



**Newmarket Holdings (Guernsey) Limited &  
Musa Holdings Limited**  
Royal Court  
15th December, 2014

**JUDGMENT  
50/2014**

**Decision on costs.**

**Approved Text  
15.12.2014**

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

**Between:                   NEWMARKET HOLDINGS (GUERNSEY) LIMITED                   Plaintiff**  
  
**-and-**  
  
**MUSA HOLDINGS LIMITED                   Defendant**

**Costs decision (made on the papers)**

**Judgment handed down: 15<sup>th</sup> December 2014**

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

**Counsel for the Plaintiff:                   Advocate S M McHugh**  
**Counsel for the Defendant:               Advocate S L Brehaut**

**Cases, Texts & Legislation referred to:**

The Royal Court Civil Rules, 2007  
The Companies (Guernsey) Law, 2008  
The Civil Procedure Rules (*The White Book 2014*)  
*Shaham v Lloyds TSB Offshore Treasury Limited* [2007-08] GLR 323  
*Maurice v Chief Executive of the States of Alderney* (unreported, 18 April 2011)  
*R (Boxall) v Waltham Forest London Borough Council* (unreported, 21 December 2000)  
*Brawley v Marczynski (Nos 1 and 2)* [2003] 1 WLR 813  
*Emezie v Secretary of State for the Home Department* [2013] EWCA Civ 733  
*M v Mayor and Burgesses of the London Borough of Croydon* [2012] EWCA Civ 495

## Introduction

1. The proceedings between the parties have concluded, save for the issue of costs. This outcome flows from the order made on 21 October 2014, giving leave to the Plaintiff, Newmarket Holdings (Guernsey) Limited, to withdraw its action against the Defendant, Musa Holdings Limited, which had first been tabled on 15 March 2013, at the same time giving leave to the Defendant to withdraw its Counterclaim, tabled on 12 April 2013. In each case, leave to withdraw was given pursuant to rule 61 of the Royal Court Civil Rules, 2007.
2. Each party now applies to have the costs of the proceedings awarded in its favour. I directed that I would reach a decision on those applications on the papers and so have had the benefit of full skeleton arguments and sight of other material. This judgment sets out the conclusions I have reached about the costs in this case.

## Procedural history

3. The relief sought by the Plaintiff was payment of an amount of £134,214.45 due under a Loan Agreement dated 1 February 2012, to which the Plaintiff, the Defendant and Brisk Properties Limited were the parties. The Plaintiff made a written demand for repayment to the Defendant on 28 January 2013. The Defendant responded two days later saying it was not in a position to make the repayment. A further aspect of the Plaintiff's claim was that it sought a declaration that a further sum of £29,350 would become repayable upon the sale of 64 Hamilton Terrace.
4. In Les Defenses, the Defendant raised an *exception de fond* that the action had been commenced before any cause of action had arisen. It asserted that the Plaintiff and the Defendant had been in a joint venture since 2007 to develop property and share the profits of doing so and that there had been a prior oral agreement, an express term of which was that the loan in question would not be repayable until completion of the sale of 64 Hamilton Terrace. Accordingly, once the written Loan Agreement was executed in February 2013, the agreement between the three parties was partly oral and partly written. Alternatively, there should be implied into the written agreement a term deferring the time for repayment until after completion of the said sale. The Defendant's Counterclaim referred to an earlier disposal of two properties, Smithfield House and Wolverley House, alleged to have taken place without consulting it and in respect of which it sought an account and payment to it by the Plaintiff of the Defendant's share of the profit.
5. In its Defences to Counterclaim, the Plaintiff denied that there had been no consultation, indicating that the sale had been required by a bank and that these transactions realised a substantial loss for which it had already accounted to the Defendant.
6. On 24 April 2013, the Plaintiff applied for summary judgment pursuant to rule 19 of the 2007 Rules. That application was granted by the Court on 23 October 2013 and judgment was entered on the Cause in favour of the Plaintiff.
7. The Defendant applied on 26 November 2013 for leave to appeal to the Court of Appeal. It also sought a stay of the judgment entered against it pending determination of the appeal. The Plaintiff made a cross-application to strike out the application for leave unless the full amount of the judgment debt was lodged at the Greffe and for security for costs in the sum of £15,000. This Court refused to grant a stay, but granted leave to appeal on terms that the amount of the judgment be paid into court. Nothing was paid in by the Defendant so its application for leave was renewed before the Court of Appeal.

8. The judgment of the Court of Appeal on 14 March 2014 was delivered by Beloff JA. At para. 14 he indicated that the Court of Appeal had been left with a lingering doubt as to whether it had been told the full story, which if established could realistically sustain the defence and which the Court considered could only be provided at a trial. Accordingly, that Court granted leave to appeal and granted the appeal to the extent that leave to defend was made conditional on the Defendant paying into court the full amount of the Plaintiff's claim. The Court of Appeal ordered that there would be costs in the cause.
9. In the meantime, the Plaintiff made an application dated 7 February 2014 pursuant to the Companies (Guernsey) Law, 2008 for the compulsory winding up of the Defendant. Following two adjournments, that application was withdrawn with no order as to costs.
10. On the return of the action to this Court, the Plaintiff applied for a date for the hearing of the case management conference, but that application was adjourned by consent on a number of occasions with the costs generally being in the cause, although on occasion reserved. With the recent withdrawal of the parties' respective actions, the proceedings have concluded, save for the issue of costs.

### **Parties' contentions**

11. It is common ground that the monies claimed by the Plaintiff have now been paid by the Defendant in full. This followed the sale of 64 Hamilton Terrace towards the end of August 2014 and the distributions of the proceeds of sale which followed.
12. It has always been the Defendant's case that the payment of those monies was only required to be made after that sale had completed and that the Plaintiff's action in bringing these proceedings was premature. That was, of course, the basis of the *exception de fond* pleaded, albeit that that issue was never resolved. The Defendant further criticises the Plaintiff for the aggressive way in which the latter has conducted the proceedings, both through attempting to obtain a summary judgment, where the Court of Appeal eventually set aside the judgment that had been granted, and through issuing winding up proceedings, rather than recognising the stance taken by the Defendant that this was simply a matter of timing. Put another way, had the Plaintiff not taken these various points and been patient, little or no costs would have been incurred by either party. The Defendant submits that the principles on discontinuance drawn from the Civil Procedure Rules of England and Wales should be adopted and costs awarded in its favour.
13. In contrast, the Plaintiff points to the fact that it has secured for itself the result sought from these proceedings. Further, it invites this Court to recognise the very narrow basis on which the Court of Appeal granted the Defendant leave to defend, effectively asserting that the Court of Appeal was highly sceptical about the reality of the prospects of success for the Defendant at the trial, given the overall tenor of that Court's judgment. In those circumstances, because of the discretion on costs vested in the Court, it would be appropriate to consider where the merits of the claim lay and treat the Plaintiff as if it had won and make the usual costs order for them to follow the event.

### **The law**

14. Both parties suggest a different approach for the Court to take. Each acknowledges that the relevant provision in the 2007 Rules is rule 82(1), which provides:

*“The Court may, in any action –*

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

*as the Court thinks just.”*

15. Reference has also been made to the general comments of Deputy Bailiff Collas (as he then was) in *Shaham v Lloyds TSB Offshore Treasury Limited* [2007-08] GLR 323, in which he indicated (at para. 6):

*"When awarding costs at the conclusion of proceedings, the Royal Court has a wide discretion under ... r.82 of the Royal Court Civil Rules 2007. In exercising that discretion, the Royal Court looks for guidance to English case law and at the principles in Part 44 of the Civil Procedure Rules."*

Whilst that case confirmed that the general principle that costs follow the event had been recognised in Guernsey law for many years, under the newer approach operating under the CPR, and so broadly incorporated into the 2007 Rules, looking at the issues raised in the case might lead to a departure from that overall principle leading to the making of an issue-based order.

16. However, the importance of relying on the general guidance derived from England is advanced by the Defendant by reference to a further rule set out in Part 38 of the Civil Procedure Rules, which deals with discontinuance. Rule 38.6(1) provides:

*"Unless the court orders otherwise, a claimant who discontinues is liable for the costs which a defendant against whom the claimant discontinues incurred on or before the date on which notice of discontinuance was served on the defendant."*

17. The Defendant proceeds to highlight several cases in the commentary to Part 44 of the Civil Procedure Rules to explain how rule 38.6 creates a presumption from which departure is permitted but the onus of persuading the Court to engage in such a departure rests on the Plaintiff (see, eg, para. 44.9.3):

*"Generally a claimant who discontinues must show some form of unreasonable conduct on the part of the defendant which provides a good reason for departure from the default rule. Where a defendant has failed to respond to the claimant's pre-action correspondence, in a case which was eventually compromised, the Court of Appeal decided that the appropriate order was that the defendant should pay the claimant's costs up to the date when the defence was served and that there should be no order for costs thereafter: Nelson's Yard Management Co v Eziefula [2013] EWCA Civ 235.*

*Where a party discontinues under r. 38.5(3) the discontinuance does not affect any proceedings to deal with any question of costs. The court has a discretion to exercise when considering an application under r.38.6, and one of the factors it may take into account is the fact that such an application was made sometime after discontinuance. On the facts of the case there was no relevant change in circumstances which would justify departing from the usual order that the discontinuing party should pay the costs of the discontinued action. Costs of the counterclaim were excluded from the order of the discontinuing claimant since any work on the counterclaim before the commencement of the proceedings would not have been part of the defendant's defence to the action: Hoist UK Ltd v Reid Lifting Ltd [2010] EWHC 1922 (Ch), Roger Wyand Q.C.*

*It is clear from the terms of r.38.6(1) and from the authorities that a claimant who seeks to persuade the court to depart from the normal position has to provide cogent reasons for doing so, and is unlikely to satisfy that requirement, save in unusual circumstances. A claimant who commenced proceedings takes upon himself the risk of the litigation. If he succeeds he can expect to recover his costs, but if he fails, or abandons the claim, at whatever stage in the process, it is normally unjust to make the defendant bear the costs of the proceedings which were forced upon him, and which the claimant is unable or unwilling to carry through to judgment: Brooke's v HSBC Bank Plc, Jemitus v Bank of Scotland Plc [2011] EWCA Civ 354.*

*When a party discontinues proceedings there was a presumption under r.38.6 that the defendant would be awarded their costs, and the burden was on the claimant to show that there was good reason to disapply that presumption. The fact that the claimant might well have succeeded at trial was not itself a good reason. The fact that the claimant's decision to discontinue might have been motivated by practical, pragmatic or financial reasons, as opposed to lack of confidence in the merits of the case, did not assist. The claimant had taken the risk of litigation and had exposed the defendant to the costs involved in defending it. It was difficult to see how any change in circumstances could amount to a good reason, unless connected with some conduct on the part of the defendant which deserved to result in an order for costs against them: Teasdale v HSBC Bank Plc [2010] EWHC 612 (QB), Judge Waksman Q.C."*

18. There is no equivalent of rule 38.6 in the 2007 Rules. Indeed, rule 61(1) sets out that:

*"No party may –*

- (a) discontinue or withdraw an action, counterclaim or any claim therein, or*
- (b) withdraw his defences or any part thereof,*

*except with the consent of all other parties to the action or by leave of the Court."*

There is nothing explicit here about the costs position. Para. (4) of rule 61 deals with the situation when a fresh claim is made and payment of costs ordered in respect of the earlier discontinued or withdrawn proceedings has not been made and so the principle is not engaged in the present case.

19. Where the issues between the parties have been resolved without needing a ruling from the Court thereon, in Maurice v Chief Executive of the States of Alderney (unreported, 18 April 2011) Deputy Bailiff Collas followed the guidance given by Scott Baker J in R (Boxall) v Waltham Forest London Borough Council (unreported, 21 December 2000, at para. 22), subsequently cited with approval in Brawley v Marczyński (Nos 1 and 2) [2003] 1 WLR 813, that:

- “(i) The court has power to make a costs order when the substantive proceedings have been resolved without a trial but the parties have not agreed about costs.*
- (ii) It will ordinarily be irrelevant that the claimant is legally aided.*
- (iii) The overriding objective is to do justice between the parties without incurring unnecessary court time and consequently additional cost.*

- (iv) *At each end of the spectrum there will be cases where it is obvious which side would have won had the substantive issue been fought to a conclusion. In between, the position will, in differing degrees, be less clear. How far the court will be prepared to look into previously unresolved substantive issues will depend on the circumstances of the particular case, not least the amount of costs at stake and the conduct of the parties.*
- (v) *In the absence of a good reason to make any other order the fall back is to make no order as to costs.*
- (vi) *The court should take care to ensure that it does not discourage parties from settling judicial review proceedings for example by a local authority making a concession at an early stage."*

These principles flow from the position (see para. 26 in the *Maurice* case) that "*The Court has a duty to manage its time and not to spend court time on hypothetical or academic appeals where little or nothing of any substance will be achieved and where there is no general public purpose to be served by hearing the appeal.*"

20. As noted on behalf of the Plaintiff, in England and Wales the *Boxall* case (supra) has now been superseded by *Emezie v Secretary of State for the Home Department* [2013] EWCA Civ 733, in which it was stated (at para. 4) that "*The starting point now is whether the claimant has achieved what he sought in his claim.*" The guidance referred to in that case was given by Lord Neuberger in *M v Mayor and Burgesses of the London Borough of Croydon* [2012] EWCA Civ 495 (see, in particular, para. 60 as expanded upon in the subsequent paragraphs). A distinction is drawn between a situation where the claimant is regarded as wholly successful, where the usual order for costs would be in the claimant's favour, where he is partly successful, where a more detailed analysis along the lines pursued in the *Boxall* case can be undertaken, and "*a case where there has been some compromise which does not actually reflect the claimant's claims*", where (see para. 63):

*"... the court is often unable to gauge whether there is a successful party in any respect, and, if so, who it is. In such cases, therefore, there is an even more powerful argument that the default position should be no order for costs. However, in some such cases, it may well be sensible to look at the underlying claims and inquire whether it was tolerably clear who would have won if the matter had not settled. If it is, then that may well strongly support the contention that the party who would have won did better out of the settlement, and therefore did win."*

## Discussion

21. In the light of all those principles, I approach the questions of where the justice of the costs issue lies as follows.
22. Under rule 61 of the 2007 Rules, it is open to parties to agree the terms, including as to costs, on which proceedings commenced can be withdrawn (or discontinued). The Court is only required to rule thereon in cases where agreement cannot be reached. However, unlike under the Civil Procedure Rules, there is no presumption that discontinuance results in the Plaintiff paying the Defendant's costs. The position in Guernsey is more flexible. Accordingly, the Plaintiff does not bear any burden to demonstrate why costs should not be awarded against it.
23. Where a party commences an action and then abandons it, it will generally be the case that the costs burden should fall on the Plaintiff, who had assumed the risk of commencing those proceedings. Because the Court will not determine matters that are no longer in dispute

between parties, the Court will also generally not wish to hear a full case only for the purposes of making a ruling on costs. That would not be a good allocation of judicial resources or be cost-effective as between the parties. It is for that reason that I did not consider it necessary or desirable for the Court to hear the full case before adjudicating on the costs position.

24. If it is possible from the procedural history and the written materials to divine which party would have been successful, it is permissible for the Court to allocate the costs justly in the light of that conclusion. If the outcome is less clear, then the default position may well have to be that there be no order as to costs. In any event, it remains open to this Court to extract from the procedural history particular applications and reach costs decision on specific issues. That is clearly allowed where most of the costs have been expressly reserved but also applies in a case such as the present where the costs have been left in the cause. Had the proceedings been contested through to their conclusion, as is clear from the *Shaham* case (*supra*), it would have been open to either party to raise specific issues for consideration of such an issue-based ruling.
25. I regard the position reached by the Court of Appeal on the application for summary judgment as having some significance to where the justice of this case lies. Having allowed the Defendant's appeal to the extent that it did, the Court of Appeal did not award the Defendant its costs of the summary judgment proceedings. Instead, it left those costs as costs in the cause. In effect, the Court of Appeal was prepared to treat the costs incurred by the Plaintiff in bringing the application for summary judgment and the costs of the Defendant in resisting that application, including the costs incurred in appealing so as to set aside the judgment that had been entered, as falling where the ultimate success lay. To that extent, deciding about the costs associated with the summary judgment proceedings can either be dealt with in the overall assessment of which party would have succeeded, or might now be taken as if it were a specific issue, where the costs now need to be decided in the light of the Court of Appeal's decision.
26. The impression I have formed is that the Court of Appeal concluded that it had to give leave to defend on a very narrow basis. But for that conclusion, it would have upheld the summary judgment entered against the Defendant and the Defendant would in all likelihood have been ordered to pay the Plaintiff's costs of the proceedings. In allowing the appeal on the basis that it did, the Court of Appeal appears to have envisaged that the Defendant would struggle to satisfy this Court at trial that the loan was only repayable after the sale of 64 Hamilton Terrace. This was the reason why it made the leave to defend conditional on paying the amount of the claim into court. In those circumstances, where the order often made when an appeal is successful is for the successful party to have its costs of the appeal (and the costs incurred in the Court below), the Court of Appeal left open the possibility that the Defendant would succeed and so potentially be entitled to its costs whilst also leaving open what I consider it regarded as the more likely possibility that the Plaintiff would succeed and so not be forced to pay the Defendant any of the costs associated with the summary judgment application and the subsequent appeal against that judgment. Because the proceedings have now been withdrawn, there remains a degree of speculation as to which of those outcomes would have followed.
27. This is not, in my view, a case where the Plaintiff has simply abandoned its claims and so should be forced to pay for the costs wasted by the Defendant in resisting the now abandoned claim. In any event, I do not consider it appropriate to import into the 2007 Rules the presumption created in Part 38 of the Civil Procedure Rules. If I consider the reason why leave to withdraw the proceedings was sought and granted, it is that the relief sought by the Plaintiff was no longer needed because the amounts in question had been paid in full. This points towards the Plaintiff having succeeded, albeit that the Defendant asserts that this outcome equally supports its arguments that the timing at which the repayment was due was

the central question, which has not been determined, and the time at which payment was made by it remains consistent with its claim that this was only to follow the completion of the sale of 64 Hamilton Terrace.

28. In my opinion, the view taken by the Court of Appeal offers more support to the Plaintiff's underlying claim than to the Defendant's. Further, the Court of Appeal rejected the Defendant's argument that there were grounds for implying a term into the written contract on the basis of business efficacy, referring instead to the Defendant's own commercial interests. Having the benefit today of looking back at how events have unfolded, I incline to the view that the Defendant's decision to defend the Plaintiff's Cause was motivated as much as anything by its apparent cash flow problems. Those same cash flow problems operated when it responded to the original demand for repayment and the comment quoted at para. 3 of the Court of Appeal's judgment ("*whilst not specifically stating that the whole balance would be repayable from the proceeds of sale of 64 Hamilton Terrace, it was based on this understanding that the Loan Agreement was signed*") supports such an impression. In my experience, it is not unknown for a debtor to resist a claim for repayment of a debt in order for it to buy time until it is in a better financial position to make repayment. That seems to have been the position in this case. Therefore, because I take the view that this is a case to which the principles expressed in the *Maurice* case (*supra*) can be applied (as developed by reference to the later English case in *M v Croydon* (*supra*)), I will take as my starting point that the Plaintiff would have succeeded and so would, in principle, have obtained an order for its costs. In doing so, I am expressly rejecting the Defendant's submissions that the presumption derived from rule 38.6(1) of the Civil Procedure Rules should apply to this case. I am satisfied that this is not a case where the Defendant should be awarded any of its costs, with the consequence that paragraph 2 of its application dated 25 September 2014 is dismissed.
29. I have, however, also had the benefit of seeing some correspondence passing between the parties' Advocates making various proposals about how the case should proceed or finally be resolved. These exchanges were conducted "*without prejudice save as to costs*" and may affect where the overall justice lies.
30. From the outset, the Defendant was suggesting that the proceedings be "*adjourned for a period of 6 to 12 months in order that Hamilton Terrace can be sold and all outstanding matters resolved between the parties*". That proposal was rejected and the summary judgment application followed. More recently, the Defendant suggested staged payments of the amounts due but with no order as to costs, to which the Plaintiff made a counter-offer of the full payment being made, but on the basis that 75% of its total costs be paid. Thereafter, when 64 Hamilton Terrace had been sold with the Defendant repaying the loan amount in full, the Defendant offered to consent to withdrawal of the action with no order as to costs. The Plaintiff responded by offering to accept 50% of its costs, which stood at that time at around £75,000.
31. Those costs will now have risen as a result of the parties engaging in the present dispute over costs. If the costs incurred by the Defendant are of a similar order, then the costs involved in these proceedings will be almost as great as the amount that was actually in dispute. To that extent, I am concerned that the way the parties have conducted themselves is not entirely in keeping with the principles set out in rule 1 of the 2007 Rules.
32. In the light of the various offers made and my overall assessment of how these proceedings have been conducted, I consider that I can properly re-visit the steps that have been taken during the course of these proceedings. In doing so, I have noted that the parties agreed that the withdrawal of the winding up application brought by the Plaintiff and then not pursued would result in there being no order as to costs. That agreement may point towards making such an order now as being consistent with the principles accepted in *Maurice* (*supra*). Equally, considering the distinct element in these proceedings of the summary judgment

obtained by the Plaintiff and then set aside on appeal, had this been approached in a similar fashion, the position reached might have been that the costs incurred by both parties in pursuing and resisting the summary judgment application would have been ordered to be borne by each of them.

33. In my judgment, that outcome would reflect the justice of how the application was resolved. The Plaintiff would have expected to secure its costs of obtaining judgment as a result of its application being successful. The Defendant might have expected to be awarded its costs for successfully appealing that order, at least to a certain degree. Therefore, although the Court of Appeal ordered that the question of costs should be left open to await the outcome following trial, I take the view that I can now assess what costs order is most appropriate in respect of that self-contained application.
34. Where the two stages of success at first instance and on appeal were almost even leads me to conclude that there should be no order as to costs. Such an order reflects the fact that the Plaintiff brought an application that was not ultimately successful but the basis on which the Defendant succeeded in avoiding judgment being entered against it was only through being required to pay the full amount sought by the Plaintiff into court. This outcome was not such an unqualified success as to justify awarding costs in favour of the Defendant and, given the overall position taken by the Court of Appeal, I consider that, had it known that there would not be a trial, the most generous order it would have made as far as the Defendant is concerned would have been to make no order.
35. By extracting for the entirety of the proceedings the summary judgment application and the appeal, I am satisfied that the outcome is a just one. I have recognised that the Plaintiff has not abandoned its claim (in the sense of no longer seeking anything from the Defendant), where a costs award against it might follow, simply because it has forced the Defendant to incur expense in engaging in litigation for no apparent purpose, but has actually obtained what it sought to obtain through the process. Because I regard the Plaintiff as having been the party succeeding overall, I start from the position that it is appropriate that it should recover its costs, rather than simply making no order at all. However, because the Plaintiff chose to take the course of seeking summary judgment where, if unsuccessful, as ultimately proved to be the case, it must have realised it was at risk of an adverse costs order in respect of that application, I take the view that it is just to make a specific issue-based award in respect of that application. In circumstances where the Plaintiff substantively gained nothing through pursuing that application, I do not consider it appropriate that it should benefit from a costs award in its favour. Equally, although the Defendant avoided judgment being entered against it, the terms of the decision of the Court of Appeal were sufficiently unusual that I do not consider that I should make any positive award of costs in the Defendant's favour. Consequently, the best I can do is to make no order and to leave each party to bear the costs they incurred in respect of the summary judgment application and the associated appeal.

## **Conclusion**

36. For the reasons given, I have concluded that the Plaintiff's costs of these proceedings (which, for the avoidance of any doubt, includes the costs involved with the current costs applications) should be paid to it by the Defendant on the standard recoverable basis, to be taxed if not agreed, save for the costs incurred by both parties in respect of the Plaintiff's application for summary judgment and the appeal thereon, where there will be no order as to costs.