Jefcoate and Spread Trustee Company Limited et al
Royal Court
17th November, 2014

JUDGMENT 44/2014

Supplementary judgment on costs regarding judgment in action dated 31st October 2014

Approved Text
17.11.2014

IN THE ROYAL COURT OF GUERNSEY

Case No CIV 1563

(ORDINARY DIVISION)

BETWEEN:

STUART LAWRENCE JEFCOATE

Plaintiff

and

(1) SPREAD TRUSTEE COMPANY LIMITED

(2) COSIGN SERVICES LIMITED

(3) SPREAD SERVICES LIMITED

(4) COSIGN NOMINEES LIMITED

(5) SPREAD NOMINEES LIMITED

(6) CHRISTOPHER JOHN NICHOLSON

(7) JOHN FIELD

Defendants

Supplementary JUDGMENT on Costs

Decision handed down: 17th November 2014

Before: Her Hon Hazel Marshall QC, Lieutenant Bailiff

Counsel for the Plaintiffs: Advocate A L Lund & Advocate P Richardson
Counsel for the First to Fifth Defendants: Advocate J P Greenfield
Counsel for the Sixth & Seventh Defendants: Advocate P T R Ferbrache

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Cases, texts & legislation referred to:

The Royal Court Civil Rules 2007
The Royal Court (Costs and Fees) Rules 2000
The English Civil Procedure Rules
Hulme v Matheson Securities (Channel Islands) Limited (No 2) (Unreported 28th November 1997, Court of Appeal (Gsy))
Shaham v Lloyds TSB [2007-8] GLR 323
*De Putron v De Putron and De Putron (*Royal Ct Civ No 1667, 29 May 2013, McMahon DB)
BCCI v Ali (No 4) [1989] 149 NLJ 1734
Fulham Leisure Holdings v Nicholson Graham [2000] EWHC 2428 (Ch)
Wates Construction v HGP Greentree Allchurch [2005] EWHC 2174 (TCC)
Euroption Strategic Fund (etc) Ltd v Skandinavisa Enskilda Banken AB [2012] EWHC 749
Three Rivers DC v Bank of England [2006] EWHC 816
HLB Kidsons v Lloyds Underwriters [2008] 3 Costs LR 427
C v P-S [2010] JLR 645
Pell v Frishmann Engineering Ltd v Bow Valley Iran Ltd [2007] JLR 479
Reid Minty (a Firm) v Taylor [2001] EWCA Civ 1723
Excelsior Commercial Association v Salisbury Hammer Aspden & Johnson [2002] CP Rep 67
Re H (Minors) [1996] 1 AC 563

1. This judgment is supplementary to my judgment in this action dated 31st October 2014, at the conclusion of which I determined that the Plaintiff's case against the Second to Seventh Defendants should be dismissed, and the First Defendant should be ordered to restore the sum of £55,000 to the Lesterps Settlement, in which the Plaintiff had an interest which he had been defending by this action. This judgment deals with my orders regarding the costs of this action, so far as they have not been subject to any previous dispositive order during interlocutory proceedings. The contest between the parties is largely a question of who is really to be regarded as being the "successful party" in all the circumstances, and whether I should exercise my power to award indemnity costs in favour of any of the Defendants, either wholly or partially.

2. My jurisdiction to award costs is contained in Rules 82 and 83 of the Royal Court Civil Rules 2007. By Rule 82, I am able to make any order with regard to the costs of an action as I think "just". By Rule 83 (1) any order for costs will be paid in accordance with the Royal Court (Costs and Fees) Rules 2000 (ie on the standard or "recoverable" basis) unless I otherwise order. By Rule 83 (2) I have power to order indemnity costs, in whole or in part:

   "(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."

   Sub-rule (a) therefore covers "special circumstances" of an indeterminate nature. Of the specific situations in sub-rule (b), only the word "unreasonably" is argued to have application in this case.

3. Although the English Civil Procedure Rules (Part 44) rules are far more elaborate than the Guernsey rules, the general basis for exercise of this court's jurisdiction to make orders with regard to costs is similar, and the Guernsey court will look to English authority (as well as Guernsey and Jersey authority) for useful guidance as to when it is appropriate to exercise the court's power to award indemnity costs: see per Southwell JA in *Hulme v Matheson Securities (Channel Islands) Limited (No 2)* (Unreported 28th November 1997, Court of Appeal (Gsy)) and per Collas DB in *Shaham v Lloyds TSB (2007-8) GLR 323,* followed in *De*

Putron v De Putron and De Putron (Royal Ct Civ No 1667, 29 May 2013, McMahon DB). *Hulme* emphasised that it is not merely where proceedings are pursued or conducted with an ulterior or improper purpose that indemnity costs may be awarded, but also where they are pursued oppressively or in such a way as to cause costs disproportionate to the amount at stake to be incurred. *Shaham* emphasised that the starting point was that the successful party would normally be entitled to costs, but that that is a rule from which the Royal Court will readily depart (see [6] – [12]).

4. Who is the "successful party" is not to be judged on technicality, but as a matter of common sense: *BCCI v Ali (No 4)* [1989] 149 NLJ 1734 at [7] per Lightman J. Therefore, a very small recovery out of a very large claim may produce the result that the "successful party" is sensibly seen as being the Defendant rather than the Plaintiff: see *Fulham Leisure Holdings v Nicholson Graham* [2000] EWHC 2428 (Ch).

5. Maintaining a claim which the Plaintiff knows, or ought to know, is doomed to fail on the facts and on the law will justify an award of indemnity costs: *Wates Construction v HGP Greentree Allchurch* [2005] EWHC 2174 (TCC). In *Euroption Strategic Fund (etc) Ltd v Skandinavisa Enskilda Banken AB* [2012] EWHC 749, Gloster J awarded indemnity costs where a claim had been "*speculative,…grossly exaggerated in quantum… opportunistic,…conducted[unreasonably] and …pursued on all issues at full length to the end….*". More elaborately, in *Three Rivers DC v Bank of England* [2006] EWHC 816 (Comm) Tomlinson J gave, at paragraph [25], eight examples of unreasonable pursuit of, or conduct associated with, a claim, which could justify an award of indemnity costs. These cases are illustrative of general principle, rather than laying down specific rules.

6. On the other hand, it is recognised that even a successful party is unlikely to win on all points and that mere failure to win some issues is not, without more, a reason for penalising a party in costs (*HLB Kidsons v Lloyds Underwriters* [2008] 3 Costs LR 427). Similarly, it is not unlikely that in the course of a long case, a party may behave less than reasonably in some respect, but it would be a matter of fact and degree as to whether this had gone far enough to justify an award of indemnity costs. I consider that this is what Beloff JA was adverting to when he said, in *C v P-S [2010] JLR 645* at [11].

   "The question will always be – is there something in the conduct of the action by one of the parties or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs, recognizing that there will usually be some degree of unreasonableness?".

7. The underlying principle is expressed in *Pell v Frishmann Engineering Ltd v Bow Valley Iran Ltd* [2007] JLR 479 at [25]

   "*The object of an award of indemnity costs is to achieve a fairer result for the party in whose favour it is made than would be the case if he were only able to recover costs on the standard basis; in the end it is a question of what would be fair and reasonable in all the circumstances*."

8. Thus, the court's discretion is entirely unfettered, but is (naturally) to be exercised "judicially" (see per May LJ in *Reid Minty (a Firm) v Taylor [2001] EWCA Civ 1723).* In *Excelsior Commercial Association v Salisbury Hammer Aspden & Johnson [2002] CP Rep 67* Lord Woolf stated that the "*critical requirement*" for an award of indemnity costs was that there must be

   "some conduct or some circumstance which takes the case out of the norm".

Submissions

9. On behalf of the Plaintiff, Stuart Jefcoate, Advocate Lund first records (and Advocate Ferbrache for the Eighth Defendant accepts) that there has been a previous agreement that any costs of the Eighth Defendant, the late Mr Piper, over and above the costs of his successful application to strike out the claim against him (which have already been dealt with) should be paid by the Plaintiff on the recoverable basis. **I will therefore so order**.

10. As regards the costs of the Sixth and Seventh Defendants, as I understood her, Advocate Lund accepts that, having lost against those parties, the Plaintiff must *prima facie* pay their costs. She submits that the appropriate order in the circumstances should be no more than that those costs be paid on the recoverable basis, although she argues for a reduction from this, on the grounds that these Defendants - I think indeed all the Defendants, she says - unreasonably never "engaged" with the Plaintiff on the question of the true value of the sites in issue until December 2013, and unreasonably refused to go to mediation in July 2014 on the unreasonable excuse that the Plaintiff must agree the amount of a previous order for costs made in their favour before any mediation could be worthwhile.

11. As regards the costs of the First to Fifth Defendants, Advocate Lund accepts, as she must do, that the Second to Fifth Defendants succeeded against the Plaintiff, and did so on the basis that they should never have been joined in the action at all. However, she submits that there should be no order as to their separate costs (if any) as they are, in reality, all part of the same Spread Group of companies as the First Defendant, and their involvement really caused no costs beyond those which the First Defendant would have incurred anyway.

12. As regards the costs of the First Defendant, she submits that, with the Plaintiff having obtained an order against it that it should repay £55,000 to the Lesterps Settlement for having been found guilty of gross negligence, the Plaintiff should be regarded as the "successful party" in the action and the starting point is therefore that the Plaintiff should have his costs against that Defendant, on the recoverable basis. If the court were to be of the view that there should be any reduction from this, on account, perhaps, of the relatively small amount recovered compared with the level of the claim, she submits that this should be modest, because all the evidence actually called would have been required in any event. She submits that in all the circumstances, no more than a 25% discount would be appropriate.

13. On behalf of the Sixth and Seventh Defendants, Advocate Ferbrache submits that, having succeeded against a conspiracy claim which I characterised as being, on examination, little better than "flimsy", his clients should receive their costs on an indemnity basis. He submits:

    i. that it was unreasonable for the Plaintiff ever to have brought a conspiracy claim at all (as the analysis in my judgment showed) and this should have been obvious;

    ii. that the wide ranging nature of the claim required a huge factual enquiry and massive evidence, thus generating enormous costs, none of which assisted the Plaintiff's case;

    iii. that the lack of substance in the claim was illustrated by the way in which it kept changing even (for example) during the Plaintiff's closing speech, when it did so in a way which had not even been put in evidence;

    iv. that the claim had been pursued doggedly, and had overhung his clients, for four years;

    v. that the claim was always grossly inflated, both as to the alleged basic land values but, more importantly, by wild allegations of mineral value (coal) made without any actual foundation in evidence; the claim had been intimated at £35M in 2009, had been quantified when pleaded initially at some £7.75M, had potentially risen to

£12.25M in the proposed amended form which had not been permitted, had become £6.7M in the amended form of claim which had eventually been permitted, had then dropped to £1.9M when the coal element of the claim had had to be abandoned for lack of evidence, and had finally resulted in a recovery of a mere £55,000, against only the First Defendant;

vi. that the Plaintiff's approach to settlement had been unrealistic, and had revealed, even, that the claim had been a cynical exercise in commercial pressure.

All the above, he submitted, took the situation out of the norm so as to justify my awarding the Sixth and Seventh Defendants their costs on the indemnity basis.

14. On behalf of the First to Fifth Defendants, Advocate Greenfield submitted that on a "common sense" basis, these Defendants were the successful party, as the Plaintiff had recovered only £55,000 out of a claim of £1.9M by the time of the trial, and with the history set out above. He submitted that the starting point ought therefore to be that the Defendants should receive their costs. However, he invited departure from this as follows:

    i. First, on the basis of my finding that the claims against the Second to Fifth Defendants were misconceived and that they should never have been separately joined in the action, he argued that those Defendants should receive 100% of their costs on an indemnity basis;

    ii. Second, for the same reasons as advanced by Advocate Ferbrache in respect of the Sixth and Seventh Defendants, he submitted that the First to Fifth Defendants ought to receive their costs of defending the conspiracy claim on the indemnity basis;

    iii. Third, he argued that the "coal" claim had been brought and maintained without any evidential basis whatsoever, until finally abandoned after a meeting between the two parties' experts in the value of coal deposits and a jointly prepared negative opinion to this effect. (I observe that in my judgment I had erroneously recollected this as being a single joint expert report, whereas in fact, it was a joint report between two experts but nothing turned or turns on this.) The First Defendant should therefore, he submitted, have 100% of its costs of the "coal" claim, on the indemnity basis.

    iv. Fourth, recognising that as the Plaintiff had recovered something, (albeit only £55,000) in respect of the breach of trust claims, and had succeeded in resisting the "no recovery for reflective loss" argument, he submitted that it was appropriate to take account of this merely by a modest reduction in the First Defendant's costs entitlement in principle as the "successful party". However, he submitted that I should also recognise that the Plaintiff's inclusion of, and persistence in, the huge, but misconceived and unreasonable, "coal" claim had in effect made the case unsettleable. In all the circumstances I should therefore order that the Plaintiff pay 85% of the First Defendant's costs of the breach of trust claim on the recoverable basis.

15. In answer to the Defendants' arguments, Advocate Lund submitted that as regards the conspiracy claim, the Defendants were being wise after the event with regard to its being "obviously" misconceived, and they should not be able to rely on this point when they had never applied to have the claim struck out at an early stage. She also submitted that it was unfair to criticise the Plaintiff's attitude to settlement, as the difficulty had been that settlement with either faction of the Defendants had to be combined with the other, and that this had never proved possible. The Defendants' own offers of settlement had not been reasonable; the Sixth and Seventh Defendants had included matters which they could not deliver themselves, with insufficient detail of how they would propose to achieve their offered terms so as to justify exploring them. The Defendants' refusal to mediate, in July 2014,

unless the amount of an award of costs made earlier to the Sixth and Seventh Defendants was agreed, was itself, she submitted, an unreasonable attempt to exert unfair commercial pressure.

16. Advocate Lund therefore persisted in her argument that there was no reason to justify ordering indemnity costs against the Plaintiff in favour of any Defendants. In her reply she submitted that if I were swayed by the First to Fifth Defendants' arguments, then the right order should still not be any more favourable to them than that there be no order as to either side's costs.

General points

17. I have already referred to the general principles as to the exercise of my jurisdiction to order costs above, to which I will have regard. In my judgment, my discretion with regard to costs should be exercised in order to achieve the disposal which seems to me to be fair (and thus "just") in all the circumstances of this action, with all the complexities which I noted in my judgment, having regard to all the aspects of the parties' conduct of the case which are before me in evidence now or from the trial, and in the light of the outcome.

18. It is nowadays generally accepted that fairness to the parties involves a balance between the prima facie rule that costs "follow the event" in the sense of the overall judgment, under which any recovery by a Plaintiff would generally carry all the costs with it, and an "issue based" approach, whereby the court would have regard to relative success on individual issues or aspects of the individual case in tempering this approach. This approach is illustrated in the form of the costs order which Advocate Greenfield has invited me to make.

19. However, in my judgment, as well as having regard to this approach, I should also seek to achieve a form of costs order which can be worked out, if necessary, as easily and cheaply as possible. This means seeking to minimise, as far as practicable, the possibility of further dispute and of any taxation becoming itself, a long, complicated and expensive exercise. For these reasons, insofar as I depart from any general award in respect of the whole of a party's costs, I should endeavour to make the basis of this easily implemented, preferably as a matter merely of mechanics. I should try, therefore, to make an order in the form of either

    i. a percentage of a parties' overall costs bill, taxed on one or other of the two recognised bases (recoverable and indemnity) so as to involve simply a matter of arithmetic, or

    ii. an order relating to costs incurred in a particular period of time, since these will be readily identifiable, or

    iii. if appropriate and possible, costs of specific, identifiable aspects of a party's legal costs, which can be quickly identified, with certainty, or

    iv. an appropriate combination of these.

    Whilst success on particular issues may be relevant as part of the material leading to one of the forms of order above, and particularly the first, I should lean against making an order that a party should pay the other party's costs of a particular described "issue". That form of order, as experience shows, leaves far too much room for dispute and disagreement, as to, for example, the correct or fair attribution of work to one particular issue rather than another, how one should approach the exercise where it might be argued that costs would have been incurred "anyway" or work has been used in relation to more than one issue, and how costs should be allocated where the costs of more than one party are combined, or are incurred in relation to different issues.

20. I was told that, with regard to the corporate Defendants, there has been no separate attribution of costs as between the First and the other Defendants as regards actual billing; all legal bills in respect of all five Defendants' costs have been sent to one single accounts department on behalf of the Spread Group. Identifying any separate costs of the Second to Fifth Defendants from those of the First Defendant would therefore be a matter to be gleaned from the narrative of a bill, and I infer that in many cases this would require an apportionment, which, once again, leaves room for potential disputes if I differentiate between these.

21. As regards the Sixth and Seventh Defendants, I was told that, in effect, the Sixth Defendant, Mr Nicholson, is primarily liable to the legal representatives for their fees and costs of running the Defence on behalf of both him and Mr Field, although as between him and Mr Field there is an agreement that Mr Field will make a proper contribution to Mr Nicholson in respect of any costs (I take this to mean, in effect, unrecovered costs) of his own defence. I do not know the basis of this, ie whether it means costs attributable to his own separate defence over and above costs which Mr Nicholson would have incurred anyway on his own behalf, or whether it would additionally include some contribution to or share of the latter, as common costs. Advocate Ferbrache suggested that the costs would be attributable between these two parties as to 75% to Mr Nicholson and 25% to Mr Field. However, this was only an "off the cuff" response to a question from me, seeking to be helpful.

22. With regard to other relevant matters, I have already referred to the changes in the quantum of the Plaintiff's claim over the lifetime of the proceedings above. The history of "without prejudice save as to costs" offers to which my attention was invited, all of which, obviously, were rejected, is that:

    i. In December 2013, the Sixth and Seventh Defendants offered, in broad terms, to allow the Plaintiff to exploit for the LS trust's own sole benefit the alleged £10M coal reserve at Wernos Washery site to buy out the LS' share in the one remaining property (Abernant) for £50,000, and to accept for their costs the (then) £500,000 paid into court as security for those. In conjunction with this, the First to Fifth Defendants offered to allow the Plaintiff to discontinue on payment of their costs on the recoverable basis. This offer was rejected by the Plaintiff on 27th January 2014.

    ii. On 27th January 2014, the Plaintiff counter-offered to accept £10M inclusive of costs. Advocate Ferbrache observes that at the time the claim itself was only for £6.7M, which, he submits, illustrates the Plaintiff's unrealistic attitude to settlement. I have to say that this does look like simply a rather petulant response to the Defendants' offer;

    iii. On 27th June 2014 the Plaintiff offered to settle for £1.7M plus their costs on the recoverable basis. Again, it is submitted that with the claim itself then being only £1,950,375, that offer was totally unrealistic.

    iv. On 30th July 2014, with the trial date looming at 4th August 2014, the corporate Defendants offered to pay £400,000 into the LS trust on the basis that they could also recover their then costs of £961,850 from the LS trust, ie, in effect, allowing the Plaintiff to withdraw at a reduced level of costs payment.

    v. On 10th August, after one week of the trial, the Sixth and Seventh Defendants offered to permit the Claimant to withdraw the claim and pay their costs on the recoverable basis, failing which they would seek indemnity costs against him if ultimately successful.

    vi. On the morning of 11th August, the Plaintiff rejected this offer but offered to withdraw all his claims against all Defendants with no order as to costs.

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23. Finally, as regards the sums in issue in this costs application, the figures are notable. I was informed that the Plaintiff's outstanding costs to date (ie those not subject to any interlocutory order) including any costs hitherto reserved, are between £1.3 and £1.5M, the costs of the First to Fifth Defendants' are £1.2M, and those of the Sixth and Seventh Defendants' are £1.58M (it being observed that they have had to employ English solicitors, by way of disbursement, to assist with the assembly of witness evidence in the UK).

24. I was also informed that, as a general guide in litigation at this level, an award of costs on the recoverable basis (where the burden of proof that any claimed item is a reasonable cost, reasonably incurred rests on the receiving party and is therefore resolved in favour of the paying party in case of doubt) would be expected to yield 55 – 60% of the party's actual bill from his own Advocate, whereas an order for costs on the indemnity basis, (where the burden of proof is reversed, and it falls on the paying party to prove that an item claimed is either not a reasonable cost or is not reasonable in amount) would be expected to yield about 85-90% of a party's actual costs. The sums at stake on this application are therefore significant.

Discussion

25. As between the Plaintiff and the Sixth and Seventh Defendants, plainly it was the Defendants who were the resoundingly "successful" party. The inevitable result, in my judgment is that the Plaintiff should pay their outstanding costs of the action. The only issue is, on what basis? I will return to that below.

26. As between the Plaintiff and the First to Fifth Defendants, I do not consider it particularly helpful to decide who was the "successful" party, since, in the somewhat unusual circumstances of this case, I would in any event be likely to depart radically from the normal "costs follow the event" rule, whichever decision I made. However, if I had to make such a finding, in my judgment it is the Defendants who would fall to be regarded as successful, rather than the Plaintiff, on a common sense view. This is because the Plaintiff (i) recovered only £55,000 out of a claim which never fell below £1.9M and was always at or in excess of £6.7M until shortly before the trial, (ii) failed completely on the alternative "conspiracy" claim, and (iii) was found to have joined the Second to Fifth Defendants into the action on a misconceived basis.

27. However, I also do not consider that the First Defendant was quite as "successful" as Advocate Greenfield urged upon me. He has invited me to make an issue-based costs order, namely that the Plaintiff should pay

    i. 100% of the 2nd to 5th Defendants' costs of all claims on the indemnity basis
    ii. 100% of STC's cost of the conspiracy claim on the indemnity basis
    iii. 100% of STC's costs of the coal claim on the indemnity basis; and
    iv. 85% of STC's costs of the Trust claim on the recoverable basis.

28. I am sympathetic to the reasons for the first three submissions. In my judgment it was, or ought to have been, obvious to the Plaintiff or his advisers that the claims against the Second to Fifth Defendants added nothing of any value to the main claim against the First Defendant, and were, in any event, made on a misconceived legal basis, as stated in my judgment. Extra costs will have been occasioned by the need to examine and defend these misconceived claims formally, and the Plaintiff ought to pay these. As Advocate Greenfield accepted in argument, however, the actual separate costs of these Defendants, particularly if regarded simply as their costs incurred *additionally* to the costs of matters undertaken on behalf of the First Defendant in any event, would be very small. As a percentage of the five Defendants' total costs Advocate Greenfield suggested 5%. I would be inclined to think that even that was generous.

29. As regards the conspiracy claim viewed in isolation, in all the circumstances of this case I would consider it right to invoke my power to order indemnity costs in favour of the First to Fifth Defendants (or more accurately STC) against the Plaintiff on this issue. As will be clear from my judgment, I regard the conspiracy claim as having been fundamentally and obviously misconceived in law, even to the extent of being fanciful as against these Defendants. It was unreasonably brought and persisted in, and unreasonably increased the costs incurred by the First Defendant, in having to defend it.

30. I am not impressed with the argument that if the claim were so obviously misconceived, the Defendants ought to have applied to strike it out at an early stage, as Mr Piper did, and should not, therefore, be allowed to fix the Plaintiff with an indemnity costs order. The Defendants owed no duty to the Plaintiff to take any such action. It is for the Plaintiff to review the merits of any claim which he is advancing to ensure that he is satisfied that it is fairly maintainable and arguable in law, not for the Defendants to protect his position. The highest that this argument might be put is that any such failure to apply is evidence that the claim was not as obviously misconceived as all that. (It is, of course, the case that merely making an unsuccessful case is no grounds for ordering indemnity costs, as that is not, in itself, unreasonable in the context of litigation.) However, I do not find that argument persuasive, either, in this case. In my judgment, a careful analysis of the elements of an unlawful means conspiracy as compared to the facts pleaded in this case, particularly with fraud being expressly disavowed, should have revealed that the claim was not sustainable. Maintaining it unreasonably caused the Defendants to incur the costs of defending it, and they are entitled to some latitude in doing so thoroughly, as they cannot be expected to take significant risks in second guessing how the claim may appear to the court. In principle, therefore, these Defendants ought to have their costs of defending the conspiracy claim on the indemnity basis.

31. As regards the "coal" claim, Advocate Greenfield points out that this was a very large element of the quantum of the claim, but was apparently launched even in the face of the Plaintiff's own valuation expert, Mr Snowden, advising that the value of any coal deposits which might be exploited commercially, and which obviously affected the value of (relevantly) Wernos Washery, required more "due diligence" (by which he no doubt meant investigation) in order to substantiate and ascertain it. This was not done. The Plaintiffs brought their claim, and Stuart Jefcoate continued it, on the basis of little more than bare assertion that valuable coal deposits existed. That element of the claim accounted, in the end, for £4.75M out of the (then) claim for £6.7M, and was persisted in until eventually, a few months before the trial, the Plaintiff was compelled, by the negative evidence of his own expert, to abandon it.

32. In my judgment, the basis for bringing this part of the Plaintiff's claim was entirely speculative. It is irresponsible and unreasonable to launch a claim without any evidential basis for believing it to be true and substantiable. The Plaintiffs really had none here, but appear to have acted simply on the strength of hearsay reports from Mr Kehoe. In my judgment that approach would justify an order that they pay the costs occasioned to the Defendants in defending the coal claim on the indemnity basis. In the event, this is the costs of the First to Fifth Defendants, as it was they who engaged the coal expert evidence required to defend it, that evidence being then adopted by the Sixth and Seventh Defendants.

33. As to the Trust claim, the point made by Advocate Greenfield, to justify his submission that the Plaintiff should pay 85% of the Defendants' costs of this issue, but only on a recoverable basis this time, is that is that the Plaintiff recovered only £55,000 out of a claim for £1.9M on this claim, and recovered in respect of only one of four claims of alleged "gross negligence".

34. I think this is over generous to the First Defendant. I found the First Defendant to be guilty of negligence in respect of all four of the transactions which were challenged. The Defendants only succeeded to the extent that they did because I held that, on balance, they

were entitled to rely on their exoneration clause in respect of the very small sums in issue with regard to Plots 4 and 8, and because I considered that they had caused no provable loss in respect of the Wernos Washery transactions. In respect of the former the Plaintiff merely failed to convince me to hold that the degree of negligence was "gross", and in respect of the latter he failed because I preferred the Defendants' valuation evidence to his. I do not regard either of these failures as sufficiently unreasonable, reprehensible or "out of the norm" as to justify a sanction as extreme as awarding indemnity costs against the Plaintiff. The former would be quite a fine judgment of fact, degree and legal principle, (and indeed I can in principle see force in an argument that a negligent Trustee who succeeds in resisting a breach of trust claim only because his negligence is not held to be "gross" should have any costs order in his favour significantly reduced), and the latter arose from reliance on an apparently competent professional. Whilst I did not find Mr Snowden an impressive witness in the trial, that is a far cry from suggesting that the likelihood of this should have been sufficiently apparent to the Plaintiffs as to make it so unreasonable for them, or later Stuart, to proceed in reliance on his evidence, that they should be deprived of what might otherwise be a costs order in their favour. I also note that the Plaintiff succeeded against the Defendant on the "no recovery for reflective loss" point which, whilst a point of law, was not entirely insignificant.

35. It is not particularly helpful to try to work out what costs order I might have made if the claim had been confined to the Trust claim and the "reflective loss" point against the First Defendant, with the outcome being the same. This is because that scenario is so distant from the real position that it is difficult to gauge how far the evidence would have been different. Quite obviously the dynamics of any attempts at settlement would have been entirely different, and the parties' actions different. Also, one cannot disengage the fact that the inclusion of the speculative but massive "coal" claim raised an almost insuperable obstacle to realistic settlement negotiations. My feeling though, for what it is worth, is that the right result would have been in the area of no order as to costs.

36. For reasons already given above in paragraph 19, I do not think it appropriate to make an issue based costs order of the kind proposed by Advocate Richardson, even though, apart from my reservations about quantum with regard to this fourth issue, I largely accept his analysis. I shall therefore make an order which achieves a reasonably equivalent result, but in a manner which will be more easily calculable. In doing so, I take into account that the First to Fifth Defendants are all companies within the same group, and have not received separate costs bills. I can see no tangible benefit to the corporate Defendants in separate costs orders with regard to the Second to Fifth, as contrasted with the First, Defendant, and a possibility of dispute if I attempt to differentiate them. It seems to me that it is possible to dissect out, easily and clearly, certain aspects of the costs of the coal claim, since that involved expert evidence.

37. I will therefore order as follows:

    i. **The Plaintiff shall pay to the First Defendant the costs of the evidence of their coal expert. I take this to be the costs of preparing instructions and instructing the expert, and his fees and disbursements (if any). If there is any dispute about these sums, then they should be taxed on the indemnity basis.**

    ii. **The Plaintiff shall otherwise pay 75 % of the First to Fifth Defendants' costs of the entire action, so far not already subject to any order, on the indemnity basis. For the avoidance of doubt, this includes the costs of preparing the witness statements of Mrs Giles, Mr Woodhead and Mr Rogers,** which I regard to have been reasonably obtained even if not ultimately deployed**.**

38. I regard the above order as fairly reflecting my view that the Plaintiff should pay certain significant aspects of these Defendants' costs on an indemnity basis, but that with regard to

the trust claim, the incidence of costs should be more in favour of the Plaintiff, although with due account being taken of the obstacle to any settlement which the unreasonable inclusion of the unjustified "coal" claim brought about. I have taken account of the parties' various offers of settlement and other matters of interaction outside the trial in reaching this result.

39. Returning, then to the position as between the Plaintiff and the Sixth and Seventh Defendants, I am satisfied that, in principle the Plaintiff should be ordered to pay their outstanding costs of the action, and the only issue is whether I should exercise my power under Rule 83(2) to order these costs to be paid in whole or part on the indemnity basis rather than the recoverable basis.

40. I have already held that the conspiracy claim as pleaded was really "doomed to fail on the law and the facts" and that this really should have been or become apparent to the Plaintiff and to his advisers, such that I would be minded to make an award of indemnity costs in principle. I am perfectly satisfied that I should make such an award in respect of the costs of Mr Field. He was, to my mind, implicated in the conspiracy claim wholly unreasonably and without any sufficient justification for doing so, having regard to the required elements of an unlawful means conspiracy and the facts as pleaded (or not pleaded) against him.

41. I have had far more concern, however, as to whether I ought to exercise my discretion in favour of Mr Nicholson in this respect.

42. I indicated at the hearing that I felt that this concern stemmed from an underlying sense that he had to some extent brought these proceedings upon himself by the way in which he had acted in relation to the Welsh portfolio. Advocate Ferbrache submitted, quite rightly, that it would not be right for me to decline to exercise my discretion in his favour in this regard (as Advocate Lund came close to submitting) just because I did not form a favourable view of Mr Nicholson as a witness and made uncomplimentary findings as to his character in Paragraph 162 of my judgment. I fully accept this. My discretion must be exercised judicially and not partially, and I ought only to take into account conduct, and conduct connected with the action and matters in issue within it, and not unconnected events.

43. Advocate Ferbrache submits that none of my findings which were either uncomplimentary or adverse to Mr Nicholson related sufficiently to the conduct of the case, so as to justify my rejecting the proposition that, having brought a completely "bad" case in conspiracy, on a pleading which barely makes out the necessary elements of this, let alone with sufficient evidence to justify bringing that case, and having lost resoundingly, the Plaintiff has unreasonably caused Mr Nicholson enormous legal costs, and ought to pay these on the indemnity basis. He submits that Mr Nicholson has succeeded despite any adverse findings of mine as mentioned above, and these are therefore neither appropriate, nor sufficient, considerations to affect the exercise of my discretion as I would otherwise be disposed to do. Whilst I accept the principle behind this proposition, I am not satisfied that it fully decides the question here. That is in effect whether, acting judicially, I "must" exercise my discretion to award indemnity costs to Mr Nicholson rather than merely recoverable costs. Mr Nicholson is, after all, invoking the discretion of the court to depart from the normal basis of an award of costs.

44. I identify two matters which are the basis of my hesitation. The first is the rather more general one mentioned above, namely that it appears to me that, to some extent, Mr Nicholson brought proceedings upon himself by his the way in which he exercised his general influence over the dealings with the Welsh property portfolio and Mr Schreibke's decisions and actions in that regard. Advocate Ferbrache's answer to this was, in effect, that Mr Nicholson's conduct could not be characterised as having brought upon himself the hopeless claim in conspiracy which was actually advanced. However, in my judgment that is not a complete answer, and I am entitled to look at the broader question whether Mr Nicholson's actions had given any justifiable cause for the Plaintiffs to consider that there were some grounds for a

claim against him. I found, in effect, that Mr Nicholson had given the Jefcoates cause for suspicion, and in my judgment justifiable suspicion, even if the claim eventually made against him had been brought on a misconceived basis. To that extent, at least, he had provoked proceedings.

45. However, and whether or not the above would be a sufficient reason for me to decline to award indemnity costs, there is a second, more direct, and far more serious matter. In the course of the trial, Mr Kehoe gave evidence that he had been approached by an unknown man on the telephone, who claimed to be acting for Mr Nicholson, and who had offered him a bribe to change his evidence and give evidence favourable to Mr Nicholson in this trial. I referred to Mr Kehoe's evidence in Paragraph 147 of my judgment. It consisted of a first telephone conversation, in November 2012, noted by Mr Kehoe, and a subsequent further call-back by the unknown man a day or two later, which conversation Mr Kehoe claimed to have recorded. Advocate Ferbrache invited me to find that this evidence was all concocted by Mr Kehoe. He put this squarely to Mr Kehoe, who denied it. Advocate Ferbrache submitted to me that I should disbelieve Mr Kehoe and find that this evidence was a fabrication, citing to me, in particular, a five second gap at the start of the recording, before the conversation commenced, which (he suggested) showed that this recording had not been - and, I think, could not have been - made as Mr Kehoe alleged. He invited me to listen to the recording and to reach this conclusion with regard to that evidence.

46. In fact, I found it unnecessary to make any finding about the genuineness of that conversation for the purpose of my determinations in the main action, and I did not listen to the recording at that time, because the memory stick with which I had been supplied did not contain that particular recording but only one of the other recorded conversations which were in evidence. I have concluded, however, that for the purpose of making a proper decision on this costs application, I do need to make a finding in this regard, because if I did come to a final conclusion that the recording was genuine, this would be a matter which might affect my view of whether it was appropriate, nonetheless to award Mr Nicholson costs on an indemnity basis.

47. I therefore called for the recording, which I have played to myself, several times, in order to examine Advocate Ferbrache's submission. I have also replayed the court recording of Mr Kehoe's evidence under cross examination, particularly from Advocate Ferbrache.

48. The gist of Mr Kehoe's evidence was that he had put the caller off on the occasion of the first conversation, which he had then written down, and got him to call again in a day or two, on the pretext that he would "think about it" but that "£30,000 cash sounded better than £25,000". He had then kept a recorder with him, and upon seeing an unfamiliar number on his telephone for an incoming call, had switched the recorder on and recorded the call. He agreed, although only in terms of "something like that", with Advocate Ferbrache's suggestion that he was saying that he had turned the recorder on and then immediately answered the call. Advocate Ferbrache did not cross examine him further as to the circumstances of his taking his second call or any detail of the recording.

49. The recording as supplied to me digitally on a memory stick starts with a few faint mechanical clicks, a pause, and then some screeching sounds which are difficult to determine but could be music from some external source. The conversation then begins with Mr Kehoe saying "Hello". It is the approximately five second gap at the start of the recording which Advocate Ferbrache suggests shows that this recording must, in fact, have been set up, rather than being spontaneously recorded in the way in which Mr Kehoe suggests.

50. Immediately following the hearing, and playing the recording, I reached a conclusion as set out in this and the following three paragraphs. Having listened to the recording, and reviewed this and the other evidence, I am satisfied, certainly on balance of probability, that this recording is genuine and I accept Mr Kehoe's evidence in this respect. Apart from

Advocate Ferbrache's specific point, I would have been inclined to come to this conclusion in any event. My reasons for this are first that, having seen Mr Kehoe give evidence, I simply do not believe that he was sufficiently sophisticated to be able to conceive the elaborate charade of two telephone calls, providing some kind of excuse for putting off the caller and recording the second call, and organising an actor to play the necessary part in the second call. There has been no suggestion that anyone else was involved, or put him up to it.

51. Second, I regret to say that the possibility of there having been such an approach procured by Mr Nicholson, is not something which I find sufficiently unlikely or inconsistent with my impression of Mr Nicholson and his conduct that I should reject it, in the face of other apparently cogent evidence. In saying this, I have been ever mindful of the high standard of evidential proof which I should require in order to reach any such finding, as will have been apparent from my reference to *Re H (Minors)* [1996] 1 AC 563 in my main judgment.

52. Third, having now listened to the second telephone call, I find it to sound so completely natural, and consistent with Mr Kehoe's account, that I believe that it is genuine. If it were not genuine, then the quality of the acting would have been extraordinary.

53. Fourth, I simply do not find Advocate Ferbrache's submissions with regard to the conclusions to be drawn from the "gap" at the start of the recording persuasive. It did not sound particularly unnatural to me, and in the absence of further cross examination (and there was none) as to some particular significance about the sounds, or what was going on, the recording does not, to my mind, sound suspicious in this regard at all. In short, I do not find anything about the recording, even the unexplained clicks, the timing and the other sound I mentioned, to be any indication that the recording was not made as Mr Kehoe said. Neither do I find Mr Kehoe's oral evidence to be arguably (and suspiciously) inconsistent with the recording, in the context of Advocate Ferbrache's actual questioning. There is nothing about the recording which is sufficiently (if at all) inconsistent with Mr Kehoe's account of how he came to make it as to cause me to think that I should have doubts about its genuineness.

54. Following my already having made and drafted the above findings, I received further communications from the parties. Advocate Lund sent to the court Mr Kehoe's actual handheld mini-tape recorder with the tape on which the actual recording had been made and converted into the digital recording on the memory stick which had been supplied to the court, with an explanation of the initial "clicks" on the recording and of the "screeching sounds" which I noted and mentioned above. Advocate Ferbrache sent in a response letter, objecting to the late introduction of new evidence, and to the Plaintiff's, in effect, making use of a point raised by the court of its own motion on this application. He also submitted that this was precluded by the fact that Advocate Richardson had not cross examined Mr Nicholson on the topic of this alleged telephone conversation, submitting that Mr Nicholson's denial, in his witness statement, must therefore be taken to be unchallenged.

55. For reasons which will be obvious, I did not need to rely on the new evidence which Advocate Lund sought to introduce to reach a final conclusion, although it is in fact perfectly consistent with my earlier finding. I find that that there is nothing in the argument that this is a point raised by the court of its own motion; in exercising my discretion with regard to costs I am entitled to take into account all of the circumstances of the case which appear to me to be material. With regard to the submission that Advocate Richardson's failure to cross-examine Mr Nicholson on this point means that I must treat Mr Nicholson's evidence as unchallenged, that does not lead to the conclusion that I must accept it as true. Mr Nicholson simply made a bare denial of having procured this approach ("Nothing could be further from the truth.") and went on to refer to other matters. Any challenge would therefore simply have consisted of putting it to Mr Nicholson that that statement was untrue. There were no other facts to investigate; Mr Nicholson proffered no other explanation than immediately raising matters going to Mr Kehoe's credit. It is not incumbent on an advocate to put every single point of dispute between the parties to the other party expressly

so long as it is clear what assertion that other party has to meet. In my judgment, that had occurred properly in this case. The court was left simply with conflicting evidence between two witnesses, and to make a decision as to which it believed. As will be apparent, I believe Mr Kehoe.

56. I therefore find that Mr Nicholson did procure this approach to be made to Mr Kehoe; I can conceive of no other basis on which this telephone conversation could plausibly have occurred.

57. I have borne in mind that I make this finding in the context of various other cross allegations against Mr Kehoe of threats made by him and also of allegations by Mr Nicholson that Mr Kehoe approached him, at some stage, and asked him for money to give favourable evidence for him. Whatever may be the truth in relation to these particular matters - Mr Kehoe denied them, and they rest, therefore, on further conflicts of evidence - the important point for present purposes, is that there is no evidence implicating the actual Plaintiff(s) in these matters, and neither do they affect the conclusion of fact that I have reached with regard to this particular recorded telephone call.

58. In the light of the above finding, in particular, therefore, I conclude that it would be inappropriate to exercise my discretion, to favour Mr Nicholson with an award of indemnity costs rather than leaving him to the normal order of costs on the recoverable basis. I have in fact considered whether, given the obvious seriousness of my finding, I ought to go further and decline to award costs in his favour at all. However, I have concluded that this would be going disproportionately far. I am dealing with one particular incident of conduct, although plainly a very serious and concerning one, but that is to be balanced against the procedural unreasonableness which I have found on the other side, in bringing and persisting in a wholly misconceived claim in conspiracy. In the circumstances, I consider that the fair result, and one which marks the court's displeasure at a party attempting to influence a witness's evidence in the way which I find occurred here, and sends out the message that this kind of conduct will not be rewarded, is simply to decline to order costs on an indemnity basis, and to confine Mr Nicholson to costs on the recoverable basis.

59. I will therefore order that

    i. **the Sixth Defendant shall recover his costs of the action, so far undisposed of, from the Plaintiff on the recoverable basis,**

    ii. **the Seventh Defendant shall recover his separate costs of the action from the Plaintiff on the indemnity basis.**

    I recognise that this might potentially cause some difficulty in the attribution of costs which may be being taxed on a different basis to different parties, but that is inevitable in the light of the conclusion to which I have come, and will simply have to be dealt with if and as it arises. (It may already arise to some extent because of the agreement made in respect of Mr Piper's costs.) I should make it clear that my intention in making the above orders is to ensure that Mr Field's financial detriment arising out of this case is as little as the rules of recovery of indemnity costs permit.

60. Since I am satisfied that the amount of the costs ultimately payable to Mr Nicholson and Mr Field, under the above order will exceed the sums presently standing in court as security for their costs, **I will also order that those sums may be paid out to them forthwith**.

61. With regard to the costs of this hearing (ie the costs of and incidental to the hearing of 6th and 7th November and any aftermath) any such hearing was inevitable and I am of the view that no party can be taken to have succeeded entirely against unreasonable opposition by any other party, and **I will make no order as to those costs, unless I receive notification that any**

party wishes to make representations to the contrary, by 4 pm on Wednesday 19th November.

62. Finally, I indicated before this hearing that I wanted an explanation as to why the document bundles in this case had contained so much unused material and duplication, having apparently included virtually everything in all three separately represented parties' disclosure lists, to the extent that only the equivalent of two out of 14 bundles of general documents had actually been referred to at the trial. I did this with a view to possibly making a specific order relating to the costs of preparing such unnecessary material. However, in the event rather more significant issues with regard to costs arose on the application. In addition, having received some written representations from the parties, I have still found it impossible to trace, to my satisfaction, the actual causes of so much unnecessary material being included in the bundles. In all the circumstances, I do not think it proportionate to conduct any further investigation to take the matter further. However, I make the warning observation that parties' advocates who unnecessarily increase the volume of documentation before the court, by including material which cannot be justified as being reasonably likely to be required in the trial, run the risk of the court imposing a costs sanction against them.

Hazel Marshall QC
Lt Bailiff

17th November 2014

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