

Cases, Texts & legislation referred to:

Shaham v Lloyds TSB Offshore Treasury Limited [2007-08] GLR 323
Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (18 March 1970)
The Royal Court Civil Rules, 2007
The Royal Court (Costs and Fees) Rules, 2012
Evidence (Proceedings in Other Jurisdictions) Act 1975, as extended to Guernsey by the Evidence (Proceedings in Other Jurisdictions) (Guernsey) Order 1980
The Royal Court (Costs and Fees) (Guernsey) Law, 1969
Perpetual Media Capital Limited v National Bank of California (unreported, 20 July 2012)
Credit Suisse Trust Limited v Nemni (unreported, 6 March 2012)
Astro Exitto Navegacion SA v Hsu (unreported, 20 December 1983)
United States of America v Philip Morris Inc. [2003] EWHC 3028 (Comm)
Gredd v Busson [2003] EWHC 3001 (QB)
Genira Trade & Finance Inc v Refco Capital Markets Limited [2001] EWCA Civ 1733
Re Asbestos Insurance Coverage Cases [1985] 1 All ER 716
King v Telegraph Group Limited [2004] EWCA Civ 613
The Boeing Company v Ppg Industries Inc. (unreported, 30 June 1988)
Alpha Developments Limited v Barclays Wealth Trustees (Guernsey) Limited (unreported, 7 May 2014)

Introduction

1. Following the judgment I handed down on 12 September 2014, upholding the opposition of the Second to Fifth Respondents to the issuing of witness summonses to them pursuant to a Letter of Request received from the US District Court for the District of Massachusetts, the Second to Fifth Respondents have sought an order that the Applicant pay the recoverable costs of and occasioned by the proceedings in which the parties engaged. This is a modification of their previous position, which was that costs should be awarded to them on the indemnity basis. The Application for costs dated 24 September 2014 is opposed by the Applicant.
2. I indicated that I would determine the Application on the basis of written submissions. Advocate Merrien's submissions on behalf of the Applicant, responding to points made on behalf of the Second to Fifth Respondents by Advocate Tim Corfield in correspondence, are dated 10 October 2014 and were accompanied by the Second Affidavit of W. Scott Thompson dated 9 October 2014 (hereafter referred to as "the Thompson Affidavit"). Advocate Corfield's submissions are dated 17 October 2014.
3. This judgment should be read in conjunction with the earlier substantive judgment, which sets out in more detail the background to the dispute between the parties, which I do not repeat here. I apologise to the parties for the fact that it has taken me longer than I had originally envisaged to consider the competing submissions and then to prepare this decision.

The parties' positions

4. The Second to Fifth Respondents rely on the principle that costs follow the event. As Deputy Bailiff Collas (as he then was) recognised in *Shaham v Lloyds TSB Offshore Treasury Limited* [2007-08] GLR 323, this Court has a wide discretion when considering how to award costs at the conclusion of proceedings, but adopts the general guidance that an unsuccessful party will be ordered to pay the costs of the successful party. Whilst the approach today may be more nuanced than it was in the last century, arising perhaps from the greater scrutiny that may now

be given to the basis of a party's success and the opportunity being recognised of treating distinct aspects of the proceedings differently (an issues-based approach), that general principle remains the starting point. In the present case, Advocate Corfield suggests that there is no question that the Second to Fifth Respondents won and so should be awarded their costs.

5. Advocate Merrien's submissions invite a different conclusion through raising a number of arguments, some of which appear to me to be quite novel. Whilst he very properly acknowledges that there is power to award costs, his first comment is that this power should be exercised having regard to the terms of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (18 March 1970) (hereafter referred to as “the Hague Convention”). By reference to its provisions, the rôle of the Applicant has not been to make any independent claims of its own before this Court. Indeed, there is an assertion that the Applicant has not submitted to the jurisdiction of the Royal Court (because it is engaged only in proceedings before the US Court), and so is not subject to the costs jurisdiction anyway. These are matters addressed, in particular, in the Thompson Affidavit. His second submission is that the jurisdiction of the Court to award costs in these circumstances is not covered by rule 82 of the Royal Court Civil Rules, 2007 because none of the proceedings have been commenced by way of tabling a Cause. That said, Advocate Merrien accepts that there is power to award costs pursuant to the Royal Court (Costs and Fees) Rules, 2012, albeit that he suggests it would not be appropriate for the Court to exercise that power. The third element of his submissions refers to the cases relied on by Advocate Corfield, where he submits that none is directly in point. Again, the factual reasons why the Applicant suggests this is not so are set out in the Thompson Affidavit. The Applicant has invited the Court to make no order as to costs.
6. Each of these grounds objecting to the making of any costs order has been covered in Advocate Corfield's submissions. He notes, in particular, that the provisions of the Hague Convention operate in international law, but have been given effect domestically by the Evidence (Proceedings in Other Jurisdictions) Act 1975, as extended to Guernsey by the Evidence (Proceedings in Other Jurisdictions) (Guernsey) Order 1980, in which no limitations on the costs consequences are stated. Indeed, he has raised again the view of the Second to Fifth Respondents that the conduct of the proceedings by the Applicant is really such that consideration could be given to making an award of full or partial indemnity costs pursuant to rule 83 of the 2007 Rules.

Costs jurisdiction

7. Although neither Advocate has referred to it, I take as my starting point section 1(1) of the Royal Court (Costs and Fees) (Guernsey) Law, 1969, which provides that:

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

8. Rule 82 of the 2007 Rules is, therefore, consistent with, and a development of, that overarching provision. Accordingly, the limitation referred to by Advocate Merrien does not assist the Applicant. The Court is able to make awards of costs in its discretion. In doing so, it will consider what outcome is just, whether the matter falls squarely under rule 82 or under the general jurisdiction referred to in the 1969 Law.

9. At the outset, it seems appropriate to refer to the way in which these proceedings developed. Because there were not two distinct stages, the parties have perhaps focused too readily on their different perceptions of what has actually taken place. Had the Applicant proceeded as is permissible to apply *ex parte* for orders pursuant to the Letter of Request, the Second to Fifth Respondents may never have been engaged at all in the proceedings. If the concerns aired by the Second to Fifth Respondents were bound to succeed in any event, this Court would not have granted any order. In effect, the Court would have declined to execute the Letter of Request and so would have declined to summons any of the Second to Fifth Respondents to be examined before a Commissioner. However, once the Second to Fifth Respondents had engaged the services of Advocate Corfield, the correspondence shows that he did not want the Applicant to adopt that permissible course of seeking orders *ex parte* but wished instead to be heard. The concern, of course, was that orders would be made, which in turn would then have necessitated an application to set them aside being made by the Second to Fifth Respondents. In those circumstances, being on notice that the Second to Fifth Respondents would challenge any orders made, Advocate Merrien chose to proceed with caution by notifying Advocate Corfield of the hearing on 2 May 2014 and I followed a similar approach to the one I had taken in *Perpetual Media Capital Limited v National Bank of California* (unreported, 20 July 2012) of hearing the matter *inter partes* so as to consider the objections raised.
10. The reason for returning to these procedural matters is to emphasise that the first *ex parte* stage of the proceedings could have been conducted without any involvement of the Second to Fifth Respondents. Had the outcome been the same, they would have had no opportunity to make any costs application because the only costs with which I am concerned are those associated with the proceedings before the Court. In those circumstances, many of the points made by Advocate Merrien would be relevant. However, had orders been made for the execution of the Letter of Request, it would clearly have been open to the Second to Fifth Respondents (or any of them) to apply to the Court to have those orders set aside on conventional grounds. In those proceedings, the Applicant would have been a respondent and would have had the choice as to whether to resist the application to set aside or not to engage in those proceedings. Once the decision was taken to oppose the application to set aside, the usual costs risks of participating in *inter partes* proceedings would, in my view, follow. That is effectively the position adopted by Advocate Corfield. What the Applicant has done is to involve itself in more than merely facilitating an application to the Court so as to seek an order for the execution of the Letter of Request.
11. Against that background, where the two stages of what can occur under the 1975 Act, as extended to the Bailiwick, are conflated into a single set of proceedings, I am satisfied that it is open to this Court to make costs awards at the conclusion of, and in the light of the outcome in, those proceedings in the same way as it would have jurisdiction to reach a just decision on where the costs should fall in ordinary civil litigation before the Court.

Submission to jurisdiction

12. In the light of that analysis, it follows that I am not persuaded that there is any merit in the suggestion that the Applicant has not submitted to the jurisdiction of this Court. The relief sought by the Applicant pursuant to the Letter of Request was for the Second to Fifth Respondents to be examined before a Commissioner on the questions set out in the Letter and to produce documentation all of which would be transmitted to the US Court for the purposes

of the proceedings taking place before it. The application dated 25 April 2014 expressly identified the Applicant as the person seeking relief, albeit the application dated 25 September 2013 appears to have envisaged Advocate Merrien’s firm requesting the Court to make an appropriate order. However, in relation to the second stage of the proceedings, ie, the challenge to the orders made raised by the Second to Fifth Respondents, the Applicant would have been served as being a necessary party to those proceedings. The position of the Applicant of actually participating in the hearing of this challenge is, in my view, comparable to (and certainly no lower than) that of Mr Nemni in *Credit Suisse Trust Limited v Nemni* (unreported, 6 March 2012), where the Court made costs orders against him.

13. I am quite sure, adopting as necessary the reasoning of Goff LJ in *Astro Exito Navegacion SA v Hsu* (unreported, 20 December 1983), to which Advocate Corfield has referred me, that the Applicant is amenable to a costs order of this Court. The detailed facts set out in the Thompson Affidavit relating to the absence of any involvement in Guernsey of him or anyone else on behalf of the Applicant are, in my view, of no relevance to the decision I am called upon to reach. The question for me is about what order, if any, to make relating to the costs of the proceedings that were conducted as inter partes proceedings before this Court. Quite how any order can be enforced if there are no assets of the Applicant within the jurisdiction is another matter. If the Applicant wishes to advance the issues it has raised here in Massachusetts, if that is where enforcement is attempted, it will be a matter for the court considering the matter at that time to take into account. I am quite satisfied that I have sufficient jurisdiction over the Applicant as a party to proceedings before this Court to make an award of costs against it, should I consider it just to do so.

Convention provisions

14. The Applicant has highlighted Article 14 of the Hague Convention which it suggests indicates that no order for costs should be made. The Article provides:

“The execution of the Letter of Request shall not give rise to any reimbursement of taxes or costs of any nature.

Nevertheless, the State of execution has the right to require the State of origin to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2.

The requested authority whose law obliges the parties themselves to secure evidence, and which is not able itself to execute the Letter, may, after having obtained the consent of the requesting authority, appoint a suitable person to do so. When seeking this consent the requested authority shall indicate the approximate costs which would result from this procedure. If the requesting authority gives its consent it shall reimburse any costs incurred; without such consent the requesting authority shall not be liable for the costs.”

One of the exhibits to the Thompson Affidavit is a copy of the Responses given by the United Kingdom to the Questionnaire under the Hague Convention, which contains answers relating to costs. Those answers also indicate that there is limited scope for the United Kingdom, and so Guernsey, as a requested State, to seek reimbursement of costs in relation to executing a Letter of Request.

15. Advocate Merrien also reminds me that the request received comes from “*a judicial authority of a Contracting State*”, which is why he submits the Applicant has done no more than

facilitate the making of the request from one judicial authority to another. He acknowledges, however, that the procedure applying under the 1975 Act, as extended, mirrors that under the Civil Procedure Rules of England and Wales.

16. In light of the scheme of the Hague Convention, because there is no provision for recovering costs (save as to expert fees), Advocate Merrien suggests that the Court should be slow to consider making an award of any costs in favour of the Second to Fifth Respondents.
17. In response, Advocate Corfield has focused attention on the word “*execution*” in Article 14, noting that the outcome in the present case was a decision declining to execute the Letter of Request. Accordingly, Article 14 is dealing with a different aspect of the Convention regime from what occurred here, and so is of no application.
18. He also refers to Article 26, enabling a Contracting States to “*request reimbursement by the State of origin of fees and costs, in connection with the execution of Letters of Request, for the service of process necessary to compel the appearance of a person to give evidence, the costs of attendance of such persons, and the cost of any transcript of the evidence*”. The answer given by the United Kingdom in respect of this Article is that “*presently, there is no policy to seek reimbursement*”. Again, Advocate Corfield submits that this is dealing with different considerations meaning that Article 26 is irrelevant.
19. I quite appreciate that, in the ordinary course of events, a Letter of Request can be put before this Court and orders made so as to enable the evidence sought under it to be obtained for use in the proceedings taking place elsewhere and that there are no adverse consequences falling to be dealt with. The expense of executing the Letter of Request can potentially be resolved by the requesting Court in the proceedings for which the evidence in question is to be obtained. To that extent, the principles referred to by Advocate Merrien are not contentious. The problem arises where there is a challenge to the making of an order (or an application to have an order made set aside). This is not something covered in the Hague Convention itself and is very much a matter for each Contracting State’s domestic law. I have noted from the answers to the Questionnaire given by the United Kingdom that its response to the question about whether a Letter of Request received from abroad as a requested State can be contested is positive and that the frequency indicated if “*Often*”. The responses also indicate that it is the Civil Procedure Rules that allow an application to set aside to be made by anyone who is ordered to give evidence.
20. Whilst Guernsey may not follow the practice in England and Wales of having specific rules for this purpose, it is clear to me that, once the potential witnesses have engaged in the process, the Court is no longer engaging in the type of *ex parte* consideration where there can be no adverse costs consequences, but rather a contested matter of a type where there will be a winner or a loser or a combination of both extremes. Procedurally, I took the view, as I had done in the *Perpetual Media* case (*supra*), that it made sense to deal with the objections on notice rather than await the no doubt inevitable application to set aside any orders for examination of the witnesses actually made. This was the course of action adopted by Moore-Bick J (as he then was) in *United States of America v Philip Morris Inc.* [2003] EWHC 3028 (Comm). That judgment does not deal with the costs issues arising from the decision not to order the examination of a witness and there was no appeal from that part of His Lordship’s orders. However, just because the application to execute the Letter of Request

was made on notice, I doubt that this would have prevented the court from making such award of costs as it considered appropriate to reflect that witness's success.

21. If the correct position in respect of Letters of Request received in Guernsey is that costs should not be awarded following the hearing of the application, but that costs might be available on an application to set aside any orders made, there would be no incentive on the part of a potential witness facing a summons to appear before a Commissioner to engage until such time as an order has been made *ex parte*. That seems to me to be the logical consequence of the submissions made by Advocate Merrien. It is an unattractive position to adopt because it would involve the Court being left to make orders which were then susceptible to challenge rather than having the benefit of argument as to why it should not make the orders sought in the first place. It appears to be a more efficient and cost-effective use of resources to proceed by way of an application on notice where it is envisaged that there will be opposition to any order made. Accordingly, whilst recognising the Convention's terms about executing Letters of Request, the stage of the process where a witness challenges the making of an order that he be examined is, in my view, a distinct stage where the ordinary principles of costs in inter partes proceedings applies.

Other guidance

22. The Applicant has gone to considerable lengths to try to distinguish the cases to which Advocate Corfield has drawn attention. The pertinent facts about the position of the US Trustee acting in *Gredd v Busson* [2003] EWHC 3001 (QB) are contained in the Thompson Affidavit. Insofar as it is relevant, I accept that this appears to have involved someone who can be regarded as part of a body having the hallmarks of an emanation of the state. However, it is not clear from the judgment of Burnton J in that case that this had any bearing at all on the award of costs.
23. The five paragraphs at the end of his judgment are primarily directed to whether the costs should be awarded on the indemnity basis or the normal basis. Burnton J concluded that "*the conduct of those acting for the trustee ... was sufficiently unreasonable for it to be appropriate not to follow the normal basis of assessing costs, but to make an order for indemnity costs*" (see para. 43). This approach pre-supposes that the ordinary approach to deciding the basis for awarding costs at the conclusion of those proceedings was applicable. There is no reference to the costs jurisdiction being available only because the unsuccessful party was associated with the US Government. His Lordship was critical of the US Trustee proceeding with an application where it was obvious (or should have been obvious) that the terms of the order sought did not comply with English requirements (see para. 41). This was, therefore, a further example of a case in which there was a challenge to an order made by the Master where ordinary principles of costs orders operated.
24. In relation to two further English decisions (*Re Asbestos Insurance Coverage Cases* [1985] 1 All ER 716 and *Genira Trade & Finance Inc v Refco Capital Markets Limited* [2001] EWCA Civ 1733), the distinction drawn by Advocate Merrien is that these cases went on appeal. In such circumstances, he submits that the party's choice of appealing took these appellants outside the scope of the Convention, thereby exposing them to adverse costs orders. The difficulty is that, as Advocate Corfield points out, an appellate court is "*not a court of original jurisdiction*" (see *King v Telegraph Group Limited* [2004] EWCA Civ 613) and has all the powers of the lower court, including the power to make a costs order. The mere fact, therefore, of having escalated the proceedings challenging the orders made is not, in my

judgment, any true basis for distinguishing the outcome of those cases. They are, once again, examples of where the courts have made costs orders in the same way they do in respect of other proceedings before them.

25. The position on costs at the first level of review is perhaps indicated by reference to the exchanges at the end of *The Boeing Company v Ppg Industries Inc.* (unreported, 30 June 1988) which was included with Advocate Corfield's original bundle of authorities. This was also a case which reached the English Court of Appeal. An application to set aside the Master's orders had been made to a judge and the judge's decision had then been appealed. In response to questions, Counsel indicated that various costs orders of different types, no doubt reflecting the judge's view of success and failure, had been made and the Court of Appeal then dealt with the costs that should follow both on the appeal and in the court below. To my mind, this case indicates that there is no merit in Advocate Merrien's submission that the costs awards were only made in the two cases to which he referred because those matters went on appeal. Treating the present case as equivalent to an application to set aside an order already made, it is apparent that the Court has jurisdiction to award costs in its discretion by reference to success or otherwise.
26. The further suggestion in the Thompson Affidavit that the position in the *Refco* case (*supra*) was somehow distinguishable because it was trading in the United Kingdom and so susceptible to a costs order that could be enforced is another instance of him grasping at straws. There are many occasions where a party to litigation before this Court has little or nothing by way of assets in the jurisdiction. That is not a reason for desisting from entering judgment, or making a costs order, against it. The absence of assets may lead to a request for, or an application in respect of, security for costs being provided, where the Court will on occasion consider whether or not the additional costs of enforcing elsewhere should be lodged by way of security or, indeed, a greater amount, all pursuant to well-established principles. This issue of trading is not, in my view, of any relevance here.
27. One area, however, where I do agree with Advocate Merrien relates to the Guernsey decision of *Alpha Development Limited v Barclays Wealth Trustees (Guernsey) Limited* (unreported, 7 May 2014), which concerned domestic proceedings in which there was an application to issue a Letter of Request. Within the context of the ongoing proceedings before this Court, it was clearly open to me to make a costs order under the terms of the 1969 Law and the 2007 Rules. By way of comparison, had the US Court declined to issue a Letter of Request, I imagine that that court could have made an appropriate costs order in relation to the failed application. The situation in that case is the reverse of the present case so that the fact that costs were awarded to follow the event on the application failing does not support the argument that the proper order for costs in the present case should be the same.

Conclusion

28. For the reasons given, despite Advocate Merrien raising a number of innovative arguments, I am not persuaded that I should exercise the discretion it is acknowledged the Court has here in such a way as to make no order as to costs. I do not regard the Hague Convention principles as pointing in that direction where a person against whom an order for an examination as a witness is made, or contemplated, challenges that outcome. In effect, what took place was a contested matter resulting in a judgment being handed down and the general principle that costs follow the event is my starting point.

29. Although Advocate Corfield has invited the Court to consider awarding costs on a full or partial indemnity basis because of the manner in which the Applicant conducted the proceedings, I do not consider any such order to be just. As I have indicated, the Second to Fifth Respondents did not need to involve themselves in the Applicant's *ex parte* application, but chose to do so. Although I declined to execute the Letter of Request, the way in which Advocate Merrien conducted the matter did not, in my view, take the case into the realms covered by rule 83 of the 2007 Rules.
30. Because of the apparent insistence of Advocate Corfield to be able to be heard on the Applicant's application to give effect to the Letter of Request, I have considered carefully what timeframe any costs award should cover. It is, of course, quite legitimate for parties to correspond in trenchant, but courteous, terms with a view to dissuading another party not to pursue a matter through the Court. Where there is no cause tabled or application made to which a party has had to respond, there is no basis for the Court making an adverse costs order. The best the party can do is to negotiate a contribution towards its costs. Once the matter reaches the Court and the party which is ultimately successful puts in an appearance, the possibility of a costs order being imposed, if terms cannot be agreed, emerges.
31. In these circumstances, I have weighed in the balance everything that has happened between the possibility of inter partes proceedings being aired and judgment. I am satisfied that, however I may view the considerable lengths to which the Second to Fifth Respondents have gone to secure the outcome for which they argued (and which can, if thought appropriate, always be tackled in the event of taxation of the bill of costs), the conduct of that opposition in the context of the actual proceedings before the Court has not been of a nature to deprive the Second to Fifth Respondents of any portion of their costs. Accordingly, their costs of the proceedings from the service of the modified application dated 25 April 2014 are to be paid by the Applicant, up to and including this Application, on the standard recoverable basis, to be taxed if not agreed.