

basis. In response, Advocate Geall, on behalf of the Defendant, argues that the proper order is one for indemnity costs. Written submissions supporting these contentions were directed in the late summer of 2014. Thereafter, I am afraid that the paperwork did not make its way to me until comparatively recently so this judgment has been delayed for much longer than it should have been. I can only apologise to the parties and to the Advocates for that delay.

3. The difference of position of the parties revolves around clause 4.2 of the Plaintiff's Offer Letter dated 24 June 2011, which was accepted by the Defendant and so contains the terms of the loan agreement under which judgment was given. Clause 4.2 provides:

"All legal valuation and survey costs, document duty, court and Greffe fees and other costs and expenses of whatever nature incurred by GHL, its agents or its legal advisers, on a full and unqualified indemnity basis in connection with this Offer Letter and/or the Loan and/or the Security Documents or any other documentation connected with them, including the costs of any proceedings taken by GHL under this Offer Letter and/or the Security Documents, shall be for your account and payable by you on demand."

Pleaded case

4. Before I consider the arguments advanced as to the proper construction to give this provision in the light of the authorities to which I have been referred, I have to consider the way the Plaintiff's case has been pleaded, because that is something that has been raised by Advocate Geall. The prayer simply asks for "Costs". However, at para. 9, this element of the claim is set out more fully: *"the Plaintiff claims in accordance with the terms of the Facility Letter as set out in paragraph 3.8 above, all costs and expenses on a full indemnity basis including legal costs incurred in the recovery of the Loan."* At the time the Cause was settled, those costs were £1,195. They have continued to accrue since that time and are now in the region of £30,000. Paragraph 3.8 pleads that it was a term of the loan agreement *"that the Defendant would be responsible for all costs and expenses, including the costs of any proceedings taken by the Plaintiff to recover the debt."*
5. Advocate Geall's primary submission is that the pleaded case seeks no more than costs *"on a full indemnity basis"*, which is an order that was not resisted from the outset by the Defendant. Conversely, Advocate Duerden points out that the Cause seeks costs by reference to the terms of the loan agreement, ie, on the contractual basis agreed by the parties. Accordingly, having referred to the contractual terms, she argues that it was not necessary to have pleaded the precise wording of clause 4.2.
6. By reference to rule 10(2) of the Royal Court Civil Rules, 2007, a plaintiff's cause is required to contain:

- "(a) a statement of the material facts on which the plaintiff relies for his claim, but not the evidence by which those facts are to be proved, and*
- (b) a statement of the relief sought (including, where damages are claimed, particulars of the amount thereof so far as reasonably possible)."*

The purpose of the pleading is to let the Defendant know the case he has to meet. The relief claimed includes the costs. The Cause makes express reference to the contract under which the claim was brought. In those circumstances, even without express reference to clause 4.2 of the loan agreement, I regard it as clear that the Plaintiff is proceeding throughout in reliance on the contract. In any event, in order to clarify the position, the Defendant would have been at liberty to seek further information as to the basis on which the claim was being put. The Defendant has been well aware that the Plaintiff is claiming costs on the contractual basis. In my view, there is no substance in Advocate Geall's pleading point.

Basis for costs

7. In any event, the dispute between the parties really turns on a question of construction, namely whether the addition of the words "*and unqualified*" in clause 4.2 adds anything to the full indemnity basis otherwise agreed to be applicable to any costs award in this case. Advocate Duerden submits that the inclusion of these words in principle means that the Plaintiff has the right to recover all its costs in their full amount and without reservation or limitation of any kind. In summary, the Plaintiff is entitled to recover pound for pound everything it pays out so that it is not out of pocket at all. She suggests that this is an aspect of the freedom of contract between the parties where they have agreed in clause 4.2 to proceed on this basis. Those costs are simply added to the Defendant's account with the Plaintiff and the parties have agreed that they are capable of being recovered on the same basis as a claim for principal or accrued interest.
8. Against those contentions, Advocate Geall suggests first that the inclusion of "*unqualified*" serves to ensure that there would be no award of partial indemnity costs, but I take the view that such an outcome is already precluded due to the explicit reference to "*full*". Accordingly, I reject that submission. In relation to his alternative submissions, he has drawn heavily on the analysis given under the law of England and Wales by Scott LJ in *Gomba Holdings (UK) Ltd v Minorities Finance Ltd (No. 2)* [1993] Ch 171. This is also the main authority to which Advocate Duerden refers.
9. In that case, the clause of the mortgage under consideration contained a promise to pay "*All costs charges and expenses howsoever incurred by the bank or any receiver under or in relation to this mortgage ... on a full indemnity basis including (but without prejudice to the generality of the foregoing) all costs charges and expenses which the bank or any receiver may incur in enforcing this security ...*". Although Advocate Geall suggests this wording is "*almost identical*", it does not, of course, include the key words that are in dispute in the present case, namely "*and unqualified*". However, despite the absence of those words, the position the plaintiffs took in that case was that "*their contractual right to indemnity costs entitles them to recover or retain all costs actually incurred save only those that are incurred otherwise than bona fide or are incurred for an improper motive*" (at page 183E). The position being adopted by Advocate Duerden strikes me as covering, and potentially going further, than that proposition and both would result in something exceeding an award of full indemnity costs without any further elaboration.
10. In *Gomba*, Scott LJ proceeded to analyse the approach taken to cases in which the phrase "*properly incurred*" has been addressed, recognising that the court would disallow any costs, charges and expenses that had not been properly incurred, albeit that "*express contractual provisions may alter what would otherwise have been the position*" (see page 185E). At page 186F, His Lordship stated:

"The reference to "a full indemnity basis" would avoid the risk of a taxation being ordered on a party and party basis or, now, on a standard basis. But nothing in the language used justifies the conclusion that the mortgagor was agreeing to pay, or to permit to be charged on the mortgaged property, costs, charges and expenses that had been unreasonably incurred or that were unreasonable in amount.

The language used does, in our opinion, justify an approach that would hold the mortgagee prima facie entitled to recover or retain the full amount of its actual costs, charges and expenses; but the language leaves open, in our opinion, the right of the mortgagor to have excluded any costs, charges and expenses that were incurred in bad faith or were unreasonably incurred or were unreasonable in amount. Vinelott J., in the passages from his judgment that we have cited, used the adjectives "wholly" and "plainly". He intended by this, we are sure, to indicate that the mortgagors must show a clear case of unreasonableness if actual costs, charges and expenses are to be excluded. We agree with this. We do not think the criterion can be put any better or more clearly than it is put in R.S.C., Ord. 62, r. 12(2) and would hold that, on the true construction of the 18 February 1985 mortgage, the defendants are entitled to be paid

or to retain out of the mortgaged property all their actual costs, charges and expenses (including the receivers' remuneration) except in so far they are of an unreasonable amount or have been unreasonably incurred and with any doubts as to whether the costs have been reasonably incurred or are reasonable in amount being resolved in favour of the defendants."

In reaching this conclusion, the English Court of Appeal rejected any broader basis for recovering or retaining costs sought by the lender. The outcome was to fix the costs on what would be termed in Guernsey a full indemnity basis. Indeed, the judgment continued (at page 187G):

"We would add only this. It is difficult to contemplate that a mortgage deed would ever be construed as entitling a mortgagee to charge against the mortgaged property, or to require the mortgagor to pay, all costs charges and expenses even if improperly or unreasonably incurred or improper or unreasonable in amount unless the mortgage deed had expressly so provided. But if a mortgage deed did expressly so provide, the enforceability of such a provision would, in our opinion, be open to serious question on public policy grounds."

11. On behalf of the Plaintiff, Advocate Duerden has, quite properly in my view, acknowledged that the awarding of costs of the litigation in this case remains at the discretion of the Court. This is the effect of section 1(1) of the Royal Court (Costs and Fees) (Guernsey) Law, 1969. It is not open to parties by their contract to attempt to displace that discretion. Equally, the Court should ordinarily consider exercising its discretion to reflect any contractual right to claim the costs of proceedings.
12. If, as I have stated, the difference between the parties is that Advocate Duerden asserts that all the Plaintiff's costs are recoverable, however unreasonable it was to incur them or however unreasonable they are in amount, and an award of contractual costs would lead to that result, I would, on public policy grounds, not make such an award. To do so would, in my judgment, enable lawyers acting for the Plaintiff to charge wholly unjustified amounts. Advocate Geall's example was of a lawyer unjustifiably inflating the hourly rate charged, which is exactly why it would be inappropriate to construe the clause in the manner proposed as covering all the Plaintiff's costs. (I should add that there is no suggestion in this case that that has been or will be done.) However, as a matter of theory, to construe the clause in that way would potentially enable charging extraordinary levels of fees without there being any prospect to have those fees scrutinised. In my view, that is not something that can be permitted.
13. As an award of costs by the Court, whatever the terms on which the order is made, rule 5 of the Royal Court (Costs and Fees) Rules, 2012 permits the paying party to request that the receiving party's bill of costs be subjected to taxation. Such a taxation is, of course, conducted by this Court; it is not an exercise performed by an external body. The taxation forms part of the overall determination of the dispute between the parties. An appeal on the ground that the taxation decision was wrong in law is available. Accordingly, if dissatisfied with the bill presented on behalf of the Plaintiff, whatever the order, this avenue of redress remains available to the Defendant.
14. In those circumstances, one might wonder why so much time and expense has been devoted to the precise terms of the order to be made. Will, for example, an award only of indemnity costs mean that the Plaintiff will be unable to recover something that will be recoverable under an order for contractual costs? The answer potentially lies in the meaning to be given to "unqualified". This is an ordinary word. It is not, so far as I can ascertain, being used in any technical sense. If it is, that has not been articulated on behalf of the Plaintiff by Advocate Duerden. She has suggested it means "without reservation or limitation". The definitions in The Shorter Oxford English Dictionary include "not modified, limited or restricted". The word is used in conjunction with "indemnity", which I regard here as being

the payment of compensation in respect of the costs incurred. Rule 2(6) of the 2012 Costs Rules provides:

“In relation to costs awarded on a full or partial indemnity basis, all costs shall be allowed except insofar as they are unreasonable in amount or unreasonably incurred; and any doubts which a person appointed under Rule 6 to conduct a taxation may have as to whether such costs are reasonable in amount or reasonably incurred shall be resolved in favour of the receiving party.”

This really reflects the position described in the *Gomba* case.

15. As an exercise of construction, I note that in clause 4.2 of the loan agreement the phrase “*on a full and unqualified indemnity basis*” applies not only to legal costs but also to other costs. For example, the clause refers to “*document duty*”, which is an *ad valorem* amount paid on registering the bond rather than as a result of any enforcement action. It also refers to “*valuation and survey costs*”, which again potentially fall outside enforcement action at which time legal costs will be incurred. In those circumstances, the Defendant has agreed to take full, or unlimited, responsibility for compensating the Plaintiff for sums expended by it. Although the final part of the clause refers to “*including the costs of any proceedings taken by GHL under this Offer Letter*”, which must be read as part of the legal costs, along with the court and Greffe fees (as those are specified in the 2012 Rules, as amended), to accede to the submissions of Advocate Duerden would mean that the Court would be unable to exercise any oversight or supervision in respect of the legal fees charged to the Plaintiff. In that respect, and only in that respect, I take the view that the word “*unqualified*” adds nothing to “*full*”, whereas in relation to fixed charges by way of disbursements outside litigation costs, it is used to mean repayment of the total amount expended.

Conclusion

16. Drawing together these various strands, I am satisfied that the Cause seeks costs on a contractual basis and that, in light of the principles set out in the *Gomba* case, that is the appropriate order to make. To that extent, the Defendant’s opposition to an order for costs on the contractual basis was misplaced.
17. The consequences of making such an order, however, are not, in my judgment, those for which Advocate Duerden has contended. If such an order meant that the Plaintiff could charge the Defendant for every single penny it has paid out without further ado, it would be tantamount to a licence to the Plaintiff to incur costs that might otherwise be regarded as unreasonably incurred or unreasonable in amount. In my view, it would lead to unconscionable results to interpret the contractual terms in such a way. As a costs order in respect of litigation, the Court’s order must be capable of being taxed if the Defendant chooses to take that course of action. In conducting any such taxation, reference would be made to rule 2(6) of the 2012 Rules. To that extent, including “*unqualified*” in the contractual provision appears to add nothing further to an order for full indemnity costs. Whereas parties to a contract might choose to agree that costs other than those determined by the Court are to be paid without any questions being asked, this Court will always retain some form of oversight over costs incurred in respect of proceedings conducted before it. In those circumstances, I can understand why the Defendant wanted to argue against an interpretation that sought more than I have found the law allows because, in my view, the parties cannot override the important principle that a paying party must have access to the Court to challenge the reasonableness of the costs claimed.
18. The outcome, therefore, is that the Plaintiff is granted the costs order sought but the meaning of it is that for which the Defendant argued. This would have been clarified if the Plaintiff had presented its bill of costs on a full and unqualified indemnity basis and the Defendant had requested a taxation. Accordingly, when it comes to allocating the costs of arguing the terms on which the costs order should be made, I cannot readily identify a winner and a loser. If this had been dealt with by me on taxation, I would have made the same order as I consider just in the circumstances where the point has been argued as part of the Court’s original

determination, namely that both parties should bear their own costs for that element of the proceedings. In effect, this means that the Plaintiff is in general entitled to its costs of the action on the contractual basis (recognising that certain costs orders have already been made), save for those costs relating to the submissions made on the papers in respect of this costs award, where there will be no order as to costs.