**IN THE ROYAL COURT OF GUERNSEY**

**ORDINARY DIVISION**

**Civil No. 1849**

**BETWEEN:**

**ROBERT TCHENGUIZ**

Applicant

- and -

**(1) STEPHEN AKERS (2)**

**HOSSEIN HAMEDANI**

Respondents

**Advocates John Greenfield** and **Elaine Gray** for the First Respondent

**Advocate Paul Richardson** for the Applicant

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# JUDGMENT ON COSTS ISSUE

(following written submissions)

of

Lieutenant-Bailiff Patrick John Talbot QC

7 October 2016

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***Introduction***

1. This is an application by the First Respondent ("**Mr Akers**"), which was issued on 9 August 2016, for an interim payment of £200,000 to be made to him by the Applicant ("**Mr Tchenguiz**") within 21 days on account of his costs. By an Order made by me on 13 May 2016, Mr Tchenguiz is liable to pay Mr Akers' costs of these proceedings on the recoverable basis ("**the application**").

2. The background to the proceedings can be found in my Judgment on Mr Akers' successful application to strike the proceedings out as against him, which was handed down on 11 March 2016, and in my Judgment dealing with the basis of taxation of costs, which was handed down on 13 May 2016. It is not therefore necessary for me to repeat the factual background in this Judgment.

3. On or after handing down judgment on 13 May 2016, I asked Advocate Gray whether she would be making an application for an interim payment on account of costs. Miss Gray's position was that she would consider that possibility in the future, but that she would not make an application at that time.

4. On about 30 June 2016 a detailed Bill of Costs was submitted by Carey Olsen, who act on behalf of Mr Akers, to AFR, who act on behalf of Mr Tchenguiz. The total sum claimed amounted to £527,310.63. By letter dated 26 July 2016, Mr Tchenguiz requested a taxation of Mr Akers' costs.

5. By letter dated 27 July 2016, AFR challenged the sum of costs claimed by Mr Akers as being excessive and said that a costs consultant retained by Mr Tchenguiz had had a preliminary view of the Bill of Costs and had concluded that the amount which would be recovered by Mr Akers on a taxation of his costs would not exceed £150,000. There is therefore a large gap between the parties' expectations.

6. Under the Bill of Costs, Mr Akers seeks to recover (i) sums expended by him on costs in retaining both Guernsey Advocates, *i.e.* Carey Olsen, and English and, I think, US lawyers and (ii) an uplift on the level of hourly rates for Advocates' fees beyond that allowed by the Royal Court (Costs and Fees) Rules, 2012, ("**the 2012 Rules**").

7. Mr Akers' costs are due to be taxed by Lieutenant-Bailiff Haworth in a three day hearing commencing next Tuesday, 11 October 2016.

8. The application was supported by an affidavit sworn by Advocate Gray on 10 August 2016.

9. With the agreement of the parties, I have dealt with the application on the written submissions of Advocate Greenfield for Mr Akers, which were lodged on 9 August 2016, and of Advocate Richardson for Mr Tchenguiz, which were lodged on 15 August 2016. But, as will be seen, I have also had regard to some of the oral submissions made by Advocate Richardson at an earlier hearing in the further proceedings brought by Mr Tchenguiz and the Current Trustee of the Tchenguiz Discretionary Trust on 29 March 2016 to commit Mr Akers to prison for alleged contempt of court ("**the new committal application**").

***Jurisdiction***

10. It is now well established, and it is not in dispute on the application, that the Royal Court has jurisdiction to make an Order for payment of a sum by a paying party to a receiving

party under an order as to costs before the amount of costs payable has either been agreed between the parties or taxed by the court. This position has been made clear in two recent judgments in the Royal Court, first, the judgment of Lieutenant-Bailiff Marshall QC in *Broadhead v Spread Trustees Limited*, 10 March 2015, and secondly, the judgment of the Deputy Bailiff in *Shelton v Barby*, 13 October 2015.

11. At paragraph 5 of his judgment in *Shelton*, the Deputy Bailiff clarified the jurisdiction to make an order for interim payment on account of costs:

> *"For my part, whilst noting the breadth of rule 82 of the 2007 [Royal Court Civil] Rules, I consider that the starting point is the primary legislation on costs in this Court (and so implying that there is no need to invoke the inherent jurisdiction of the Court), which is equally broad. Section 1(1) of the Royal Court (Costs and Fees) (Guernsey) Law, 1969 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."…"*

12. In addressing the question whether or not there is a presumption that an order for interim payment on account of costs will be made, at paragraph 10 of his judgment in *Shelby* the Deputy Bailiff considered, and I respectfully agree with him, that no such presumption applies automatically, but that

> *"… it should be taken to be more that a presumption exists that, if sought, the Court will make such an order on the type of conservative basis indicated, thereby enabling the receiving party to be in a position to progress enforcement of that element of the Court's decision at an earlier stage than would otherwise be the case.*"

13. In *Broadhead*, at paragraph 69, Lieutenant-Bailiff Marshall QC expressed the view that an award of an interim payment on account of costs is now "*the norm in modern litigation, commercial or otherwise*". She continued as follows:

> "*It is a principle of common fairness, based on the proposition that it is not fair for a successful party to be too much delayed in receiving money which he will already have expended, and which he will undoubtedly be entitled to receive from the unsuccessful party, merely because determination of the precise total amount payable is pending."*

14. At paragraph 74, the Lieutenant-Bailiff concluded that the correct approach for the Court to take was:

> *"… to assess broadly the amount likely to be awarded and then build in a significant safety margin by awarding a conservative fraction of that sum as a payment on account. What that fraction will be is a matter for the court's discretion and according to its instinct as to what is fair and right in all the circumstances of the case. It is very much a broad brush approach. Examples from previous decisions will be very fact specific and provide only examples of method rather than quantum. Conservatism is therefore appropriate as the extent to which actual costs may fall to be reduced on taxation cannot be known. This means, in my judgment, that it is not appropriate for the court to aim to assess the* ***minimum*** *which the receiving party could be awarded on taxation and then award that sum, but rather to assess broadly the amount* ***likely*** *to be awarded and then build in a significant safety margin by awarding a conservative fraction of that sum as a payment on account. What that fraction*

*will be is a matter for the court's discretion and according to its instinct as to what is fair and right in all the circumstances of the case. …"*

15. I respectfully agree with the passages from each of these judgments set out above and I intend to follow the guidance there provided in this Judgment.

16. Once the Court has decided, in the exercise of its discretion as to costs, taking into account all the material circumstances, that an order for an interim payment on account of costs should be made, it is then for the Court to determine an amount of costs which the receiving party is certainly going to be entitled to receive on taxation, as Lieutenant-Bailiff Marshall QC said at paragraph 69 in *Broadhead*,

***Discussion***

17. The questions which arise for me to decide on the application are these:
    i. whether I should, at this stage, make an order for an interim payment on account of Mr Akers' costs; and
    ii. if I decide to make such an order, what sum should I order Mr Tchenguiz to pay to Mr Akers as such an interim payment.

18. Advocate Greenfield submitted that an order should be made at this stage, before the costs are taxed, so as not to keep Mr Akers from 'his money' any longer. Mr Greenfield stressed the following matters:
    i. that Mr Akers was liable to pay his own lawyers in these proceedings £527,000, a sum which Mr Greenfield correctly described as a very large amount of costs, and the details of which are set out in over 90 pages of the Bill of Costs;
    ii. that Mr Tchenguiz had not appealed my Order of 11 March 2016 striking out these proceedings as against him;
    iii. that, in his submission, the new committal application was irrelevant to the exercise of the Court's discretion whether or not to make an order for an interim payment on account of costs in *these* proceedings – see also paragraph 24 of my judgment of 13 May 2016 to this effect;
    iv. that interest on judgment debts, including costs, runs at 8% under section 2 of the Judgments (Interest) (Bailiwick of Guernsey) Law, 1985 and that Mr Tchenguiz would, (as the Deputy Bailiff explained in *Shelby* at paragraphs 8 and 9 of his judgment,) be able to limit his liability to pay Mr Akers at that high rate of interest by making a payment on account earlier than under any order consequent to a full taxation of costs; and
    v. that the evidence of Mr Tchenguiz in paragraph 36 of an affidavit sworn by him in the Guernsey 1 proceedings on 10 December 2013 to the effect that at that time he was reliant upon loans from family members to meet his day-to-day living expenses raised concern to his client Mr Akers that Mr Tchenguiz's ability to meet costs might be somewhat doubtful, and that an order under the application should, therefore, be made as soon as possible.

19. Finally, Mr Greenfield relied upon the following factors as amounting to good reasons for me exercising my discretion to make an order for an interim payment on account of Mr Akers' costs:
    i. that these proceedings involved serious issues affecting the liberty of the subject;
    ii. that they involved detailed consideration of the law of contempt in Guernsey, a topic on which there was "*… little jurisprudence;*" and
    iii. that they also involved parties who lived outside Guernsey and concerned acts allegedly committed in London.

20. In his oral submissions on 3 August 2016 on Mr Tchenguiz's application for a temporary stay of the new committal application, Advocate Richardson submitted that, if I were to grant a conditional stay, the most that I should order Mr Tchenguiz to pay by way of an interim payment towards his liability for Mr Akers' costs of these proceedings as a condition of allowing such a stay should be £90,000. Mr Richardson's approach at that oral hearing was that the court should look at what he called the '*macro picture*' and decide to order Mr Tchenguiz to pay a maximum of 60% of the sum of £150,000, which the costs consultant retained for Mr Tchenguiz had stated was the most that would be payable on a taxation of Mr Akers' costs on the recoverable basis.

21. During the same hearing, Mr Richardson helpfully presented an overview of the Bill of Costs. He calculated that Carey Olsen's claimed fees included about £129,000 for Mr Greenfield's fees and about £152,000 for Miss Gray's fees, applying their hourly charging rates which were well above those set by the 2012 Rules, and that further Carey Olsen fees were claimed for other fee-earners, who were not Advocates, bringing the total for the firm up to £366,000. It follows that, as well as the fees charged by Mr Akers' two Advocates, a further sum of about £185,000 had also been charged for Carey Olsen's services. Whilst I have not checked Mr Richardson's calculations, no other calculation was put to me by Mr Greenfield on that hearing, and it is, in my view, therefore safe to treat Mr Richardson's overview as a fair summary.

22. On 15 August 2016, Ms Nicole Martin, in-house legal counsel for Mr Tchenguiz, swore an affidavit in opposition to the application. She provided a helpful, detailed chronology of relevant procedural events within both these proceedings and the new committal application. She also explained the steps which had been taken by or on behalf of Mr Tchenguiz relating to the Bill of Costs, including his decision to seek a taxation of costs. Ms Martin also exhibited a schedule based on advice from a costs lawyer, Mr Nick Overton, retained on behalf of Mr Tchenguiz.

23. In his submissions dated 15 August 2016, Advocate Richardson added to Ms Martin's arguments against the making of an order for a payment on account of Mr Akers' costs and made further submissions on the quantum of any such order as might be made. He contended that any application for an interim payment on account of costs should have been made on 13 May 2016, when I delivered my judgment on the basis of taxation of costs, and not almost three months later.

24. I do not regard that as a reason *per se* for refusing to make an order. Whilst the court would generally expect such an application to be made at an early stage, and often immediately after final judgment has been delivered, there is, in my judgment, no procedural or other bar to making it later; but I accept that the timing of the application is one of the matters which I should take into account when exercising my discretion whether or not to make an order for payment on account.

25. Advocate Greenfield submitted that, when addressing the quantum of any order for interim payment which I might make, I should not assess the costs summarily or engage in an exercise equivalent to a preliminary taxation of costs. He accepted that I should exercise the Court's discretion as to the quantum of costs in a conservative way, but not, as Lieutenant-Bailiff Marshall QC put it in paragraph 73 of her judgment in *Broadhead*, "*taking conservatism to the point of unreality*".

26. I agree with Mr Greenfield's suggested approach, which has not been disputed by Mr Richardson, and I have adopted it in reaching my conclusion on quantum.

27. Mr Greenfield accepted that I should not include in any payment on account of costs which I might make in favour of Mr Akers either (i) any proportion of the large sum of over £161,000 claimed for overseas lawyers' costs and any other disbursements, or (ii) any element within Carey Olsen's fees which represented an uplift over the rates for Advocates' fees allowed in the 2012 Rules. Further detail of the approach taken by Carey Olsen was set out in paragraphs 17 and 18 of Miss Gray's affidavit in support of the application. It is clear from those paragraphs that a flat hourly rate of £245 had first been applied to the 900 or so hours of Carey Olsen's work so as to produce a total of £220,500 for their fees from which a sum of £20,500 had then been subtracted "*… to allow for a reduction in hourly rates below £245, or for some time to be disallowed altogether …*", thereby producing the total claimed in the application of £200,000.

28. Paragraph 27 of Ms Martin's affidavit and Schedule 1 thereto, when read together, in effect comprise Mr Overton's advice that the most which he considered that Mr Akers would be likely to obtain on the taxation hearing would be an order for payment of a total of £154,293.13. It is also to be noted that the column of calculations which led to that total sum was headed "***Maximum likely recoverable amount (though not accepted as reasonable)***" and that Ms Martin deposed in paragraph 29 of her affidavit that she believed that significant reductions would be made to the total sum of £527,000 claimed by Mr Akers for two main reasons, namely, first, that high chargeable rates had been used for Carey Olsen's fees, and, secondly, that a relatively large number of different legal advisors had been retained, often at high charging rates, on behalf of Mr Akers. It seems to me that those reasons can also amount to an argument that, whilst Mr Akers had been entitled to seek whatever high-level legal advice he wanted, he was only entitled to recover on the recoverable basis of taxation the cost of obtaining a reasonable amount of legal advice at reasonable charging rates. Such arguments are, I

expect, likely to be deployed on behalf of Mr Tchenguiz at the taxation hearing next week, but cannot be decided by me at this stage.

29. In conclusion, Ms Martin submitted in paragraph 30 a. of her affidavit that the court should regard Mr Overton's estimate of what Mr Akers would recover on taxation of his costs as more reasonable than the Bill of Costs itself and that I should accept Mr Overton's estimate and order Mr Tchenguiz to make a payment on account of Mr Akers' costs of between 40% and 60% of £150,000, *i.e.* between £60,000 and £90,000.

***Decision***

30. I do not consider that the arguments presented on behalf of Mr Tchenguiz against the making of an order for payment on account of Mr Akers' costs are persuasive. Indeed, I do not consider that there is any good reason for not making such an order at this stage. In my judgment, it is a matter of common fairness on the facts of this case that I should do so, and I shall therefore make such an order.

31. I turn to what I have found the more difficult issue, *i.e.* the determination of an appropriate sum for Mr Tchenguiz to pay as an interim payment towards Mr Akers' costs of these proceedings

32. Taking into account all the circumstances of the case and the overall context and manner in which these proceedings have been prosecuted, I consider that there is a reasonably strong likelihood that Mr Akers' costs will be materially reduced on the taxation of costs to be conducted by Lieutenant-Bailiff Haworth next week. Of necessity, this is only a preliminary view on my part, but it has played a part in the conservative approach which I have taken in deciding the amount of the interim payment on account of costs.

33. Secondly, it is right, in my judgment, that I should disregard Mr Tchenguiz's ability or inability to pay such a sum. This factor was not pressed on his behalf in either Advocate Richardson's written submissions or Ms Martin's affidavit, and I shall not, therefore, take it into account on the application in the exercise of my discretion as to the quantum of the interim payment on account of Mr Akers' costs.

34. Thirdly, I consider that Mr Greenfield and Miss Gray, on behalf of Mr Akers, have taken a realistic approach to the application in accepting that all overseas' lawyers costs should be disregarded and that an overall charging rate of £245 per hour should be used by them for their firm's costs, with the deduction of the further £20,500 which I have mentioned above. Those two matters are, as I view the matter, clearly relevant to the exercise of my discretion, and I have taken them into account in determining the sum to be ordered as a payment on account of Mr Akers' costs of these proceedings.

35. In assessing the total amount of Mr Akers' costs which might be ordered on the taxation to be paid by Mr Tchenguiz, I have done the best I can at this stage to form a view of the

amount which I consider is likely to be ordered on taxation and I have also built in a significant safety margin in assessing the size of the interim payment to be made by Mr Tchenguiz on account of Mr Akers' costs. I consider that the approach of Mr Akers mentioned by me in the previous paragraph may to some extent have amounted to the building in of a material part of such a safety margin; but I consider that a further degree of safety is required. On the other hand, it is simply not possible for me at this stage to accept that Mr Overton's estimate of no more than £154,293.13 would be preferred by Lieutenant-Bailiff Haworth on the taxation hearing. It is to be remembered that the role of the court on the application is not to conduct a preliminary taxation of costs or make a summary assessment of costs. As I have sought to explain in this Judgment, that role is more limited.

36. Taking into account all the submissions made on behalf of the parties both in skeleton arguments and in affidavits on each side, I have decided, in the exercise of the court's discretion as to costs, that, in all the circumstances, Mr Tchenguiz should pay Mr Akers the sum of £110,000 by way of interim payment on account of Mr Akers' costs. I consider it is both reasonable and appropriate that the payment should be made within 21 days of the handing down of this Judgment.

37. I invite Counsel to agree draft terms of an order and submit the draft to me through the Greffe within the next 48 hours. I also invite Counsel to lodge brief, written submissions relating to the costs of the application within 7 days; I propose to deal with that issue on the papers.

**PATRICK TALBOT QC**
Lieutenant-Bailiff

7 October 2016