Mourant Ozannes v Dr Eberhard Braun (as Insolvency Administrator of Walter Marketing Gmbh & Co)
Court of Appeal
11th December, 2014

JUDGMENT 51/2014

Appeal against a costs order made on 3rd April 2014.

Approved Text
11 December, 2014

IN THE GUERNSEY COURT OF APPEAL

CIVIL DIVISION
Appeal No. 478

11th December, 2014

Between: **MOURANT OZANNES** **("Appellant")**

-v-

DR EBERHARD BRAUN (AS INSOLVENCY ADMINISTRATOR OF WALTER MARKETING GMBH & CO) **("Respondent")**

Advocate M Newman for the Appellant
Advocate M Adkins for the Respondent

JUDGMENT

CROW JA
Introduction

This is the judgment of the court.

1. Mourant Ozannes are appealing against a costs order ("the Costs Order") made on the 3rd April 2014 by McMahon, Deputy Bailiff. He gave his full reasons for making that Costs Order later, on the 29th May 2014 ("the Costs Judgment"). On the 31st July 2014 he gave Mourant Ozannes permission to appeal, not because he believed that the appeal had any real prospects of success but solely because he considered there is a public interest in this court having an opportunity to provide guidance on the approach to be taken when considering wasted costs applications against firms of Advocates.

2. The circumstances in which the Costs Order came to be made in this case are unusual and the

course of the Proceedings was long and tangled, but we will limit our summary of the background to a brief outline of the salient points. We can do so partly by reference to Mourant Ozannes' own files, because legal professional privilege has been waived.

The procedural history

3. The substantive Proceedings were brought by the respondent in this appeal as plaintiff in the action ("the Plaintiff") against Brantridge Estates Limited ("the Defendant"). The Defendant is a Guernsey registered company. Between 2000 and 2003 it apparently received about €500,000 from a German limited partnership, Walter Marketing GmbH & Co KG ("Walter Marketing"). On the 31st December 2003 the Plaintiff (a practising lawyer in Germany) was appointed as the insolvency administrator over the assets of Walter Marketing. He took the view that the payments to the Defendant might be recoverable under s. 134(1) of the German Insolvenzordnung, in respect of which there is a two year limitation period ("the Claim").[1] By email dated the 21st December 2005 he contacted Mourant Ozannes[2] asking for their assistance in issuing and pursuing proceedings against the Defendant in Guernsey, and indicating that the Claim faced an "*imminent statute-barred limitation after 31 December 2005*" under German law. Having conducted the usual conflicts check, Mourant Ozannes replied the next day indicating their willingness and ability to act. The Plaintiff subsequently indicated in further email correspondence that the German limitation period had been extended by agreement with the Defendant's German lawyers and would expire on the 31st January 2006. A formal letter of retainer was issued on the 26th January 2006, and proceedings against the Defendant were issued in this jurisdiction by Mourant Ozannes on behalf of the Plaintiff ("the Proceedings") four days later, on the 30th January 2006, the day before the German limitation period expired.

4. If it was not in any event apparent, the email exchanges between Mourant Ozannes and the Plaintiff in December 2005 and January 2006 made clear that Mourant Ozannes were not holding themselves out as having any familiarity with German law, and that they were entirely dependent on the Plaintiff and his firm (in practice, principally Dr Tashiro) for information and advice as to the relevant principles, provisions and effect of German substantive and procedural law. The Plaintiff does not suggest otherwise.

5. Once the Proceedings had been issued, there followed many months of interlocutory duelling between the Defendant and the Plaintiff. From early 2006 until July 2009 there was a succession

[1] We will refer in this judgment to the German provisions on 'limitation' because that is the word used by the German law experts although it might have been more accurate to refer instead to 'prescription' because our understanding is that the effect of the relevant provisions is to extinguish the claim.

[2] The firm's name was Ozannes until May 2010, but for simplicity we will refer to them in this judgment as 'Mourant Ozannes' throughout.

of hearings involving an application for default judgment, a *Requête Civile*, an application for security for costs, an *Exception de Fond* and an *Exception de Forme*. In the course of these various applications, Mourant Ozannes filed on behalf of the Plaintiff an affidavit sworn on the 13th June 2008 by Dr Ulrich Haas, an expert on German law, in answer to the Defendant's *Exception de Fond*. The main issue he was addressing was whether, as a matter of German law, the commencement of proceedings in Guernsey had the effect of halting the limitation period under s. 204(1) of the German Civil Code. In this context, he mentioned in a footnote that under s. 204(2) the suspension imposed by s. 204(1) ends six months after "*the final and absolute decision in the proceedings commenced, or after they end in another way*". He then quoted the rest of s. 204(2) as follows:

> *"If the proceedings come to a standstill because the parties do not prosecute them, the date of the last act in the proceedings by the parties, the court or other body responsible for the proceedings takes the place of the date when the proceedings end. Suspension commences again if one of the parties continues the proceedings."*

6. The significance of this provision will become apparent later. For present purposes it is sufficient to note that s. 204(2) was quoted in footnote 22 of Dr Haas's affidavit, and that that footnote had been highlighted in the copy of his affidavit subsequently disclosed by Mourant Ozannes, suggesting that someone in the firm had considered it significant – although who that was and when it happened has not been established.

7. After all the interlocutory skirmishes, a substantive Defence was finally tabled on the 23rd October 2009. In an email dated the 29th January 2010, Mourant Ozannes explained to the Plaintiff that a pleaded response to a Defence was not always essential, but they set out a number of reasons why a *Réplique* would be advantageous in this case, and the Plaintiff seems to have accepted that advice. There then followed a long chain of correspondence between Mourant Ozannes and the Plaintiff in which instructions, documents and translations were sought and provided with more or less efficiency on either side from time to time. The Plaintiff claims to have counted a total of 73 pieces of correspondence passing between them in the period from January 2010 to January 2012. Although not formally conceded, the figure is not disputed by Mourant Ozannes and it provides some indication of the extent of the communications between the lay client and their legal representatives in this period.

8. In the meantime, on the 27th November 2009 a consent order ("the Consent Order") had been lodged with the court which provided that "*the Plaintiff is to lodge and serve a Réplique by 31 December 2009*" , and that "*the Case Management Conference listed for 27 November 2009 be adjourned to the first available date after 31 January 2010*". The date for lodging the *Réplique* was subsequently extended by agreement between Mourant Ozannes and Carey Olsen (the Defendant's Advocates) on a number of occasions, the last agreed date being the 15th January

2010. No further extensions were agreed or even sought.

9. Indeed, once the Consent Order had been lodged, no further formal steps were taken in the Proceedings at all for more than a year and a half, until the *Réplique* (barely more than a page long) was lodged on the 29th July 2011. As a result, it is common ground that the Proceedings became *périmée* on the 28th November 2010.

10. There is nothing in Mourant Ozannes' file or in their affidavit evidence to suggest that those handling the case realised that the proceedings had become *périmée* at the time. At some point later, probably in the autumn of 2011, Mourant Ozannes did realise. In an internal Memorandum dated the 16th September 2011 (nearly 10 months after the Proceedings had become *périmée*), Advocate McHugh stated that "*for the first time I have come across peremption ... I was not sure what to do in terms of writing to Careys in view of the potential Pre-emption [sic] issue*".

11. Five months later, on the 2nd February 2012, Mourant Ozannes contacted the Plaintiff by email and explained for the first time about the "*peremption issue*", adding this:

> *"I can confirm 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."*

12. Three months after that, in an email dated the 9th May 2012, Dr Tashiro (on behalf of the Plaintiff) raised with Mourant Ozannes for the first time the possibility that the Claim had in any event become time-barred under German law pursuant to s. 204(2) of the Civil Code.

13. An application to restore the Proceedings to the *Rôle des Causes en Preuve* was finally issued by Mourant Ozannes on behalf of the Plaintiff on the 30th July 2012 ("the Restoration Application"). On the same day the Defendant issued an application seeking orders for the Proceedings to be struck out either (i) on the grounds that they were *périmée* or (ii) for want of prosecution pursuant to r. 52(3), or (iii) on the basis that the Claim was time-barred pursuant to s. 204 of the German Civil Code ("the Strike-out Application").

14. In support of the Strike-out Application, the Defendant adduced expert evidence from Regina Rath, Counsel at Simmons & Simmons, Frankfurt. Dr Tashiro was provided with a copy of that evidence and she told Mourant Ozannes in an email dated the 7th August 2012 that "*overall she is right*". Nevertheless, the Plaintiff dedicated a considerable amount of effort to preparing expert evidence in reply. Having seen the various exchanges between the Plaintiff and their German law experts, we agree with the summary given in §113 of Advocate McHugh's 3rd affidavit: there was no real difference of opinion between the experts as to the content of German law, and the only significant disagreement concerned its application to the facts of this case. In short, if it could be shown that the failure to progress the Proceedings after the Consent Order had been lodged was in the court's 'sphere of responsibility', then s. 204(2) would not

apply: but if the progress of the Proceedings was the responsibility of the parties, in particular the Plaintiff, then failure to take any formal steps after late November 2009 meant that the German limitation period would have recommenced six months later, and as a result the Claim would have become time-barred under German law in late May 2010, in other words six months before the Proceedings became *périmée*.

15. Based on the material we have seen, it is therefore apparent that the following firm conclusions can be drawn with regard to the *péremption* issue:

    15.1. Mourant Ozannes were aware from the very outset of their retainer that the German limitation period expired at the end of January 2006, so they knew that the Claim would be irretrievably lost if the Proceedings were dismissed.

    15.2. There is no evidence that Mourant Ozannes ever advised the Plaintiff before November 2010 (or indeed at any stage until February 2012) of the risk that the Proceedings would become *périmée* if no formal steps were taken for over a year. Mourant Ozannes have never asserted that any such advice was given.

    15.3. Mourant Ozannes' failure to take any formal steps in the Proceedings for well over a year after the Consent Order had been lodged resulted in the Proceedings becoming *périmée* on the 28th November 2010. That conclusion is irresistible.

    15.4. Relisting the CMC within 12 months after the Consent Order had been made would have prevented the Proceedings from becoming *périmée*. In other words, there was no need to await full instructions, or obtain further documents or translations of existing documents in order to draft and lodge a fully detailed *Réplique* before taking a formal step in the Proceedings and thereby stopping time running for the purposes of *péremption*.

    15.5. The failure to relist the CMC for the first available date after the 31st January 2010 and the failure to lodge a *Réplique* by the stipulated date constituted breaches of the Consent Order. (The position might have been different if the order had provided for a *Réplique* to be lodged "*if so advised*" and if the CMC had been adjourned for a date to be fixed by agreement between the parties.)

16. We also consider that the following firm conclusions can be drawn with regard to the position under German law:

    16.1. Once the Consent Order had been lodged, the further progress of the Proceedings was the responsibility of the Plaintiff (specifically with regard to the relisting of the CMC and the service of the *Réplique*) for the purposes of s. 204(2).

16.2. As those steps were not taken for a period of more than six months after the Consent Order had been lodged, the German limitation period started running again in May 2010 and, since the Proceedings had been issued the day before the limitation period expired, the Claim became time-barred under German law the day after the limitation period recommenced.

16.3. There is no basis on which it could fairly be suggested that Mourant Ozannes either knew or ought to have known that that was the position in German law at any point between November 2009 and May 2010. Mourant Ozannes are not German lawyers, and the Plaintiff knew that. The fact that a translation of s. 204(2) of the German Civil Code had appeared in a footnote in an expert report in June 2008 dealing with a different issue does not lead to the conclusion that Mourant Ozannes knew or ought to have realised its potential effect in relation to the conduct of the Proceedings well over a year later in different circumstances. Indeed, it is fair to observe that the risk that the German limitation period would recommence if formal steps were not being taken in the Proceedings in this jurisdiction appears to have occurred to Dr Tashiro (like the Plaintiff, a practising German lawyer) only in May 2012.

Dismissal of the Proceedings & costs

17. The Plaintiff's Restoration Application was heard together with the Defendant's Strike-out Application on the 22nd and 23rd July 2013 before the Deputy Bailiff. He gave a reserved judgment on the 23rd October 2013 dismissing the Proceedings on the basis that they had become *périmée* on the 28th November 2010 and that they would not be restored. He also held that, even if that had not been the case, the Proceedings would have been struck out on the grounds that the Claim had become time-barred under German law.

18. On the 6th November 2013, the Defendant issued an application ("the Defendant's Costs Application") for (i) its costs of the Proceedings against the Plaintiff on the indemnity basis, (ii) including the cost of obtaining certain German legal advice, (iii) an uplift from the usual rate in respect of Advocates' fees, and (iv) interest on such costs as had already been paid by the Defendant. On the 21st February 2014, the Plaintiff issued an application ("the Wasted Costs Application") for an order (i) that Mourant Ozannes be disallowed their profit costs and any reimbursement of expenses for the entirety of the Proceedings, (ii) for the repayment of any profit costs or expenses thus far paid to Mourant Ozannes, (iii) that Mourant Ozannes pay such of the Defendant's costs as may be found payable by the Plaintiff, and (iv) that Mourant Ozannes pay the Plaintiff's costs of the Wasted Costs Application and of the Defendant's Costs Application on the indemnity basis.

19. Colllas Crill, the Plaintiff's new Advocates, wrote to Mourant Ozannes on the 19th February 2014 setting out in detail the reasons why the Plaintiff was claiming a wasted costs order against them. The basis of the Wasted Costs Application was further explained in two affidavits sworn by Dr Tashiro on the 26th February and the 26th March 2014 respectively, and in the Plaintiff' Skeleton Argument dated the 27th February 2014. Mourant Ozannes have accordingly had a full opportunity to understand and reply to the Wasted Costs Application and have not identified any further evidence they might have wished to adduce in response.

20. The Defendant's Costs Application and the Plaintiff's Wasted Costs Application were only partially successful. In summary, the Deputy Bailiff allowed the Defendant's application for costs of the Proceedings (save for the costs of its unsuccessful raising of the *Exception de Fond*) including the cost of German legal advice, but only on the standard basis and without any uplift or interest. He ordered the Plaintiff to pay those costs in respect of the period up to the 28th November 2010, being the date on which the Proceedings became *périmée*. He ordered Mourant Ozannes to pay any costs incurred thereafter. As between the Plaintiff and Mourant Ozannes he made a similar division, disallowing profit costs and disbursements in respect of the period since the 28th November 2010, but not before then. Since all parties had enjoyed incomplete success, he made no order as to the costs of the various costs applications.

21. Mourant Ozannes are now appealing the Costs Order in so far as it affects them. Before dealing with their submissions, it is convenient to start by summarising the Deputy Bailiff's reasoning.

The Costs Judgment

22. The first issue which he addressed (Costs Judgment, §29 – 31) was whether the Wasted Costs Application was suitable for summary disposal. Basing himself on the Privy Council decision in *Harley v. McDonald* [2001] 2 AC 68 he decided that the court should only exercise its jurisdiction to make a wasted costs order in cases where it is able to deal with the issue summarily because the factual position is sufficiently clear. In the case before him, the Deputy Bailiff reached the conclusion that Mourant Ozannes had had ample opportunity fully and fairly to present their case, and as a result he considered it was a suitable case for summary disposal.

23. The second issue he addressed (Costs Judgment, §32 – 35) was the applicable test. So far as that was concerned, he regarded himself as being bound by *Havilland Estates Ltd v. Channel Island Ceramics Ltd* (1993) 15.GLJ.51 and *E v. E* [2007-08] GLR 133 to find that a wasted costs order can only be made against lawyers who have been guilty of a 'serious dereliction of duty'.

24. The Deputy Bailiff then applied that test to the facts of this case (Costs Judgment, §36 – 43). He said that one of the duties of an Advocate is to progress litigation expeditiously and not to let an

action become *périmée*. As such, there is a breach of duty in all cases where a matter becomes *périmée*. The question whether in any given case that breach of duty is sufficiently serious to warrant a wasted costs order would depend on the particular facts. In relation to this case, he observed that it was apparent to all concerned that the Proceedings had been issued on the very last day of the German limitation period, and although he accepted that Mourant Ozannes were reliant on the Plaintiff in relation to matters of German law, he decided that Mourant Ozannes should have maintained closer supervision of the procedural timetable than they did, and that they were accountable to the Plaintiff and to the court for their failure to file the Plaintiff's *Réplique*. He considered that the outcome of the Restoration Application might have been different if steps had been taken earlier, and he concluded that it was a serious dereliction of Mourant Ozannes' duty to let matters stagnate as long as they did. Advocate Shepherd, appearing for Mourant Ozannes, accepted at the costs hearing that the delay was "*unacceptable by reference to what the Guernsey Bar expected*" (Costs Judgment, §43). The Deputy Bailiff concluded that there had been a serious dereliction of duty.

25. The next point with which he dealt (Costs Judgment, §44 – 49) was causation. So far as that was concerned, he adopted a 'but for' test derived from *Harley v. McDonald* and *Brown v. Bennett (No. 2)* [2002] 1 WLR 713, asking himself whether on the balance of probabilities the costs would have been incurred but for Mourant Ozannes' dereliction of duty. He concluded that the costs incurred up to the date when the Proceedings became *périmée* were properly incurred in the ordinary course of litigation and should accordingly be paid by the Plaintiff, but the costs incurred thereafter were occasioned by Mourant Ozannes' dereliction of duty and should therefore be paid by them. Nevertheless, in the course of considering the apportionment of blame as between the Plaintiff and Mourant Ozannes for the events which occurred (or did not occur) in the period from late 2009 to August 2012, he concluded that the Plaintiff had to share some of that blame. In particular, he said that if he had not been faced with the Restoration Application, he would in any event have struck the Proceedings out on the basis that the Claim was time-barred under German law (Costs Judgment, §47).

26. In the event, the Deputy Bailiff made the Wasted Costs Order summarised in §20 above.

The grounds of appeal

27. The basis on which Mourant Ozannes seek to persuade this court to overturn the Wasted Costs Order may be summarised under the following headings:

    27.1. First, they say that the Deputy Bailiff was wrong to deal with the matter summarily because the issues in dispute were too complex and contentious for such disposal.

27.2. Secondly, they say that even if the Proceedings became *périmée* as a result of their dereliction of duty, the action would in any event have been struck out because the Claim was time-barred under German law before it became *périmée*, and as a result the necessary causal link between any dereliction of duty and any waste of costs is absent.

27.3. Thirdly, they say that the Deputy Bailiff misunderstood what is meant by 'serious dereliction of duty' in that he failed to appreciate the requirement both for manifest delay and inappropriate conduct.

27.4. Finally, Mourant Ozannes say that the Deputy Bailiff was wrong, on the basis of the concession quoted in §11 above, (i) not only to deprive them of their profit costs and disbursements as against the Plaintiff (which they had conceded) but also to impose on them a liability for the Defendant's costs (which they had not conceded), and (ii) to impose that liability on Mourant Ozannes both in respect of the Restoration Application (which was the intended subject matter of their concession) and also the Strike-out Application (which they say formed no part of the concession).

28. In the course of oral argument, particular emphasis was placed on the first two Grounds as Mourant Ozannes' principal case on appeal. These two points are closely related, but we will deal with them separately. Before doing do, we will consider briefly the threshold test that an appellant has to satisfy, and also offer some observations about wasted costs orders in general, before turning to a detailed consideration of the various Grounds of appeal in this particular case.

The test on appeal

29. It is common ground that the court below had jurisdiction to make the Wasted Costs Order by virtue of s. 1(1) of the Royal Court (Costs and Fees) (Guernsey) Law, 1969,[3] and r. 82(1) of the Royal Court Civil Rules 2007.[4] As such, this is an appeal against a discretionary judgment. The test on appeal in such circumstances is well established and not in dispute. An appellant must show that:

29.1. the judge below misdirected himself with regard to the principles in accordance with which his discretion should be exercised, or

29.2. the judge took into account matters which he ought not to have taken into account, or

[3] "*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.*"

[4] "*The Court may, in any action (a) make any such order as to costs of the proceedings, or of any stage or application in the proceedings ... as the Court thinks just.*"

failed to take into account matters that he should, or

29.3. the decision was plainly wrong, in the sense that no reasonable judge properly directed could reasonably have reached the same decision.

30. It is often said that an appellant faces a particularly high threshold test where he is seeking to appeal against a costs order, and that is even more true in relation to a wasted costs order, because any such order will have been made by the trial judge who will have become familiar with the proceedings and the parties' conduct and the nuances of the action to an extent that is impossible to replicate in an appellate court: *Persaud v. Persaud* [2003] EWCA Civ 394, at §41.

Wasted costs

31. Since this court has not previously had an opportunity to consider in detail the jurisdiction to make wasted costs orders against legal representatives, and since the Deputy Bailiff specifically gave permission to appeal in order to afford us that opportunity, it may be convenient to start by setting out some general propositions about the correct approach, both in terms of principle and of practice. In the course of argument and in reaching the conclusions set out below we have considered a wealth of authority including, from this jurisdiction, *Havilland Estates*, *E v. E*, and *Jefcoate v. Spread Trustee Co Ltd*, Royal Court 11/2013; from Jersey, *Drake v. Gouveia* [2000] JLR 411; from England, *In re Jones* (1870) LR 6 Ch 497, *Myers v. Elman* [1940] AC 282, *Thompson v. Fraser – Practice Note* [1986] 1 WLR 17, *Gupta v. Comer* [1991] 1 QB 629, *Ridehalgh v. Horsefield* [1994] 3 All ER 848, *Roache v. News Group Newspapers* [1998] EMLR 161, *R v. Bromley LBC, ex parte Barker* (unreported, 17th April 2000, QBD), *Brown v. Bennett (No. 2)*, and *Radford & Co v. Charles* [2003] EWHC 3180 (Ch); and, on appeal from New Zealand to the Privy Council, *Harley v. McDonald*. We have derived most assistance from *Harley v. McDonald* which is the one recent case that is least contaminated by the detailed legislative or procedural rules that may apply in other jurisdictions, and addresses the issues most cleanly by reference to principle.

31.1. Wasted costs orders have both a punitive and a compensatory function. They serve to punish unacceptable conduct by lawyers (thereby serving the wider public interest by encouraging best practice in the legal professions generally) and they also serve to compensate (or at least immunise) a party against legal expenses incurred unnecessarily as a result of the conduct of legal representatives which falls short of the required standard (thereby serving the narrower public interest of preventing innocent litigants from suffering unnecessarily from the sins of the lawyers). Only if those two purposes can be served should a wasted costs order be made in any particular case.

31.2. The applicable test is whether the legal representative has been guilty of a serious dereliction of duty to the court. That test, which was accepted in this jurisdiction in *Havilland Estates* and *E v. E*, derives from the House of Lords decision in *Myers v. Elman*. In the court below the Plaintiff urged the Deputy Bailiff to abandon it, and to adopt instead the different test now set out in §5.5 of Practice Direction 46 to the English CPR.[5] The argument was that, since *Havilland Estates* and *E v. E* borrowed the 'serious dereliction of duty' test from the then existing English case-law, the courts of this jurisdiction should move with the changes that have occurred in England since then and adopt whatever test is currently applicable there. The Deputy Bailiff rejected that argument. The Plaintiff has not served any notice of cross-appeal seeking to reopen the issue in this court, and accordingly we have not heard argument on it, but our view is that the Deputy Bailiff was right. The decision in *Myers v. Elman* was based on the court's interpretation of its unfettered discretion to award costs: that is the jurisdiction conferred on the Royal Court by s. 1 of the 1969 Law, and accordingly *Myers v. Elman* provides persuasive authority. Since then, the position in England has changed, not as a result of any development of the common law, but rather as a result of express rule changes. There is a significant difference between, on the one hand, reflecting in this jurisdiction a development of the common law that has evolved in England (which may well be desirable) and, on the other hand, altering the general law of this jurisdiction by reference to a mere rules change in England (which may well not). Similarly, there is also a significant difference between, on the one hand, adopting in this jurisdiction a purely procedural device that has been developed in the English CPR without waiting for a formal, procedural rule change in this jurisdiction (which may well be desirable) and, on the other hand, altering a substantive legal test by reference to which a discretionary jurisdiction is exercised by reference to some mere rule change in England (which may well not). In England itself, the decision in *Gupta v. Comer* serves to illustrate the point that a rule change which alters the applicable substantive test for some purposes (there, wasted costs orders in civil proceedings) should not be interpreted as imposing an equivalent change for other purposes (namely, wasted costs orders in criminal cases). *A fortiori*, the courts here should not, merely by reference to an English Practice Direction which has no equivalent in this jurisdiction, adopt a different threshold test for the substantive exercise of a discretionary power unless they are satisfied that that change is inherently justified. In the present context, we do not consider that any change is

[5] The English court is now able to make a wasted costs order if and only if (a) the legal representative has acted improperly, unreasonably or negligently, and (b) the legal representative's conduct has caused a party to incur unnecessary costs, or has meant that costs incurred by a party prior to the improper, unreasonable or negligent conduct have been wasted, and (c) it is just in all the circumstances to order the legal representative to compensate that party for the whole or part of those costs.

warranted. The 'serious dereliction of duty' test has been in place here for over 20 years since the decision in *Havilland Estates* and we see no reason to alter it.

31.3. There are two important aspects of the test that bear particular emphasis – one concerning the gravity of the breach and the other concerning the person to whom the duty is owed. As regards the first, the notion of a serious dereliction of duty is to be equated with gross negligence or gross neglect. Mere negligence of itself is insufficient. As regards the second, it is important to emphasise that there must be a breach of duty to the court, not just a breach of duty to any lay client.

31.4. As a result, there is a significant difference of principle between a wasted costs order and a claim in negligence by a client against his own legal representatives. The court's jurisdiction to make a wasted costs order is based on and triggered by a breach by the legal representatives of their duty to the court. By contrast, in a negligence action the former clients are basing their claim on a breach by their former lawyers of a duty of care owed to them personally. Without being unduly prescriptive, this is likely to mean in practice that a wasted costs order is far more likely to be made in favour of one party against the opposing party's lawyers: by contrast, wasted costs orders as between a litigant and his own lawyers (or former lawyers) are likely to be much rarer. Similarly (and again without seeking to be unduly prescriptive) wasted costs orders are far more likely to be made in response to conduct directly involving the prosecution or defence of proceedings in court, such as a failure to comply with a court order or with rules of court,[6] or non-attendance at a court hearing, or grossly inappropriate conduct at the hearing. By contrast, incompetent advice to the lay client is far less likely of itself to prompt a wasted costs order, and is more likely to find its remedy in a negligence action. That is not to say that the two situations (breach of duty to the court and breach of duty to the client) are mutually exclusive. Far from it: in many cases, a lawyer's misconduct may well involve a breach of both, but the court should always bear in mind that any exercise of its summary jurisdiction in costs is an expression of its control over the conduct of litigation, not a peremptory ruling in a negligence action.

31.5. As to the applicable procedure, applications for costs are, of necessity, dealt with summarily. That being the case, if the court is faced with a wasted costs application and it reaches the conclusion that in order to dispose of the issues fairly significant further documentary disclosure is required in addition to that adduced at trial, or that significant further witness evidence is required, or that cross-examination is required of witnesses who have already given evidence, then that is likely to be a powerful indicator that the

[6] See for example *Radford & Co v. Charles* at §30 – 31.

issue is not suitable for a wasted costs order. This should not encourage respondents to try raising complex, tangential issues which do not need to be resolved in order to dispose fairly of a wasted costs application, and the court should be astute to disregard any such forensic blustering. Furthermore, in every case the lawyers against whom the application is made will have an opportunity to show cause why the order should not be made, and (if well advised) they are likely to put at least some new material before the court that was not available at trial for that purpose. Of course, that should not lead to the conclusion that the matter is unsuitable for summary disposal. Moreover, there may be cases (and this is one) where a substantial body of further material is put before the court because legal professional privilege has been waived: again, that should not necessarily discourage the court from determining a wasted costs application, if it can comfortably do so on a summary basis. But if an application cannot fairly be disposed of without the necessary examination of significant new evidential material, then the court should consider carefully whether a wasted costs order is the appropriate tool. In all cases, it will be a matter of judgment for the court hearing the application to assess whether it can be determined summarily.

31.6. In making that assessment, the court should bear in mind that, particularly in cases where the costs order is being sought by former clients against their own former lawyers, alternative remedies may be available, either by means of a claim in damages for negligence (in order to satisfy the private interests of the litigant) or by means of disciplinary proceedings (to meet the wider public interest in punishment and protection). It is not the function of the court, in exercise of its summary jurisdiction in costs, entirely to usurp either of those separate remedies. Of course, the compensatory and punitive functions of a wasted costs order share a considerable amount of territory with the compensatory function of claims in damages and the punitive function of disciplinary proceedings, but the separate availability of those other remedies underlines the need for the court to ensure that it is not being asked to use an inappropriate tool for the job in hand in any case where a wasted costs order is being sought. In a clear case the court can certainly make a wasted costs order and thereby save the parties the added expense and delay that would be incurred in pursuing a negligence action: but if the court feels that the issues are not suitable for summary determination then it can and should decline to make a wasted costs order, not because it means thereby to exonerate the respondent legal representatives, but because it knows that another procedure is better suited to assessing their culpability and/or the extent of any losses caused.

31.7. Fairness requires that legal representatives facing a wasted costs application should have an opportunity to understand and answer any application that may be made against them,

and proportionality requires the court to assess whether the costs at stake balanced against the likely complexity of resolving a wasted costs application justify a contested determination of such an application. To that extent, we agree that the English CPR r. 46.8(2)[7] and §5.7 of Practice Direction 46[8] correctly reflect the requirements of natural justice and procedural expediency, and should broadly be followed in this jurisdiction.

32. With these general observations in mind, it is now possible to address the various grounds of appeal.

Ground 1: summary disposal

33. Mourant Ozannes' first point is that the relevant issues were too complex and contentious to be determined summarily, not least because the Wasted Costs Application amounted to a claim in negligence against Mourant Ozannes. For that reason, it was also urged on us that a wasted costs order in this case was particularly inappropriate because it raised the undesirable possibility of inconsistent judicial rulings if in due course a separate negligence action were to be brought by the Plaintiff against Mourant Ozannes (for example, for damages for the loss of the opportunity of recovering €500,000 from the Defendant), and that claim were to fail. Advocate Newman also urged on us that it was unfair for any lawyer to have a wasted costs order made against him in circumstances that amounted to a finding of gross neglect, because that would be likely to skew the outcome of any subsequent negligence action.

34. In considering these submissions, it is important to keep the context firmly in mind. Two points in particular bear emphasis. First, it was conceded by Advocate Newman for Mourant Ozannes that there will be cases (rare, he would say) in which the court can properly make a wasted costs order which is tantamount to a finding of negligence against a lawyer, so long as the facts are sufficiently straightforward and readily ascertainable. Secondly, he also conceded that the question whether any given case is suitable for summary determination is a matter of judgment for the trial court. Both of these concessions were rightly made, and as a result two consequences flow. First, it is unavoidable that some wasted costs orders will be made which are tantamount to findings of gross neglect on the part of a lawyer, thereby raising the risk of inconsistent findings and skewing any negligence action which Advocate Newman foresaw.

[7] "*The court will give the legal representative a reasonable opportunity to make written submissions or, if the legal representative prefers, to attend a hearing before it makes [a wasted costs] order.*"

[8] "*As a general rule the court will consider whether to make a wasted costs order in two stages – (a) at the first stage the court must be satisfied – (i) that it has before it evidence or other material which, if unanswered, would be likely to lead to a wasted costs order being made; and (ii) the wasted costs proceedings are justified notwithstanding the likely costs involved; (b) at the second stage, the court will consider, after giving the legal representative an opportunity to make representations in writing or at a hearing, whether it is appropriate to make a wasted costs order in accordance with paragraph 5.5 above.*"

Secondly, the question for us in this appeal is not whether we would have decided that this Wasted Costs Application was suitable for summary determination, but whether the Deputy Bailiff was plainly wrong to do so. We do not consider that he was.

35. The main part of Mourant Ozannes' argument under this heading is that there were disputes of fact which needed to be resolved, and which could not be resolved without cross-examination. A list of 10 such disputes was scheduled to their Skeleton Argument. In summary, they said this:[9]

> *"the questions of precisely when and how the proceedings became périmée, what caused the action to become périmée and/or prescribed (under either German or Guernsey law), whether the prescription of the claim can be attributed (solely, partly or at all) to [MO] and whether, as a consequence, [MO] is or would be liable in negligence are all questions that are crucial to determining whether the Wasted Costs Order should have been granted and are questions that cannot ... be determined on a summary basis without testing the evidence by way of cross-examination of the key witnesses, Advocate McHugh and Dr Tashiro."*

36. We disagree in every particular. For the reasons we have already given, it is entirely clear exactly when and why the Proceedings became *périmée*, and when and why the Claim became time-barred under German law. Furthermore, it was neither necessary nor appropriate for the Deputy Bailiff to make any finding of actual liability in negligence against Mourant Ozannes before making a summary determination of costs: the question was simply whether they had been in serious dereliction of their duty to the court. Moreover, we can discern no relevant conflict of evidence between Advocate McHugh and Dr Tashiro that required any cross-examination of either. The nearest Mourant Ozannes get to identifying a conflict is the question when limitation under German law was first raised by the Plaintiff, but the facts in relation to that issue speak for themselves: it is a matter of record that Dr Haas said what he said in his report in June 2008, and that Mourant Ozannes received and filed a copy of that report with the court; and it is a matter of fact that the Plaintiff has not produced the slightest evidence to suggest that he ever mentioned to Mourant Ozannes the possibility of limitation under German law resulting from a lack of progress in the Guernsey Proceedings until May 2012.

37. In relation to Advocate Newman's point on fairness (§33 above) we would also observe in passing that it can cut either way. For example, if a litigant seeks a wasted costs order and that application is heard on the merits and dismissed, that might skew against him any subsequent claim he may seek to bring in negligence. A partial answer to that concern would be that the test for negligence is different from the test for wasted costs, but nevertheless there remains a risk that any determination on the merits of a wasted costs application could impact on a subsequent negligence action whichever way the costs application was determined.

[9] Skeleton Argument dated the 8th October 2014, §15.

38. In all the circumstances, the Deputy Bailiff was fully entitled to reach the conclusion that the issues raised in the Wasted Costs Application were capable of being fairly resolved on a summary basis. He had the enormous advantage of having heard the Restoration Application and the Strike-out Application, and he was accordingly familiar with the factual issues and the whole course of the litigation which itself gave rise to the Wasted Costs Application, while Mourant Ozannes who appeared for the Plaintiff in the Restoration and Strike-out Applications had been made fully aware of the complaints made against them. Of course, in any case where a trial judge hears a consequential costs application he will have had the advantage of previously having heard and determined the substantive proceedings: but in this case there was an exceptionally close nexus between the specific issues in the Restoration and Strike-out Applications and those in the Wasted Costs Application, and that has a significant bearing on the question whether the latter could fairly be determined on a summary basis.

Ground 2: causation

39. Mourant Ozannes' second point is one of causation. They point out that (i) the Deputy Bailiff held (Costs Judgment, §47) that the Proceedings would in any event have been struck out because the Claim had become time-barred under German law some six months prior to the Proceedings becoming *périmée* in this jurisdiction, and (ii) that Mourant Ozannes were themselves entirely dependent on the Plaintiff's expertise in German law throughout and the Deputy Bailiff acknowledged as much (Costs Judgment, §46) and recognised that the Plaintiff was not "*blameless*" (Costs Judgment, §47). On that basis, they say that even if the Proceedings became *périmée* as a result of their dereliction of duty, the action would in any event have been struck out, and as a result the necessary causative link between any dereliction of duty on their part and any waste of costs is absent.

40. We reject this argument. The reason why the German limitation period expired was exactly the same as reason why the Proceedings became *périmée* – namely, Mourant Ozannes' inexcusable failure to comply with the Consent Order by relisting the CMC or lodging a *Réplique*, or taking any other formal step to progress the Proceedings for well over a year. That is the serious dereliction of duty to the court identified by the Deputy Bailiff in the Costs Judgment. The fact that the Claim became time-barred six months before it became *périmée* does not exonerate Mourant Ozannes from that breach of duty: it simply reflects the different legal regimes in Germany and Guernsey respectively. Similarly, the fact that Mourant Ozannes did not appreciate the risk that the Claim would become time-barred under German law (any more than they realised that the Proceedings would become *périmée* under Guernsey law) cannot exonerate them from their serious breach of duty to the court: the relevant breach was non-compliance with the Consent Order, not a failure to recognise the consequences of inaction under Guernsey

law. Applying the 'but for' test, on the balance of probabilities the costs of neither the Restoration Application nor the Strike-out Application would have been incurred but for Mourant Ozannes' dereliction of duty.

41. For these reasons, we reject the suggestion that the Deputy Bailiff erred in relation to causation. He was fully entitled to take the view that the costs incurred in the period after the Proceedings became *périmée* would not have been incurred but for Mourant Ozannes' serious dereliction of duty. The question whether fairness then also required Mourant Ozannes to pay the costs of the earlier stage of the Proceedings (before they became *périmée*), which were effectively thrown away as a result of the action being struck out, falls to be considered separately under Ground 4 in relation to the exercise of the court's discretion.

Ground 3: application of the test

42. The test applied by the Deputy Bailiff was whether there had been a sufficiently serious dereliction of duty. Mourant Ozannes accept that that is the right test, but they say that the Deputy Bailiff misunderstood what it means. Basing themselves on *E v. E*, they submit that both manifest delay and inappropriate conduct is required in every case, and that the Deputy Bailiff overlooked the requirement for both elements. They also contend that the Wasted Costs Application was advanced solely on the basis of negligence pure and simple, not on the basis of any breach of duty to the court, let alone any imputation of misconduct. In particular, Advocate Newman urged us to accept (which we do) that nothing said forensically on behalf of Mourant Ozannes (for example, the observation quoted in §24 above) was intended as, or could amount to, a formal concession that they had been guilty of negligence.

43. That point aside, in our judgment this Ground of appeal must be rejected. As a matter of general principle it is not necessary in all cases for a litigant seeking a wasted costs order to establish that there has been inordinate or inexcusable delay, nor is it appropriate to qualify or restrict the applicable test ('serious dereliction of duty') by reference to concepts of professional misconduct. What there must be in all cases is a serious dereliction of duty, irrespective of whether that involves any delay, and irrespective of whether it also constitutes professional misconduct. That is the true *ratio* of *E v. E*, at §69 – 70, following *Havilland Estates*, which was in turn following *Myers v. Elman*, and we would disapprove of any attempt either to enumerate the factual circumstances that are capable of giving rise to a finding of serious breach of duty, or to define the concept exhaustively (a warning expressed also in §55 of *Harley v. McDonald*).

44. Furthermore, it is entirely clear from the Plaintiff's Skeleton Argument dated the 27th February 2014 (in particular, the heading above §21, and the content of §25 and §26) that the Wasted Costs Application was being advanced expressly on the basis that Mourant Ozannes had been

guilty of a serious dereliction of duty to the court, and not just on the basis of a beach of their duty of care to their client.

45. It is fully apparent from the Costs Judgment, in particular at §39 and §43, that the Deputy Bailiff applied the correct test, finding (as it happens) that there had been inexcusable delay in this case (which was conceded) and also that there had been a serious dereliction of Mourant Ozannes' duty to the court. We would add only this. It bears emphasis that, in any case where a wasted costs application is made, the court will be considering whether the lawyers were in serious dereliction of their duty to the court. Not every incompetent act or omission by a lawyer will constitute a sufficiently serious breach. Indeed, we would add that, although non-compliance with the rules of court and with court orders are in principle capable of constituting a sufficiently serious dereliction of duty, not every act or omission of non-compliance will be enough. In each case it will be a matter of judgment for the trial court, based on the exact nature of the rule or order in question, the nature of the non-compliance and also the consequences of that non-compliance, to assess whether the threshold test has been satisfied.

Ground 4: the apportionment of costs

46. Finally, Mourant Ozannes contend that the Deputy Bailiff made the wrong apportionment of costs. Although they confirmed in the court below that they were not resiling from the concession quoted in §11 above, they contend in this court that that concession only provided an assurance to the Plaintiff that Mourant Ozannes would not charge him for the Restoration Application: they contend that the Deputy Bailiff was wrong to take it into account in also visiting on Mourant Ozannes a costs liability as against the Defendant, and wrong again in doing so in relation to both the Restoration Application and also the Strike-out Application.

47. There is nothing in this point. First, the Deputy Bailiff did not treat Mourant Ozannes' concession as any form of contractual undertaking, nor did he base his judgment on any interpretation of the precise scope and effect of that concession. Rather, he took the general tenor of the concession into account (as he was fully entitled to do) along with all the other matters mentioned in the Costs Judgment as indicative of Mourant Ozannes' culpability for what had happened, and as contributing to the conclusion that the right order for costs was to apportion liability as he did. Secondly, there is in any event a very considerable degree of overlap between the Restoration Application and the Strike-out Application, which was based partly on *péremption* and partly on the Plaintiff's failure to prosecute the Proceedings expeditiously. In taking the approach he did, the Deputy Bailiff did not err in principle, nor did he take irrelevant material into account, nor did he reach an unreasonable decision.

48. Indeed, there might have been an argument for saying that, if he had applied the logic of *Drake*

v. Gouveia (which he would have been perfectly entitled to do), he could have reached the conclusion that Mourant Ozannes should have been disallowed their profit costs and expenses of the entire Proceedings, and should have been held liable to the Defendant for the entirety of its costs, not just from date on which the Proceedings became *périmée*. That would arguably have been the outcome if the English approach had been adopted.[10] However, since there is no notice of cross-appeal on this point and we heard no argument, we do not need to and cannot reach any conclusion on it. Suffice it to say that Ground 4 of this appeal is unsustainable.

Conclusion

49. For these reasons, the appeal is dismissed.

50. Finally, we would add this. Advocate Newman's arguments under Ground 1 spilled over into a more general submission that, because of the standing of Advocates in this jurisdiction, it would be particularly inappropriate, and would unfairly undermine public confidence in the profession, to make a wasted cost order which was tantamount to a finding of negligence in any case where there had not been a trial of the relevant issues with cross-examination. We are unable to accept that submission. For the reasons we have given, it is appropriate to make a wasted costs order only in certain limited circumstances. If in any given case the court reaches the conclusion that such an order is appropriate then it should make the order, and it should not be deterred from doing so for fear of diminishing the profession's public stature. Indeed, the converse is true: nothing would be more likely to bring the profession into disrepute than a public perception that serious derelictions of duty were going unpunished and that litigants who had been seriously disadvantaged by such conduct had in all cases to incur the added cost and delay of a separate negligence action before obtaining just satisfaction.

[10] See §(b) in footnote 5 above.