



Romain Zaleski v GM Trustees Limited
Royal Court
25th April 2016

JUDGMENT
16/2016

Decision on costs

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

Between: **ROMAIN ZALESKI** **Plaintiff**
-and-
GM TRUSTEES LIMITED **Defendant**

Hearing date: 4th March 2016

Judgment handed down: 25th April 2016

Costs decision

Before: Richard James McMahon, Esq., Deputy Bailiff

Advocate for the Plaintiff: Advocate C J Hay

Advocate for the Defendant: Advocate N Kapp

Cases & legislation referred to:

The Royal Court Civil Rules, 2007

The Royal Court (Costs and Fees) Rules, 2012

Excelsior Commercial Industrial Holdings Limited v Salisbury Hammer Aspden & Johnson [2002] EWCA Civ 879

Credit Suisse Trust Limited v Nemni (unreported, 6 March 2012)

Hulme v Matheson Securities (Channel Islands) Limited (No. 2) (1997) 24.GLJ.80

Investec Trust (Guernsey) Limited v Glenalla Properties Limited (unreported, 21 January 2015)

Williams v Jervis [2009] EWHC 1837 (QB)

Wates Construction Limited v HGP Greentree Allchurch Evans Limited [2005] EWHC 2174 (TCC)

Jefcoate v Spread Trustee Company Limited (unreported, 17 November 2014)

Buckley v Ronez Limited [2009-10] GLR 120

Barclay v Latrobe-Bateman [2009-10] GLR Note 1

Jackson v Dear (unreported, 8 July 2013)

Shelton v Barby (unreported, 13 October 2015)

The Judgments (Interest) (Bailiwick of Guernsey) Law, 1985

The Trusts (Guernsey) Law, 2007

Re JP Morgan 1998 Employee Trust 2013 (2) JLR 239

Re Spurling's Will Trusts [1966] 1 WLR 920

Close Trustees (Switzerland) SA v Castro [2008] EWHC 1267 (Ch)

Introduction

1. This judgment is supplemental to the Court's judgment dismissing the Plaintiff's action, which was handed down on 1 September 2015. At para. 179 of that judgment, I invited the parties to attempt to agree the appropriate costs order. I assumed that costs would follow the event. Initially, Advocate Hay, who now appears on behalf of the Plaintiff, opposed such an order but, just prior to the hearing on 4 March 2016, acknowledged that the Plaintiff could not resist an order for costs on the recoverable basis. However, on behalf of the Defendant, Advocate Kapp has pursued an Application for full indemnity costs, or an uplift in the recoverable rate in the event that any costs are awarded only on the recoverable basis, together with ancillary orders in any event seeking an interim payment of £100,000 on account of the Defendant's costs, the payment out of Court of the amount lodged by the Plaintiff by way of security for costs, and an order relating to the Defendant's ability to take any costs not paid by the Defendant from the PMO Trust, initially from the portion notionally allocated to the Plaintiff and, if there remained a shortfall, from the rest of the Trust.
2. At the conclusion of the hearing, I formally made an award of costs in the Defendant's favour, indicated that it was likely to be on a partial rather than full indemnity basis, reserving the exact basis, including as to whether any uplift in the recoverable rate was to be made. I also reserved my decision as to whether there should be an interim payment, but granted the application permitting the security for costs amount to be paid out, especially as Advocate Hay did not oppose that element of the Application. I dismissed the part of the Application seeking orders as to taking costs from the PMO Trust fund, again reserving the reasons for that decision. At the request of Advocate Hay, I also reserved the costs of the Application itself. This judgment, therefore, sets out the further decisions I had reserved and gives the reasons for the various decisions associated with the Application.
3. I do not propose to set out the background to the action or the factual findings made by the Jurats, save to the extent necessary to explain the decisions I have reached. The earlier judgment sets out fully how the claim came about, how it was litigated and the basis of the Court's decision and reference can properly be made to it as necessary to obtain a fuller understanding of the matters addressed in this judgment.

Indemnity costs

4. Under rule 82 of the Royal Court Civil Rules, 2007, the Court is given a wide discretion to make such order or orders as to costs as it thinks "*just*". Costs may be ordered to be paid on a full or partial indemnity basis in the circumstances described in rule 83:
 - "(a) *where, in the special circumstances of the case, it is the opinion of the Court that costs should be ordered otherwise than on the basis provided by the 2000 Rules, or*
 - "(b) *where any party has pleaded or otherwise pursued or defended an action, claim or counterclaim unreasonably, scandalously, frivolously or vexatiously, or has otherwise abused the process of the Court.*"

The reference to the 2000 Rules now needs to be read as a reference to the Royal Court (Costs and Fees) Rules, 2012, as amended. The Advocates were broadly agreed as to the applicable legal principles.

5. Advocate Hay referred to the need for the Defendant to establish that there was something taking the case "*out of the norm*". This was the formulation used by the Court of Appeal in England and Wales in *Excelsior Commercial Industrial Holdings Limited v Salisbury Hammer Aspden & Johnson* [2002] EWCA Civ 879, which had been cited with approval in *Credit Suisse Trust Limited v Nemni* (unreported, 6 March 2012). He also referred to the Court of Appeal decision in *Hulme v Matheson Securities (Channel Islands) Limited (No. 2)* (1997) 24.GLJ.80, which sets out the types of consideration that courts in this jurisdiction

have to consider if asked to award indemnity costs. Southwell JA regarded that as a paradigm example of where indemnity costs should be awarded because there had been "no justification for putting [the receiving party] to the expense of any costs at all".

6. Advocate Kapp drew attention to a more recent decision of the Court of Appeal dealing with indemnity costs: Investec Trust (Guernsey) Limited v Glenalla Properties Limited (unreported, 21 January 2015). At para. 15(d), the Court indicated that:

"The court's approach is similar to that adopted in Jersey in relation to similar rules. The Jersey approach is shown by the following two citations from decisions of the Jersey Court of Appeal:

"The question will always be - is there something in the conduct of the action by one of the parties or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs, recognising that there will usually be some degree of unreasonableness? We did not consider that there is a need for the claiming party to show a lack of moral probity or conduct deserving of moral condemnation, or malicious or vexatious conduct": C v P-S 2010 JLR 645 at [11] per Beloff JA;

"The grounds for considering the making of an award of indemnity costs were most recently considered by this Court in Leeds v Weston and Levi [2012] JCA 088. In reviewing earlier decisions of this Court Jones JA noted that there had to be some special or unusual feature justifying such an award such as culpability, abuse of process, deceit, unreasonable behaviour, abuse of court procedures or the submission of unnecessary evidence; but not necessarily a lack of moral probity, malice or vexatious conduct": Federal Republic of Brazil v Durant Intl Corp [2012] JCA 160 per McNeill JA."

7. There are many examples of the way in which applications for indemnity costs fall to be resolved. Most are, of course, fact-specific and so do not assist directly. Applying the approach of the Court of Appeal, which is binding, the principal question for the Court to resolve is whether there is "something in the conduct of the action by one of the parties or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs, recognising that there will usually be some degree of unreasonableness".
8. In support of the Defendant's Application, Advocate Kapp submits that the manner in which the Plaintiff conducted the litigation was unreasonable. She suggests that there are four bases for this assertion. The first is that the Plaintiff unreasonably failed to accept an offer of compromise. The second refers to what she suggests was hopeless expert evidence. The third relates to advancing hopeless allegations and the fourth relates to the alleged failure to particularise clearly and accurately the Plaintiff's case. I will address each of these in turn, although not in that order.

Expert evidence

9. Advocate Kapp bases her submission in relation to the quality of the Plaintiff's expert evidence on the way this type of issue has been dealt with in Williams v Jervis [2009] EWHC 1837 (QB) (at para. 24):

"There remains the issues surrounding Dr Gross and Mr Hay without which [counsel for the Claimant] frankly concedes an application for indemnity costs would not have been made. Both these doctors, in their conduct as expert witnesses, justify in the claimant's submission an order for indemnity costs. Each was the subject of severe criticism in the main judgment. Their conduct and the way they addressed their duties as expert witnesses fell well below what can properly be expected from expert witnesses and in my judgment can certainly be described as falling "outside the norm". It is not a question of the evidence of other witnesses being preferred to the

evidence of these two doctors or of their merely performing poorly as witnesses during the case. Nor is my assessment of them based on hindsight. The sad fact is that these two doctors did not address their responsibilities or conduct themselves properly as expert witnesses."

In my view, this statement of principle means that there must be something more than the Court simply preferring the evidence of one side's expert over that of the other side's. The touchstone remains whether there is something taking the case outside the norm.

10. The finding of the Court in the main judgment was that it preferred the Defendant's expert over the experts relied on by the Plaintiff. The highest that any criticism of the Plaintiff's experts goes is at paragraphs 138 and 139 and the Court's reference in para. 146 to their approach to investment as being untenable.
11. Advocate Kapp submits that the Plaintiff's experts fundamentally misunderstood the nature and the issues in the action and gave inconsistent evidence. It appeared that they may have done their work for other proceedings rather than concentrating on the Guernsey action. These were matters that should have been appreciated and dealt with by the Plaintiff's legal team before the trial. On the other hand, Advocate Hay refers to the way in which the Court chose to overlook what might have appeared language difficulties and the fact that the Plaintiff's experts had managed to consult with the Defendant's expert so as to produce a joint memorandum demonstrating where there was agreement and extracting the areas of disagreement as being evidence of them having performed their duties to the Court adequately.
12. I am satisfied that the situation in the present case is not as extreme as in *Williams v Jervis*. There were some shortcomings in the way the Plaintiff's expert evidence came out but this is why the Court ultimately chose to prefer the evidence of the Defendant's expert. Whoever had given the evidence on behalf of the Plaintiff, assuming it was the same opinion, would have faced the same outcome. This was not a case in which the Plaintiff's experts have fallen so far short of the standard expected that it follows that there should be indemnity costs awarded against the Plaintiff. I take the view that they were conducting themselves as experts should, in that they were conscious of their responsibility to try to assist the Court. Accordingly, I reject this argument from Advocate Kapp and regard it as no more than an aspect to bear in mind overall when considering what order for costs is just. In itself, the way in which the Plaintiff's expert evidence was given does not justify an order for indemnity costs.

Particularisation of case

13. Advocate Kapp has referred to the way in which Advocate Robilliard had to seek to amend the Plaintiff's Cause on several occasions, including during the trial itself, with the final version in respect of which leave was sought and granted only appearing some time after the end of the hearing. She is critical of the way in which the Plaintiff was putting an element of his case only became apparent at the trial (see the comment at para. 116 of the main judgment). In response, Advocate Hay queries how these alleged failings can justify awarding indemnity costs in respect of the entirety of the proceedings.
14. This aspect of the Defendant's case is not something that has been advanced with any particular vigour. I suspect that Advocate Kapp realises that on its own it amounts to little but that it has been included so as to bolster some of the other submissions. There was a significant contest on the question of amending the Cause in respect of which judgment was given on 18 December 2014. At that time, the costs of that application were left in the Cause. That is a slightly unusual outcome, but it was a slightly unusual application. Because those costs are in the Cause, and costs are to follow the event, the Defendant gets its costs of those amendments anyway. The nature of the amendments that needed to be sought late in the day arose from the multiplicity of currencies used in the proceedings and the way in which some amounts had been incorrectly stated. This only became apparent during the hearing as the

evidence was given. To that extent, the late amendments sought, which were not opposed, showed how problematic it had been to identify what the claim was for.

15. None of these matters, in my view, leads to the case being taken outside the norm. It was frustrating to find that there was some uncertainty about the claim and it would have been better had someone got to grips with all of this previously, but I cannot find that indemnity costs are payable by virtue of these matters. Once again, this goes to the overall impression of the litigation and whether, viewed as a whole, it can be found to fall beyond the cases in which recoverable costs suffice.

Hopeless allegations

16. The basis for Advocate Kapp's submissions on this contention is the statement in Wates Construction Limited v HGP Greentree Allchurch Evans Limited [2005] EWHC 2174 (TCC) that "*to maintain a claim that you know, or ought to know, is doomed to fail on the facts and on the law, is conduct that is so unreasonable as to justify an order for indemnity costs*" (para. 27). This passage was cited with approval in Jefcoate v Spread Trustee Company Limited (unreported, 17 November 2014). In support, Advocate Kapp has highlighted that the evidence of the Plaintiff was disbelieved, with findings that the Plaintiff had a selective memory and that he embellished events to suit himself and that, because of the concurrence issue, the Plaintiff must always have realised that his claim could not succeed. The Plaintiff's approach had been unrealistic throughout because gross negligence could not have been established and, as the Court noted, had the Defendant done as the Plaintiff wished, it could have endangered the trust assets.
17. On behalf of the Plaintiff, Advocate Hay points out that there had been no application to strike out and the situation was not the same as in the Wates Construction case where the claim was discontinued, thereby recognising it was without proper substance. In short, the Plaintiff's case was always an arguable one that needed to be resolved at trial and was not conducted in such a way that this factor should result in an award of indemnity costs.
18. Contrary to Advocate Hay's submission, I take the view that the absence of any application for strike out (or summary judgment) is not conclusive that pursuing the litigation was not unreasonable. Whilst in some situations the two concepts can be linked, I am not persuaded that it is right to do so here. The threshold for having an action struck out is a high one. The mere fact that a defendant chooses not to test whether that threshold can be met does not mean that there is some acknowledgement that it is reasonable to continue with the claim. However, in the present case, I am also persuaded by the Plaintiff's general point that the Plaintiff had a case that needed to be resolved through litigation. The majority of cases involve one side's evidence being preferred to the other side's. Just because a person is disbelieved does not mean that he should not have pursued his claim. If I thought that the Plaintiff himself had not believed what he was saying had happened the way he recalled events, that would form the genesis of a claim for indemnity costs. However, although the Plaintiff has been shown to have been misguided to pursue this matter to a trial because the outcome has been adverse to him, when viewed in isolation, once again I find myself siding with the Plaintiff because I cannot say that his allegations were as hopeless as the Defendant now suggests they were. He faced an uphill battle, but the Jurats still needed to determine the case. The case turned on whether or not the Plaintiff had proved loss to the Trust and, on that question, the expert evidence relied on by the Plaintiff was rejected. It is only with hindsight that it can possibly be suggested that the case was misconceived, rather than it always obviously having been so. Once again, if viewed in isolation, the submission that this case was bound to fail and so was hopeless is not, of itself, a reason to award indemnity costs.

Rejection of offer

19. The first head under which the Defendant sought indemnity costs was that the Plaintiff had unreasonably rejected an open offer to compromise. The offer was made in 2011. This was before any proceedings were commenced. The Defendant offered to assign to the Plaintiff (or to cede to him) any claims it had as trustee which may exist arising from the sale of the PMO

shares so that he could pursue them at his own cost. This offer was set out in a letter dated 13 May 2011. At para. 155 of the main judgment, the Jurats found that the terms on which this offer was made were reasonable. However, the Plaintiff did not accept this offer and chose instead to make a claim against the Defendant that it should have pursued some action on behalf of the Trust.

20. Advocate Kapp suggests that the Jurats' finding means that the rejection of the offer to compromise, which would have avoided that aspect of the Plaintiff's claim in its entirety needing to be pursued had it been accepted, was unreasonable conduct. Moreover, the Plaintiff would have been in a better position than he now finds himself as he would have been free to pursue whatever action or actions he considered should have been pursued by the Defendant, instead of losing this action.
21. In response, Advocate Hay submits that the offer was not a feasible one to accept because the Protector's consent was required before such an assignment could take place. Moreover, by reference to established principles on offers and costs (eg, *Buckley v Ronez Limited* [2009-10] GLR 120) the failure to beat an offer does not automatically result in an award of indemnity costs and the Court still needs to make an assessment of the reasonableness of the paying party's actions.
22. In my judgment, this is the strongest of the grounds advanced by Advocate Kapp. In the light of the Jurats' finding, this was an aspect of the case that should not have been pursued in these proceedings because the Plaintiff should have realised that what he was being offered by the Defendant was the best outcome he could hope to achieve. Had he accepted it, he would have been master of how to pursue those he most blamed for the situation in which he found himself. Instead, he chose to pursue the Defendant in its capacity as trustee and so forced the Defendant to incur costs that could otherwise have been avoided. Given that the Defendant resisted the claim on behalf of the Trust, it is only right and proper that the costs associated with this part of the claim should be borne in their entirety by the Plaintiff. To an extent, this is the application of the principle referred to in the *Hulme v Matheson Securities* case that where it is shown that a party has been put to the expense of litigating needlessly, it is a paradigm case for indemnity costs. I regard the Plaintiff's behaviour in this regard as being so unreasonable that it falls within rule 83, meaning that some of the costs to be awarded against him should be on the indemnity basis.

Extent of indemnity costs

23. The next issue for me is whether this unreasonable rejection of the offer, combined with my overall impression of the way the action was conducted, including the matters to which I have already referred, should attract an award of full or partial indemnity costs. The reason why I have not awarded full indemnity costs is that this particular unreasonable response to an offer of compromise made ahead of proceedings being issued would not have affected the entirety of the claim but only a part of it. The level of other unreasonableness is not such that I would feel it appropriate to award indemnity costs without attempting to apportion those aspects warranting such an order whilst leaving the remainder of the costs as recoverable only.
24. At the hearing, I asked Advocate Kapp to estimate the amount of time she believed had been allocated to the part of the claim that should have been resolved by the Plaintiff accepting the offer. She gave her rough estimate at 40% of the overall costs. Advocate Hay was in greater difficulty, having not had conduct of the trial. As a result, he gave his estimate in a post-hearing supplemental written submission dated 9 March 2016. In this document, he has analysed the various written materials so as to reach his estimate that perhaps 5 to 10% of the overall costs should be treated as related to what the parties have called the Litigation Claim. In the Plaintiff's Skeleton Argument, seven of the 103 paragraphs deal with this issue. In the Defendant's Skeleton Argument, it is a higher proportion, being 13 of the 96 paragraphs. In the written evidence, there was just one sentence in the Plaintiff's witness statement and 13 of 179 paragraphs in that of Mr Ward's on behalf of the Defendant. Looking at the transcript of the trial, it seems that 25 or 30% of the pages covering submissions dealt with this issue. A purely arithmetic averaging of the various proportions results in 13.87%.

25. Advocate Kapp has provided her own post-hearing supplemental written submissions commenting on those of Advocate Hay. They are dated 15 March 2016. She offers a more detailed analysis, relying on the comment in the judgment that there had been a degree of overlap between the different parts of the claim. By way of example, having regard to the Amended Cause, she draws attention to there being six distinct paragraphs relating to the Litigation Claim and 12 distinct paragraphs relating to the so-called Administration Claim, where the remaining 30 paragraphs dealt with both. In those circumstances, she suggests that the general paragraphs can be disregarded and the distinct paragraphs split one-third to two-thirds. The position was that the case as originally pleaded showed that the balance between the two parts of the claims were more heavily focused on the Litigation Claim. Adopting a similar approach to the main judgment, 123 paragraphs are general, 26 relate to the Litigation Claim and 31 to the Administration Claim, ie, a proportion of 46% to 54%. She has analysed all the witness statements and concluded that 37% of the paragraphs covering a distinct claim rather than both dealt with the Litigation Claim. I could go on and set out the other aspects analysed, but I do not feel I need to because the various headings all result in figures that lead to an overall percentage of 42.5, which is remarkably close to Advocate Kapp's initial estimate of 40%. The figure might actually have been inflated by reference to the split in the documents produced for the trial before and after September 2008 suggesting that the Litigation Claim was more document heavy.
26. Interesting though these analyses are, the appropriate just award is as much a matter for a broadbrush impression as it is for a quasi-scientific deconstruction of the written materials that Counsel have undertaken. What I am aiming to do is to reach a conclusion that properly reflects what aspects of the overall costs of the action could have been avoided if the Plaintiff had conducted his action reasonably and not unreasonably. As I have indicated, the primary reason why I am awarding a tranche of the costs on the indemnity basis is because I am satisfied that the Plaintiff should not have pursued the Litigation Claim element of his case and should have confined himself to the rest of it. In that regard, my overall impression during the interlocutory stages of the case and at trial was that the very highest percentage would be the 40% suggested by Advocate Kapp. Accordingly, it did not surprise me that that was her figure apparently plucked from thin air (although I regard it as being more of an educated guess anyway and I think she should have foreseen the way the hearing might have gone and had some figure in mind as having sensibly prepared for that issue to arise). The lower end I always had in mind was 25% because come what may, I felt that that part of the claim accounted for at least one-quarter of the preparation and hearing time.
27. Having thought carefully about the parties' supplemental submissions, and having also taken into account that I can regard some of the other elements as pointing towards, though not in themselves warranting, indemnity costs, I have concluded that the 40% analysis suffers from treating all the elements on which arithmetic has been produced broadly equally when some of the areas looked at will have occupied far less overall time than others. I am, however, quite clear that Advocate Hay has pitched his estimate unrealistically low and that, even my initial low figure of 25% does not do justice to the way the Litigation Claim took up time. As a result, I will order that the Defendant's costs should be split one-third to the Litigation Claim and two-thirds to the rest, which means that one-third of the Defendant's costs will be paid by the Plaintiff at the indemnity rate and two-thirds will be paid on the recoverable rate.

Uplift to recoverable rate

28. In respect of those costs payable at the recoverable rate, Advocate Kapp has sought an uplift on the hourly rate for Advocates' fees that would normally be payable under rule 2(2) of the 2012 Rules. (In 2015, the rate was £244 per hour.) In doing so, she has referred to *Barclay v Latrobe-Bateman* [2009-10] GLR Note 1, in which it was held that "*the clear importance of the case, and the difficulty and novelty of the plaintiffs' legal arguments, justified increasing the hourly recoverable rates for the defendants' advocates' and solicitors' fees from £210 to £300 per hour*".
29. In response, Advocate Hay refers to a passage in *Broadhead v Spread Trustee Company Limited* (*supra*, at para. 49):

"The statutory limit on Advocate's recoverable fees is a salutary constraint on the costs of litigation in a small jurisdiction such as Guernsey. It encourages economy by those with strong cases and realism by those with weak cases. It acts as a brake on the tendency of litigation costs to spiral out of control, such that a paying party may face the possibility of an unpredictable bill of a huge, possibly even ruinous, amount, so that the costs themselves become such a large aspect of the litigation that they prevent a sensible settlement of the case on its merits from being achieved. In my judgment, these salutary effects were intended to be, and should be, carefully upheld. It should only be in the most clear and rare cases that an uplift in the prescribed maximum should be ordered."

30. That is a statement to which I align myself. Any uplift will be a rarity. In *Jackson v Dear* (unreported, 8 July 2013), the rationale for awarding an uplift was that "*paying parties under orders for costs in such large scale litigation would reasonably expect to pay costs at a rate which more directly reflects the rates prevalent in the market-place for such cases, which are relatively uncommon within the Bailiwick*". All the decisions on uplifts are, of course, decisions of this Court and so are not binding upon me in any case.
31. In my view, this was not an action that involved issues beyond the normal diet of the Guernsey Bar warranting awarding any uplift on the prescribed maximum hourly rate for costs on the recoverable basis. Whilst it was not a comparatively simple claim, as Advocate Hay has suggested, it was not large-scale commercial litigation. It was expected to be a two-week trial with expert valuation evidence and that is roughly what it turned out to be. The overall loss to the Trust was put at a little over £18 million, which is certainly a significant amount, but it is not as large as in some other cases and the way in which the Plaintiff wished to put his case was more about himself than generally. Complexity cannot, in any event, be resolved simply by reference to quantum because a small value claim can raise questions of importance or novelty. In short, I can see no reason for departing from the statutory maximum in this case.

Interim payment on account

32. Paragraph 2 of the Application seeks an order that the Plaintiff pay to the Defendant £100,000 on account of the inter partes costs. The basis for doing so was that in *Broadhead v Spread Trustee Company Limited (supra)* it was suggested that the principle of making such an award had become the norm in modern litigation and was available either under the wide powers conferred by rule 82 of the 2007 Rules or under the Court's inherent power. The principle is based on common fairness, in that a successful party should not be too much delayed in receiving money already expended and to which he will undoubtedly be entitled.
33. In *Shelton v Barby* (unreported, 13 October 2015), I also took the view that the Court has jurisdiction to order an interim payment, but I did not regard it as a presumption in all cases that this should automatically follow. It is incumbent, as has been the case here, for the receiving party to make an application and, where appropriate, the Court will adopt a "*rough and ready basis*" to assess what can properly be ordered to be paid. In doing so, the Court can bear in mind that the order for costs will be carrying interest under the Judgments (Interest) (Bailiwick of Guernsey) Law, 1985 at 8%, which is potentially an incentive to the paying party to make some payment towards the costs anyway.
34. On behalf of the Plaintiff, Advocate Hay resists the making of an order for an interim payment. In doing so, he suggests that the Defendant's costs to date are likely to have been met through insurance and so the Defendant itself has not had to expend money. There is no evidence to support that suggestion. Further, as a corporate entity, the Defendant can comfortably wait to receive payment until the conclusion of any negotiations about the costs to be paid or at the end of a taxation and that the Plaintiff would be required to take steps to liquidate assets so as to satisfy any interim payment ordered. There is no evidence, however, that this will be the case.

35. My task in respect of this paragraph of the Application has not been made easy by the Advocates. I have not seen a draft bill of costs of the Defendant in order to have something from which to make the rough and ready assessment to which I have referred. All I have is a bare assertion from Advocate Kapp that the costs of the Defendant are around £700,000. It is incumbent on a party seeking an interim payment on account of costs to assist the Court by making available some material from which to ascertain whether the figure to be used meets the tests. Whilst Advocate Kapp can offer the view that limiting the application to £100,000 is a very conservative approach, I have had to ask myself whether making such an order would produce a fair outcome. If I assume that the reference to £700,000 is a reference to the costs incurred by the Defendant calculated on the indemnity basis, one-third of those costs would still exceed £200,000 and the prospects of that amount being taxed down to such an extent that it becomes no more than £100,000 (plus €24,000, which is the amount to be paid out to the Defendant as agreed from the sum lodged as security for costs) are slim. Further, even allowing for the two-thirds tranche at the recoverable rate and discounting it by an appropriate percentage to take into account the effects of taxation, and discounting it again to reflect that this is a conservative amount to be awarded as an interim payment on account, the overall position must be that the quantum of the costs to be paid by the Plaintiff to the Defendant will exceed by a significant sum the amount sought.
36. The contentions of the Plaintiff against the making of such an order also needed to be supported by evidence as opposed to mere assertion if they were to be considered properly. The opening sentence of the main judgment shows that the Court formed the impression that the Plaintiff has amassed a considerable fortune over his lifetime. In those circumstances, a suggestion that he is unable to find £100,000 within a fairly short period of time is rather absurd. If the Plaintiff wished to explain that all his assets are illiquid and it will cost him extra money to liquidate whichever asset or assets would be needed to make a payment of £100,000, he needed to support that contention with some evidence. In the absence of evidence, I feel I am left with the same overall impression of the Plaintiff as before, namely that he has access to the resources to be able to satisfy any order for an interim payment without undue hardship to him.
37. The outcome is that I take the view that neither party has performed particularly well in relation to this issue. Although I can understand an argument that it is the Defendant who makes the application so that any shortcomings in the material placed before the Court should lead to the dismissal of this aspect of the Application, I prefer to be pragmatic about this. In a case where it is obvious that the amount sought by way of an interim payment is small by comparison to the costs that will inevitably have been incurred, I am prepared to take notice of that fact and proceed to make an order even though there really should at least have been an outline bill of costs provided. I am also satisfied that the absence of a draft bill of costs has not put the Plaintiff at such a disadvantage that Advocate Hay has been unable to make sensible submissions on this issue. If I decline to make an order (or adjourn para. 2 to enable the Defendant to submit material) it will only add to the overall costs of both parties. I am satisfied that I can make a just decision on the question of interim payment by using my general experience of the level of costs firms such as Carey Olsen charge for the work that has been undertaken in respect of this action. In doing so, I recognise, first taking into account the payment of €24,000, that ordering a payment on account of £100,000 will still be a fraction of the total costs to be paid to the Defendant by the Plaintiff.
38. Because there is a suggestion that one or more of the Plaintiff's assets will have to be liquidated, instead of ordering that £100,000 be paid within 14 days, which is the period I first had in mind, I will extend that time by one week. Accordingly, under para. 2 of the Application, I will order that a payment of £100,000 be made by the Plaintiff to the Defendant within 21 days of the date of this judgment.

Taking costs from trust assets

39. The final paragraph of the Application sought an order that the Defendant be allowed to raise and pay on the indemnity basis its costs of the action not otherwise paid by the Defendant under the costs order initially from those assets in the PMO Trust treated as being the

Plaintiff's share and thereafter from the remainder of the trust assets. I rejected that element at the hearing and now set out my reasons for doing so.

40. Advocate Kapp refers to section 35(2) of the Trusts (Guernsey) Law, 2007, which provides that "A trustee may pay from the trust property, and may reimburse himself from the trust property for, all expenses and liabilities properly incurred in connection with the trust", as being the basis on which to invite a ruling at this stage. Because the Plaintiff's action was dismissed in its entirety, there is no misconduct that can be advanced to deprive the Defendant of its indemnity. In respect of a similarly worded provision in Jersey, the Jersey Court of Appeal confirmed in *Re JP Morgan 1998 Employee Trust* 2013 (2) JLR 239 that a trustee's complete indemnity where a beneficiary has failed in a claim for breach of trust means that the trustee should not be left to bear any part of the costs out of his own pocket. The fairness of the approach suggested by the Defendant is to avoid the other beneficiaries of the PMO Trust having to bear the costs incurred more than is absolutely necessary. This was something touched upon in *Re Spurling's Will Trusts* [1966] 1 WLR 920 and dealt with more explicitly in *Close Trustees (Switzerland) SA v Castro* [2008] EWHC 1267 (Ch).
41. In response, Advocate Hay submitted that the present action is not the appropriate forum in which to make any order of the type envisaged by para. 4 of the Application. The Court should be confining itself to making an award of costs in favour of the successful party against the unsuccessful party and should not be considering more widely the way in which the Defendant might administer the trust assets thereafter. Indeed, to do so would amount to a fettering of the trustee's discretion in respect of the PMO Trust.
42. Whilst I have a degree of sympathy with Advocate Kapp's wish to resolve what appears to be a comparatively straightforward matter whilst the parties are before the Court, I agree with Advocate Hay that it is premature to make such an order now. The principal reason for not doing so is that I have no idea what the stance of the other beneficiaries of the Trust might be. No one has advanced any evidence that this was something that has been raised with them. Although it is fair to say that the other beneficiaries had taken a common position in respect of how to treat the proceeds of sale which was distinct from that of the Plaintiff, I simply do not know what an order of the type sought would mean for the ongoing administration of the Trust. I note that in the *Close Trustees* case the trustees applied for approval of a step proposed to be taken in the administration of the trust (ie, invoking the well-known *Public Trustee v Cooper* jurisdiction) and so one can assume that all those who needed to be represented were before the court. The position is different in the present case. The other beneficiaries are not represented, save to the extent that the Defendant is obliged to advance their interests, and this has been hostile litigation based on alleged breaches of trust rather than a matter of administration. In those circumstances, I consider that the Defendant must wait and see what happens next. When the costs ordered to be paid by the Plaintiff have been paid to the extent that the Defendant can recover them, the Defendant would need to decide how to take monies in respect of its indemnity from the trust fund. If that is likely to be contentious, the Defendant can seek the Court's blessing at that time on the basis of an actual decision taken rather than on the current theoretical basis. All those entitled to be heard will have an opportunity to articulate their positions. On a technical basis, I am not convinced that an order of the type sought can be made under the 2007 Rules and should probably have been brought pursuant to the 2007 Law but, because I am rejecting this part of the Application, I will leave that question open and make no ruling on the requirement to identify the legal basis for it.

Conclusion

43. For all the reasons I have given, I make an order that one-third of the Defendant's costs of the action shall be paid by the Plaintiff on the indemnity basis and that the other two-thirds shall be paid by him on the recoverable basis. If the eventual bill of costs cannot be agreed, the Plaintiff can request that it be taxed. Having made the order for costs and reserving the basis of it on 4 March 2016, any amount crystallising will bear interest from 4 March 2016. By consent, the amount of €24,000 lodged by way of security for costs shall be paid out to the Defendant. In addition, within 21 days from the date of this judgment, the Plaintiff shall pay

to the Defendant £100,000 on account of the costs ultimately to be paid. The rest of the Defendant's Application is dismissed. In respect of the costs incurred dealing with the costs Application, they are reserved. I encourage the parties to attempt to agree what the appropriate costs order is. Whilst the Defendant has not succeeded on every aspect of the Application, subject to anything further that might be said on behalf of the Plaintiff, I provisionally regard the Defendant as the successful party here, with the consequence that the order I have in mind is for the Defendant to have its costs on the standard recoverable basis.