



**Barclays Wealth Trustees (Guernsey) Limited et al v
Alpha Development Limited et al**
Court of Appeal
20th March, 2015

**JUDGMENT
21/2015**

Judgment of the Court in relation to costs of the appeal. (See Judgment 19)

Approved Text
20.03.2015

**IN THE COURT OF APPEAL OF GUERNSEY
Civil Division - Appeal No 486**

On Appeal from the Royal Court of Guernsey (Ordinary Division)

20th March 2015

Before:

**John Vandeleur Martin QC
Sir David Calvert-Smith
David Anderson QC**

BETWEEN:

**(1) BARCLAYS WEALTH TRUSTEES (GUERNSEY) LIMITED
(2) SHARON ANN PARR
(3) WARNER THOMAS KOLLER
(4) GAVIN ANTHONY ST PIER
(5) STEPHEN PERRY LE RAY
(6) BARCLAYS WEALTH DIRECTORS (GUERNSEY) LIMITED
(7) BARCLAYS WEALTH CORPORATE OFFICERS (GUERNSEY) LIMITED**
Appellants/Defendants

and

**ALPHA DEVELOPMENT LIMITED
ALPHA DEVELOPMENT (CHELSEA) LIMITED**
Respondents/Plaintiffs

**Advocate Mark Dunster for the Appellants
Advocate Graham Bell for the Respondents**

COSTS JUDGMENT

MARTIN JA:

1. On 9 March 2015 we handed down judgment allowing the appeal in this matter. At the same time we gave directions for the resolution of any issues arising from that judgment. An issue has arisen as to the costs of the appeal and of the hearing below. We have had written submissions from both parties on that issue. This is the judgment of the court in relation to costs. It assumes knowledge of our previous judgment.

2. The appellants' position is that the costs should follow the event. They have put forward for inclusion in the Act of Court a draft paragraph in the following terms:

"That costs arising from the hearing before the Royal Court of Guernsey (insofar only as they relate to the disclosure of without prejudice documentation evidencing the terms of alternative offers of finance made by the Bank of Scotland) and costs before the Court of Appeal shall be paid by the Respondents to the Appellants in any event on the recoverable basis".

3. The respondents object to this paragraph. Their position is that there should be no order for the costs of the appeal, or that the appellants should have only 50% of their costs; and that in either event the first instance costs order should remain. The first instance costs order required the appellants to pay two thirds of the respondents' costs of the specific disclosure application (which included other matters than those to which the appeal related), but otherwise provided that the costs should be in the cause.
4. The basis of the respondents' objection is what they describe as the appellants' "belated and very substantial change of position". This is a reference to the appellants' decision to confine their appeal to documents evidencing offers of alternative finance made by BoS, instead of pursuing the wide-ranging disclosure sought by their application and reiterated in their notice of appeal. This decision was communicated by the appellants to the respondents and the court only at the start of the hearing of the appeal.
5. The implications for the costs of the appeal are said by the respondents to be as follows:

"Because the Defendants did not communicate their change of position prior to the hearing before this Court, it deprived the Plaintiffs of the opportunity to consider disclosing just the 'offer document' in order to compromise the application, which would have avoided the need for the Appeal. The Plaintiffs submit that the Defendants' conduct was wholly inconsistent with the Overriding Objective and ought to be penalised by this Court, and that no order as to costs is appropriate. In the alternative, the Plaintiffs submit that the Defendants should only be entitled to recover a reduced proportion of their costs of the Appeal on the recoverable basis; the Plaintiffs submit that 50% would be an appropriate figure".

6. There appear to be two strands to that contention: first, that the court should punish the appellants for the late revelation of the reduced scope of the application; secondly, that the court should make some assessment of the chance that the appeal would not have been fought at all if the revelation had been made earlier. Only the second of these looks to the possible effect on the respondents. As to the first, it does not seem to us appropriate to penalise the appellants for their decision to reduce the scope of the application: confining disclosure to what is relevant and necessary is entirely consistent with the overriding objective. As to the second, it seems to us that it is not enough for the respondents to say that they lost the chance to consider voluntary disclosure. In the first place, they did not lose that opportunity: they could have sought an adjournment in which to consider the matter, but they did not do so. In the second place, it seems to us unlikely that voluntary disclosure would have been given if there had been more time for consideration. It is notable that in their costs submissions the respondents do not say that they would have made voluntary disclosure, merely that they did not have a chance to consider doing so. Moreover, in paragraphs 12 and 13 of our previous judgment reference is made to the possibility that the respondents might need to disclose the terms of the BoS offer in order to make out their own case at trial; and when this issue was being aired in argument Advocate Bell made clear that he was not prepared to abandon resistance to the appeal for that reason. It appears to us that the respondents were concerned to avoid disclosure if they properly could.
7. In reality, the appeal was fought entirely on the question of principle – namely the status and scope of *Muller*. The question of the extent of the documentation to which the principle

applied was not raised. The respondents chose to resist the limited disclosure ultimately sought on a point of principle, and they lost. They should pay the costs of the appeal.

8. As to the costs at first instance, the respondents say that the Lieutenant Bailiff might have come to a different conclusion if the appellants had sought only the evidence of the BoS offer. We think that is unlikely. To order disclosure of any part of the without prejudice material, the Lieutenant Bailiff would have had to find a relevant exception to the without prejudice rule; and she was clearly of the view that the only suggested exception, that established by *Muller*, was unsatisfactory on a number of grounds. She, too, was focusing on the principle, not on the documents to which the principle might apply.
9. Finally, again in relation to the first instance costs, the respondents say that a substantial part of the first instance hearing and the preparation for it concerned a waiver point that the appellants lost and did not appeal; and that they should not have to pay the costs of that issue. Again, we do not agree. The appellants were entitled to production of without prejudice documents that fell within the *Muller* exception, regardless of whether or not the protection had been waived; and had that point been recognised and production ordered it is very unlikely that a separate costs order would have been made in relation to the waiver issue.
10. Accordingly we direct that the costs be dealt with in the way proposed by the appellants in the draft paragraph quoted in paragraph 2 above.