strike out was unreasonable.

13. In that regard, Advocate Le Cras frankly accepted that bringing the application to restore the action pursuant to rule 86(b) of the 2007 Rules was not unreasonable and, because of the complexities of the questions arising on the Defendant's strike out application associated with the German law provisions, there were arguable points that could properly be advanced, as they were by Advocate Shepherd at the substantive hearing, which meant that there was nothing unreasonable to which she could point. With the benefit of hindsight, the restoration application may have been more speculative than some others that have been made, but the concession from Advocate Le Cras effectively meant that the test in rule 83(2)(b) had not been met. In those circumstances, I formed the conclusion, as I had suspected would be the case following the substantive hearing, that any costs to be awarded to the Defendant should be on the recoverable basis rather than an indemnity basis.

### ***Exception de Fond costs***

14. At paragraph 83 of my substantive judgment, I had referred to “*save for any specific costs where orders have already been made*” because I had thought that certain matters had already been dealt with. However, despite there being some correspondence about the costs following the raising by the Defendant of an unsuccessful *Exception de Fond* resulting in the judgment of 30 July 2009, there had been no order in that regard. The position was different following the earlier *requête civile*, where the Plaintiff had been ordered to pay the Defendant's costs and the amount of those costs was subsequently agreed between the parties.
15. Although it would have been better for the parties to have sought a resolution of that issue at the time, I concluded that there was nothing in the Rules preventing me from reaching different decisions about costs in respect of different stages of the proceedings. Indeed, rule 82(1)(a) envisages such orders without being prescriptive about when they can be made. At the conclusion of any proceedings before the Court, insofar as costs awards have not already been made in respect of any stage or application in those proceedings, the Court is at liberty to make the costs order or orders that it thinks is just. Such an order might, for example, disallow a portion of one party's costs to reflect that the party has not been wholly successful or to show the Court's disapproval of the conduct of a particular aspect of the proceedings. Equally, however, in respect of anything readily identifiable, the Court is permitted to extract that stage or particular application and made a specific costs award in relation to it.
16. Having considered the history of the case, I took the view that it would be unjust to award the Defendant the costs of pursuing its *Exception de Fond* unsuccessfully. I was not persuaded by the submission of Advocate Le Cras that the appropriate order should be that neither party got its costs. Those litigants who make discrete applications of the type made by the Defendant must realise that the successful party is likely to want its costs relating to that discrete application. Although I had not heard the *Exception de Fond*, I am confident that, if asked at the time, the Court would have awarded costs in respect of that discrete application to follow the event and on the standard recoverable basis. Accordingly, I was able to make an order that the costs of and incidental to the *Exception de Fond* application should be paid by the Defendant to the Plaintiff.

### **Costs of German lawyers**

17. Both parties had instructed German law experts because it was agreed that German substantive law governed certain aspects of the Plaintiff's claim. However, whereas the Plaintiff is a partner at Schultze & Braun, as is Dr Tashiro, who gave evidence on the

Plaintiff's behalf, the Defendant is a Guernsey company and so needed to instruct German lawyers to assist its Advocates at Carey Olsen on those matters where German law impacted. The Defendant instructed Ettrich (formerly Ettrich Sturmfels) for that purpose and sought an order that these costs should, subject to agreement or taxation, be recoverable as part of the Court's order.

18. The jurisdiction of the Court to make such an order extending to the fees of external lawyers derives from the broad terms of the 1969 Law (see, eg, *Ladbroke's plc v Galaxy International Limited* (unreported, 10 November 2008)). However, as Advocate Hay readily acknowledged, this was not a case where the Guernsey Advocates had a choice between doing something themselves or instructing an external lawyer to perform that task on their behalf. Instead, because of the impact of German substantive law on the conduct of these proceedings before the Court, it was quite reasonable for the Defendant to have instructed German lawyers as well as Guernsey Advocates. There being no opposition to this element of the Defendant's Application, paragraph 3 was duly granted.

#### **Advocates' fees: uplift of hourly rate**

19. In support of the Defendant's Application for an uplift from the usual rate for recoverable costs specified in rule 2 of the 2012 Rules to £320 per hour, Advocate Le Cras referred to the approach taken by Lieutenant-Bailiff Talbot QC in *Jackson v Dear* (unreported, 8 July 2013). At para. 22, the rationale for rule 2(2) of the 2012 Rules, enabling the Court to order a departure from the usual maximum in respect of Advocates' fees was explained in the following manner:

*"I consider that the primary purpose of sub-rule (2) is both to declare a maximum recoverable rate and to allow the Court in an appropriate case to award a higher rate. I do not consider that the true construction of the wording requires that any order of the Court under sub-rule (2) should order a reduction in the maximum rate only. Nor, to my mind, does any such construction meet the needs of users of the Royal Court in large-scale, commercial litigation, which increasingly forms a material part of the business of the Court. Paying parties under orders for costs in such large-scale litigation would, in my view, reasonably expect to pay costs at a rate which more directly reflects the rates prevalent in the legal market-place for such cases, which are relatively uncommon within the Bailiwick."*

20. I agree with that statement of principle. Paragraph (2) of rule 2 specifies the usual ceiling for recoverable costs. If an Advocate chose to charge at below that maximum rate, the costs to be recovered under a costs award would then be at that lower rate. The learned Lieutenant-Bailiff expressly left open whether there is power to reduce the maximum rate and, because it is not relevant to this case, I similarly leave that question open whilst sharing his doubts that there is any power to reduce the hourly rate. *Jackson v Dear* (*supra*) was an exceptional case in which the presiding judge considered that it "*raised novel and complex questions of company law*" and was "*regarded by all the parties as being of very great personal and financial importance to them*". I did not consider that the same comments could be made about the present case.
21. To the extent that the claim brought by the Plaintiff against the Defendant was at all exceptional, this arose from the impact of German law and that is something which the order that the costs of instructing German lawyers can be recovered already addresses. However, the other issues dealt with during the course of the proceedings, whether related to pleading the case, including the preparation of a Replique, the raising of a prescription *Exception de Fond* and the applications to restore and strike out, were all, in my view, matters which are part of the regular diet of the Guernsey Bar. As a result, I concluded that it should only be in a genuinely exceptional case that the Court should be persuaded to grant an uplift to the maximum Advocates' fees recoverable and that this was not such an exceptional case.

### Interest on costs

22. The Defendant's amended Application also sought an order for interest on the costs incurred by the Defendant from the date they were incurred by it until judgment at 1% above the Bank of England Base Rate. Such an order had been made by Lieutenant-Bailiff Talbot QC in *Credit Suisse Trust Limited v Nemni* (unreported, 18 November 2011), albeit that no reasoning underpinning that outcome was provided to me.
23. Whilst I accept that the wording of rule 82 of the 2007 Rules and section 1(1) of the 1969 Law is sufficiently broad to confer on this Court jurisdiction to make such an order if it considers it just to do so, I noted that the jurisdiction of the courts in England and Wales to make such an order has been set out in Part 44.3(6)(g) of the Civil Procedure Rules ("*The orders which the court may make under this rule include an order that a party must pay ... interest on costs from or until a certain date, including a date before judgment*"). The passage in the commentary to that provision (para. 44.3.1) neatly encapsulates the submissions made by Advocate Le Cras by reference to the cases mentioned therein:
- "Rule 44.3(6)(g) enables the court to order interest on costs to run from a date other than the date of judgment. The court has the power to reach a conclusion as to interest suiting the particular circumstances of the case: Powell v Herefordshire Health Authority [2002] EWCA Civ 1786; [2003] 3 All E.R. 253, CA. "In any event in principle there seems no reason why the court should not [award interest] where a party has had to put up money paying its solicitor and been out of the use of that money in the meanwhile" per Waller L.J. in Bim Kemi AB v Blackburn Chemicals Ltd (Costs) [2003] EWCA Civ 889. The court has expressed the view that the appropriate dates, when seeking to measure the extent to which a party has been out of pocket, would be the dates on which the invoices were actually paid. The appropriate time for interest to stop would be when interest on costs is replaced by judgment interest: Douglas v Hello Ltd [2004] EWHC 63 (Ch) Lindsay J."*
24. I decided that I would not award interest on the costs in respect of the time prior to judgment because I took the view that the justice of this case was best served by making no awards in respect of such interest. Although the Defendant had amended its Application to seek pre-judgment interest, the outcome was that some of the costs sought by the Defendant had been awarded to the Plaintiff (ie, the costs in respect of the unsuccessful *Exception de Fond*) and it would have been wrong, in my view, for me to have awarded interest on the costs in one direction rather without also awarding it in the other direction. There was, therefore, an element of netting off the position of both parties.
25. I further took into account that the costs order I was making would form part of the Court's judgment and would carry interest at the rate prescribed under the Judgments (Interest) (Bailiwick of Guernsey) Law, 1985. In the light of the overall order made, the costs elements in favour of both parties would be generating interest at a rate that is arguably more than compensatory and so would relieve any burden sustained by either from being kept out of money otherwise paid over, or which might have been ordered to be paid over some years previously.
26. Finally, I noted that there had been no evidence placed before the Court showing what had been paid by the Defendant to its Advocates or to its German lawyers during the course of the proceedings. In those circumstances, I felt uncomfortable making an order for interest on costs without fully understanding what the consequences of doing so might be. Further, although 1% above the Bank of England Base Rate might be the usual approach of the Commercial Court of England and Wales, the cases show that other rates are also chosen, so it would have been helpful to have had a clearer picture of whether the Defendant had needed to borrow or was otherwise unable to do certain activities which would have generated income otherwise lost so as to have been in a position to appreciate the impact of funding these proceedings on it.

27. For these reasons, I rejected the application to award interest on the costs actually paid out by the Defendant to its legal team and confined the incidence of interest to the judgment interest attaching to the costs awards themselves.

### Wasted costs

28. Having reached those decisions about which costs should be awarded in favour of the Defendant and on what basis, I turned to the considerably more difficult issue of the person by whom those costs should be paid. The Respondent, Mourant Ozannes, opposed the making of any order for the firm to pay any portion of the costs awarded to the Defendant on the basis that it was not appropriate to dispose of the issues raised by the Plaintiff summarily and, failing that, that the test for a wasted costs order had not been satisfied or that the Plaintiff had failed to establish a causal link entitling the Court to order that the Respondent pay any part of the costs order made in favour of the Defendant. I will address each of those points in turn.

#### *Summary disposal*

29. On behalf of the Respondent, Advocate Lyall relied on the indication given in the authorities that the Court should not resolve any issues that are not appropriate for summary disposal. The clearest exposition of that principle was given in the judgment of the Privy Council in Harley v McDonald [2001] 2 AC 678 (at para. 50):

*“As a general rule allegations of breach of duty relating to the conduct of the case by a barrister or solicitor with a view to the making of a costs order should be confined strictly to questions which are apt for summary disposal by the court. Failures to appear, conduct which leads to an otherwise avoidable step in proceedings or the prolongation of a hearing by gross repetition or extreme slowness in the presentation of evidence or argument are typical examples. The factual basis for the exercise of the jurisdiction in such circumstances is likely to be found in facts which are within judicial knowledge because the relevant events took place in court or are facts that can be easily verified.”*

30. The Plaintiff had placed his case against the Respondent squarely on the allegation that it conducted the proceedings against the Defendant negligently through failing to avoid the action becoming *périmée*, referring in particular to passages in paragraphs 45, 46 and 60 of my earlier judgment, the latter of which described that conduct as suffering from “*woeful inadequacies*”. However, Advocate Lyall pointed out that in Harley v McDonald (*supra*), their Lordships had commented (at para. 51):

*“Nor is it appropriate for the court in exercising its summary jurisdiction to make a costs order to say whether the client had a cause of action against his barrister or solicitor for negligence. This is a matter which ought to be dealt with in separate proceedings, in which the issues of fact and law between the client and the practitioner are clearly focused and the practitioner is given a full and fair opportunity to respond to the client’s claim.”*

I consider that this passage represents sound guidance that should be followed in Guernsey. On a wasted costs application the Court should not be being invited to reach firm conclusions as to whether the applicant had established any cause of action against the respondent Advocates where such a conclusion could only be reached following a full exploration of the facts. Such an exploration of the facts might entail the Court being constituted with the Jurats, subject to the ability of a judge to sit unaccompanied pursuant to section 13 of the Royal Court (Reform) (Guernsey) Law, 2008. Accordingly, the type of case in which a wasted costs order can be made through summary disposal is where the factual position is sufficiently clear to warrant summary disposal. Provided the Advocates in question have

been given a full and fair opportunity to present their case, in my view, in those circumstances the Court can, if it wishes, proceed to make a wasted costs order.

31. In the present case, I took the view that the Respondent had been offered ample opportunity to advance its case fully and fairly. The Third Affidavit of Advocate McHugh set out in great detail how the relationship between the Plaintiff and his former Advocates had been conducted. As a result, I was provided with considerably more information than I had been given during the substantive restoration and strike out proceedings. When read in the light of the evidence given on behalf of the Plaintiff by Dr Tashiro, I decided I was able to form a view on whether it would be appropriate to order that any of the costs awarded to the Defendant should be paid by the Respondent. In doing so, I took into account the further guidance of their Lordships in *Harley v McDonald* (*supra*, at para. 54):

*“The court must have particular regard in cases of this kind to the factual basis upon which the jurisdiction is to be exercised. It cannot rely on its own knowledge when it is faced with issues about the nature or scope of the instructions which the client has given about the conduct of the litigation or the advice that may or may not have been tendered to the client by his barrister or solicitor. Fairness to the barrister or solicitor requires that notice should be given of the allegations about breaches of duty which raise these issues and that an opportunity should be given to them to challenge the allegations, if so advised, by cross-examining witnesses and leading evidence.”*

However, I concluded that this was a case in which the documents exhibited largely spoke for themselves. Communications between the Plaintiff, which were conducted principally through Dr Tashiro and her colleagues, were often by e-mail or recorded in contemporaneous file notes. I took the view that it was not unfair to the Respondent to proceed to a summary disposal of the issues raised and that, when viewed in the round, it would be a much more cost-effective solution for the benefit of all concerned.

*Test for wasted costs*

32. On behalf of the Plaintiff, Advocate Hay suggested that the Court should adopt the test from Section 53.4 of the Costs Practice Direction associated with Part 48 of the Civil Procedure Rules:

*“It is appropriate for the court to make a wasted costs order against a legal representative, only if –*

- (1) the legal representation has acted improperly, unreasonably or negligently;*
- (2) his conduct has caused a party to incur unnecessary costs, and*
- (3) it is just in all the circumstances to order him to compensate that party for the whole or part of those costs.”*

In doing so, Advocate Hay suggested that developments in England and Wales should be regarded as being persuasive and the Court frequently has regard to what is now happening under the Civil Procedure Rules to fill in gaps in the Court’s own Rules.

33. The difficulty with that approach is that there is Court of Appeal authority in this jurisdiction establishing a different test. In *Havilland Estates Limited v Channel Island Ceramics Limited* (1993) 15.GLJ.51, the principle from *Gupta v Comer* [1991] 1 QB 629 was followed, in which *Myers v Elman* [1940] AC 282 was treated as authority “for the proposition that in the exercise of its inherent or common law jurisdiction over solicitors, as officers of the ... Court, the court should not make a cost order against a solicitor in his capacity as such unless satisfied that the conduct which gave rise to those costs ... could properly be described as “a serious dereliction of duty”.” That test was then endorsed in *E v E* [2007-08] GLR 133.

34. In the light of those two Court of Appeal decisions, I regard this Court as being bound to continue to apply the test for wasted costs of ascertaining whether there has been a sufficiently “*serious dereliction of duty*” to warrant such an order. It is possible that, in time, the 2007 Rules might be modified to introduce a test derived from the Civil Procedure Rules, but that stage has not yet been reached. Until such a change is made, or the Court of Appeal rules that its previous endorsement of the older test in English law should be updated in some fashion, this Court should approach matters in the manner established by the superior Court. For those reasons, I rejected Advocate Hay’s submission on the test to be applied.
35. In doing so, I am conscious that their Lordships in *Myers v Elman* (*supra*) offered slightly different formulations of the test. The “*serious dereliction of duty*” wording came from the speech of Viscount Maugham, whereas Lord Atkin used “*gross negligence*” and Lord Wright used “*gross neglect*”. Each of these formulations requires a higher hurdle to be surmounted than the test found in the Costs Practice Direction. I will continue to refer to the test as requiring a “*serious dereliction of duty*” because that was the style referred to in the Court of Appeal, although the three approaches appear to me effectively to be interchangeable.

#### *Application of test*

36. Advocate Hay submitted that, even if I rejected his suggestion to adopt the test in the Costs Practice Direction, the evidence clearly established that the Respondent was responsible for a “*serious dereliction of duty*”. In doing so, he referred to what Neuberger J (as he then was) stated in *Radford & Co v Charles* [2003] EWHC 3180 (Ch):

- “30. *It should be emphasised that I am not suggesting that by failing to miss any time limit, so that he is in breach of his duty to his client, a solicitor could not be liable for a wasted costs order. Indeed there will be many occasions where such an order would be appropriate. For example, where a solicitor fails to serve a document on another party within a time limit laid down by a court order or by the CPR, through an oversight. In such a case, there would be a very strong case for saying that a solicitor should pay the costs of all parties to an application to extend time, or for relief from sanctions, which was necessary as a result of the oversight.*
31. *However, in such a case it can be fairly said that the solicitor was in breach of his duty to the court, as well as a breach of duty to his client, because he was acting in litigation for his client, and had failed to comply with an order or rule of the court.*”

Although the reference to “*oversight*” suggests simple negligence rather than “*serious dereliction of duty*”, I regard this passage as offering me guidance if I consider that what took place did satisfy the more rigorous test required in Guernsey.

37. Advocate Lyall, however, sought to distinguish the degree of criticism levelled at the Advocate in *E v E* (*supra*) from the position of the Respondent in the present case. At paragraph 18, the Court of Appeal had noted that “*The length of the delay was manifest, as was the fact that the reason was the inappropriate conduct of the early parts of the appeal*”. In his submission, this meant that there could only be serious dereliction of duty if there is manifest delay in taking a step and there has also been inappropriate conduct.
38. In my judgment, there is no strict requirement to establish both limbs, as suggested on behalf of the Respondent, before the Court can find that there has been a serious dereliction of duty. What is called for is an assessment of what happened and who was accountable for it. If, through undertaking that assessment, the Court concludes that the Advocate or firm has fallen far short of what should have occurred in performing the duty owed to the client, and arguably to the Court as its officer, then it moves on to assess whether the causal link to wasted costs

has been satisfied and, if so, whether, in the Court's discretion, it is just to make an order for costs to be paid by the Advocate or firm.

39. In the present case, it had become quite clear to the parties that the Plaintiff's proceedings had been commenced on the final day of the German law prescription period. In those circumstances, both were aware that any lifting of the suspension of the prescription period would be terminal for the Plaintiff's action. Those were matters of German law, on which the Respondent was reliant on the Plaintiff for guidance. At the same time, as Guernsey Advocates, the Respondent should have maintained closer supervision of the procedural timetable than it did. Restoration actions should now be of purely historical interest because each practice should have the capability to have electronic warnings diarised or some other system of alerting them to ensure that appropriate steps to avoid an action becoming *périmée* are taken. The failure to file the Plaintiff's Replique and proceed to the next step of the case management conference was, therefore, something for which the Respondent was accountable to the Plaintiff and to the Court.
40. Had steps been taken to seek restoration earlier, the outcome of that application may have been different, recognising always the added complexity arising from the lifting of the suspension of the prescription period under German law. It was, therefore, a serious dereliction of the Respondent's duty to let matters stagnate for as long as it did. One of the duties of an Advocate conducting litigation is to ensure that an action does not become *périmée*, but is progressed expeditiously in accordance with the Court's Rules. I take the view, therefore, that there is a dereliction of duty in any case where a matter becomes *périmée* unless that happens on the express instructions of the client. Whether or not that dereliction of duty is a serious one will then depend on what happens next. In the present case, the Respondent did not spot that the matter had become *périmée* until some considerable time later and, even then, did not address the deficiencies as quickly as it might have.
41. The Respondent's file and the Third Affidavit of Advocate McHugh show that there was correspondence with Dr Tashiro at fairly regular intervals during 2010. In my judgment, this is significant because it was during this time that both client and Advocates should have been focused on taking steps within the time frames each knew was relevant to the progression of the claim against the Defendant. However, there is no suggestion in the exchanges exhibited that either was aware that time was drifting past without re-engaging the Defendant's Advocates or, perhaps more importantly, the Court. Having received the Consent Order made by the Court on 27 November 2009 and realising that the extensions of time informally agreed with the Defendant's Advocates had passed without further extended times being agreed, and ideally put into a Consent Order to be placed before the Court to preserve matters, no one outside the Plaintiff and his German and Guernsey lawyers knew what was happening. Between November 2010 and March 2011, which was the critical time at which the action became *périmée*, there was no contact between the Respondent and Dr Tashiro. The Replique was finally prepared and lodged with the Court in the summer of 2011, but not served on the Defendant's Advocate. (As an aside, if I were looking for inappropriate conduct, that failure to serve at the same time as lodging might fall into that category.) No steps were taken by the Respondent to seek to list the case management conference that had been deferred until after that time.
42. It was Advocate Lyall who, in February 2012, raised with Dr Tashiro the issue of the action having become *périmée*. He explained that the Replique had still not been served on the Defendant's Advocates and, given the applications previously made on its behalf, fully expected the Defendant to raise the procedural bar available to it if the Plaintiff took a further step, thereby necessitating an application by the Plaintiff to restore the action to the *Rôle*. He confirmed on behalf of the Respondent that "*should it become necessary to make an application to restore the claim the costs involved in doing so will be met by this firm.*" Following further correspondence, including between the Advocates, the application to restore dated 30 July 2012 was made.

43. In my view, the seriousness of the dereliction of duty is shown by the fact that the delay involved was regarded by me as inordinate and Advocate Shepherd accepted that what had occurred was “*unacceptable by reference to what the Guernsey Bar expected*”. The fact that the restoration application failed speaks for itself. The Plaintiff’s action could no longer be progressed because of the Respondent’s inactivity. That consequence demonstrates the seriousness of the Respondent’s dereliction of duty meaning that that aspect of the test was, in my judgment, satisfied.

*Causal link*

44. The Plaintiff sought an order that the whole of the costs involved in conducting his claim should be paid by the Respondent because the benefit of the action was lost through the Respondent’s failure to prevent it becoming *périmée*. Advocate Hay drew attention to the approach in the Royal Court of Jersey in *Drake v Gouveia and Lemprière Whittaker Renouf* [2000] JLR 411, in which it found that the former advocates of the appellant were solely responsible for the claim being struck out for inordinate and inexcusable delay, for which there had been no explanation, and so should pay the costs of both parties to the action. He submitted that the same principle applied in the present case.

45. In response, Advocate Lyall highlighted that in *Harley v McDonald*, the Privy Council had confirmed that the wasted costs jurisdiction “*is compensatory in that the court directs its attention to costs that would not have been incurred but for the failure in duty. It is punitive in that the order is directed against the practitioner personally, not the party to the litigation who would otherwise have had to pay the costs*” (para. 49). On causation, he referred to *Jackson & Powell on Professional Liability*, 7th ed., where, by reference to *Brown v Bennett (No. 2)* [2002] 1 WLR 713, it is suggested that “*The court must ask whether the costs in question would have been incurred on the balance of probabilities but for the lawyers’ conduct, not whether there was a substantial possibility that they would not have been incurred*”.

46. As I have already stated, because of the impact of German law on the Plaintiff’s claim, the Respondent was dependent on Dr Tashiro and others in the Plaintiff’s firm giving instructions in that regard. Further, because of the decision on the prescription *Exception de Fond* raised by the Defendant, the Plaintiff and his legal team knew that there was no leeway at all if the prescription suspension were to be lifted for any reason. As a result, I consider that the Plaintiff should have had any possibility of the prescription suspension being lifted at the forefront of his mind. I am, therefore, surprised that the Plaintiff himself, or Dr Tashiro on his behalf, did not question the Respondent more directly than appears to have been the case in the early part of 2010. The exchanges either side of Christmas 2009 between Dr Tashiro and the Respondent make it clear that Dr Tashiro was concerned about the apparent urgency with which the Plaintiff’s Replique needed to be finalised, but then did not query why the pace slowed whilst they were waiting for certain documents to be translated from German. The exchanges about translations continued through the Spring of 2010 and into the summer. It was, by then more than six months since Dr Tashiro had been informed that the Respondent had agreed an extension to the deadline for the Replique with the Defendant’s Advocates. Despite that, she did not query how the six-month period of inactivity, which I consider she can be taken to have understood might be relevant, would impact on the Plaintiff’s proceedings. Thereafter, by May 2012, Dr Tashiro realised that there was a “*big problem with the limitation period*” and she was enquiring as to whose task it was to serve the Replique, whether the Court’s, the Bailiff’s or the Plaintiff’s. By August 2012, when Dr Tashiro had seen the content of Ms Rath’s Affidavit, she commented that “*overall she is right*” and subsequent correspondence between her, or her colleagues, and the Respondent concentrated on how to present a contrary argument.

47. Having had the benefit of seeing how the Plaintiff and the Respondent set about dealing with the action having become *périmée* coupled with the added complication of the Defendant raising the German prescription point in support of its strike out application, I have formed the clear impression that the Plaintiff himself, or perhaps more accurately those working in his firm on his behalf, have to shoulder some of the accountability for the Plaintiff's action having come to an end in the way it did. Whilst my decision was to dismiss the Plaintiff's restoration application pursuant to rule 86(b) of the 2007 Rules, had I been faced solely with an application to strike out because the German law prescription period had expired, the action would have been struck out on that basis. Accordingly, the Respondent should not, in my judgment, be held solely accountable for all the costs incurred from the start of the Plaintiff's action because this was a consequence outside the sphere of responsibility of the Guernsey Advocates. To that extent, whereas the appellant in *Drake v Gouveia and Lemprière Whittaker Renouf* (*supra*) had been found to be blameless, the Plaintiff and his German law advisers in this case are not, in my view, blameless.
48. Having decided not to adopt the same approach as in the *Drake* case (*supra*), the question I needed to ask myself was whether any of the costs incurred by the Plaintiff should fall to be paid by the Respondent instead. If the action had not become *périmée*, the application to restore would not have been required and the action would have proceeded and been resolved substantively following a trial. In those circumstances, the costs up to the time when the matter became *périmée* were being incurred by the Plaintiff in the usual way and there was nothing to suggest that the Respondent would have faced an application for a wasted costs order in relation to any of them up to that date.
49. The Third Affidavit of Advocate McHugh clarifies that the Plaintiff and the Respondent appreciated that there would be an uphill struggle to persuade the Court to restore the action but, in the circumstances in which they found themselves, they took the decision not to abandon matters and to pursue that application and resist, as best they could, the Defendant's strike out application. I have paid particular attention to the indication given on behalf of the Respondent that the costs associated with making such an application would be borne by the Respondent. During the course of the hearing I enquired of Advocate Lyall whether the Respondent had in any way resiled from that position and was told that it had not. Accordingly, I reached the conclusion that the just outcome as between the Plaintiff and the Respondent was that the indication about bearing the costs of the restoration application, which I consider should be treated as extending to the work entailed in addressing the Defendant's strike out application as well, should apply equally to any costs ordered in favour of the Defendant. In summary, I regard the Respondent as having been in the position of funding the entirety of the attempt to restore the Plaintiff's action and can, therefore, incorporate that finding into the Court's costs award.

#### *Outcome*

50. In the light of those conclusions, I determined that the Respondent should not be disallowed its profit costs and expenses for the work undertaken on behalf of the Plaintiff in respect of the action against the Defendant up until the time that it became *périmée*. It was only at that point that the Respondent's serious dereliction of duty took effect and was, it seemed to me, the reason why the Respondent indicated that it would bear the costs of any restoration application. There was, therefore, no order for any repayment by the Respondent to the Plaintiff of monies previously paid. In relation to the order for costs in favour of the Defendant, costs incurred up to that same date would need to be paid by the Plaintiff but, thereafter, the costs of the Defendant in the action, principally associated with the restoration and strike out issues, would be payable by the Respondent. To that extent, the Plaintiff's application of 21 February 2014 was allowed in part.

## Costs

51. In relation to the final question of where the costs of these costs applications should fall, as I indicated at the beginning of these reasons, I made no order. There was, in my view, no clear winner on the day. The Defendant had sought costs on the indemnity basis, alternatively with there being an uplift in the hourly rate allowed for the maximum Advocates' fees, yet had been awarded no more than costs on the standard recoverable basis. The only aspect of success was in relation to the principle of the costs of instructing German lawyers, which had not been opposed. To that extent, it would have been possible to have awarded some costs against the Defendant, but I took the view that this would be an unjust outcome because the Defendant had already been put to expense in appearing in the claim brought by the Plaintiff and was seeking to recover as much as it properly could once those proceedings were extinguished. The Plaintiff had successfully resisted the Defendant's application for indemnity costs but had been mostly unsuccessful on his own application for wasted costs. The party arguably achieving the greatest success at the costs hearing was the Respondent, as it had avoided an order that it pay both the Plaintiff's and the Defendant's costs on the indemnity basis or indeed some other basis. However, it had still had a costs order made against it and, looking at matters in the round, if it had not been for its serious dereliction of duty, the action would have continued through to a determination on its merits and there would have been no applications relating to costs in respect of the restoration or strike out applications. Accordingly, I decided that the Respondent should not take the benefit of any costs award against either or both of the other parties and that, honours being approximately equal, each party should bear its own costs of arguing the costs applications.