**IN THE ROYAL COURT OF GUERNSEY**

**(ORDINARY DIVISION)**

**Between**

**RICHARD ANTHONY BAKER LOVERING**
**and**
**CHRISTINE ANNE LOVERING** **Plaintiffs**

**-and-**

**PETER JOHN GRANVILLE ATKINSON, MARK GERARD FERBRACHE AND PAUL RICHARDSON IN PARTNERSHIP AS ATKINSON FERBRACHE RICHARDSON ADVOCATES AND NOTARIES PUBLIC** **Defendants**

**Judgment handed down: 23rd January 2018**

**Before: Richard James McMahon, Esq., Deputy Bailiff**

**Counsel for the Plaintiffs:** **Advocate C A Tee**
**Counsel for the Defendants:** **Advocate S R Geall**

**Cases, Texts & Legislation referred to:**

The Royal Court Civil Rules, 2007
The Royal Court (Costs and Fees) (Guernsey) Law, 1969
*Hulme v Matheson Securities (Channel Islands) Limited (No. 2)* (1997) 24.GLJ.75
*Investec Trust (Guernsey) Limited v Glenalla Properties Limited* (unreported, 21 January 2015)
*Jefcoate v Spread Trustee Company Limited* (unreported, 17 November 2014)
*Shaham v Lloyds TSB Offshore Treasury Limited* [2007-08] GLR 323
*Scott Halborg v EMW Law LLP* [2017] EWCA Civ 793
*The Civil Procedure Rules*
*Zakirov v Newmans Solicitors* [2012] EWHC 90222 (Costs)
The Royal Court (Costs and Fees) Rules, 2012

**Introduction**

1. This judgment is supplementary to the judgment of the Court dismissing the Plaintiffs' action, which was handed down on 28 November 2017. It deals with the costs order following that judgment in accordance with the directions given in para. 112 thereof (and repeated in para. 2 of the Act of Court).

2. By an Application dated 12 December 2017, the Defendants seek an order that the Plaintiffs pay all their costs of these proceedings on a full indemnity basis pursuant to rule 83 of the Royal Court Civil Rules, 2007. In response, the Plaintiffs oppose such an order. Their primary position is that the Court should refrain from making any order as to costs because they intend to appeal the dismissal of their action. Alternatively, they invite the Court to make no order as to costs, with the consequence that both sides will bear their own costs.

3. I had indicated that I would, if I felt I could, resolve the costs issues between the parties on the papers. I am satisfied that I can properly do so, and have reached my decision on the basis of the written materials submitted by Advocate Geall on behalf of the Defendants and Advocate Clare Tee on behalf of the Plaintiffs.

**Legal principles**

4. The submissions of Advocate Geall set out the relevant legal principles. Advocate Tee has not suggested that she differs from what has been submitted on behalf of the Defendants. Indeed, the applicable general principles are, in my opinion, well-established.

5. By virtue of rule 82 of the 2007 Rules, made under the Royal Court (Costs and Fees) (Guernsey) Law, 1969, the Court may make such costs order or orders in proceedings as it "*thinks just*". Rule 83 further provides that costs on a full or partial indemnity basis may be ordered (see para. (2)):

> "*(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 [2012] 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.*"

6. The costs regime in Guernsey is not as prescriptive as the provisions that apply in England and Wales. However, the Court has long recognised that guidance can be found in the principles applying in that jurisdiction (see, eg, *Hulme v Matheson Securities (Channel Islands) Limited (No. 2)* (1997) 24.GLJ.75). More recently, the Court of Appeal in *Investec Trust (Guernsey) Limited v Glenalla Properties Limited* (unreported, 21 January 2015) helpfully summarised the appropriate approach to take (see para. 15). Reference was made in para. 15(d) to the similar approach in Jersey in two cases decided by 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 do 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.*"

In other decisions of this Court, referring to various English decisions, it has been accepted that the key requirement is for there to be "*some conduct or some circumstances which takes the case out of the norm*" (see, eg, *Jefcoate v Spread Trustee Company Limited* (unreported, 17 November 2014)). These cases set out the principles I am satisfied form part of Guernsey law and which I must follow.

**Defendants' contentions**

7. Advocate Geall submits that the Plaintiffs acted unreasonably on the following bases (para. 3 of his Skeleton Argument dated 12 December 2017), in that they:

    (i) pursued a claim which lacked the necessary evidential foundation and which was contradicted by the conveyancing documents upon which they relied at trial by way of evidence, and thus was doomed to fail from the outset. The Defendants emphasised repeatedly the fact there was no Defect and tried to impress this upon the Plaintiffs from January 2015 (before the proceedings were issued) and repeatedly throughout the currency of the proceedings;

    (ii) failed to engage with the Defendants in relation to the key issues on the merits throughout;

    (iii) failed to accept offers made by the Defendants on a "drop hands" basis, from 18 April 2017 onwards, and on two further occasions subsequently.

8. The Defendants draw attention to the way in which the plan annexed to the Cause evolved into a different plan shortly before the trial began, and on which the Plaintiffs then purported to base their claim and the lack of certainty as to precisely what they were alleging was the Defect on which they based their claim. They further point out that Advocate Tee acknowledged in her closing speech that it was open to the Court to extrapolate from where the physical driveway could be seen in place on later aerial photographs to where it was most likely to have been in the 1960s. The Defendants also note that the only conveyance in which the area of land causing concern to Mr Guilbert was mentioned was not one forming the title of the Plaintiffs' property. They Defendants allege that the Plaintiffs and their Advocates refused to engage adequately in the correspondence passing between both sides, which highlighted some of these matters and took issue in any event with the quantum of damages being claimed, suggesting that at best the size of the claim was less than half of that pleaded.

9. Prior to the trial, the Defendants made an offer on a "without prejudice save as to costs" basis, contained in a letter dated 18 April 2017, for the Plaintiffs to withdraw their proceedings with both sides bearing their own costs. That offer was not accepted, and it was repeated twice

subsequently, when it was also not accepted. The only offer made by the Plaintiffs was on 6 September 2017 and was to settle their claim for £85,000 plus costs.

**Plaintiffs' contentions**

10. In her written submissions dated 19 December 2017, Advocate Tee first invites the Court to stay the Defendants' Application pending determination of the envisaged appeal to be made by the Plaintiffs. She also points out that the position of Advocate Geall, as a partner in the successor firm to that actioned by the Plaintiffs, means the Defendants were effectively representing themselves and so do not have any recoverable costs or, if they do, the Defendants will make a profit from any award of costs and so need to give credit for those profits.

11. The Plaintiffs argue that their claim was not hopeless from the outset, as shown by the lengthy judgment delivered, demonstrating that the action was a triable one. Advocate Tee points out that a number of other lawyers who had had involvement with the dispute over the years had aligned themselves to the position taken by the Plaintiffs. She acknowledges a degree of reticence in engaging with the Defendants in correspondence, but explains that this arose because the Plaintiffs felt that the Defendants' correspondence was persistent, bullying, disproportionate, contrary to the overriding objective and was designed to wear down the Plaintiffs.

12. In relation to the Defendants' own conduct of the case, Advocate Tee refers to some of the matters put to the First Plaintiff in cross-examination which were inconsistent with the evidence to be given on behalf of the Defendants and the late disclosure of a meeting note that Mr Woodward had in his possession. She also refers to the far more extensive evidence actually given by Advocate Ferbrache at the trial than had been set out in his witness statement. For these reasons, she submits that there is a basis on which the Court can depart from the general position that costs follow the event and so make no order as to costs.

**Discussion**

13. I am not persuaded by Advocate Tee that the justice now lies in not addressing the costs position at the end of the proceedings before this Court. Just because an appeal is intimated is not, in my view, a good reason to leave the costs flowing from this action to the appellate court. The Court of Appeal may deal with the outcome differently, and any costs order made by this Court may itself be reversed in whole or in part in the event that an appeal succeeds, but I incline to the view that the parties need the finality brought about by a final costs order at the conclusion of the trial. Indeed, both parties might wish to argue for a different outcome before the Court of Appeal and I hope that the appellate court will be assisted by the brief reasoning that follows. Accordingly, I am satisfied that it is appropriate and necessary to make some order as to costs rather than staying the Defendants' Application.

14. I take as my starting point that costs will generally follow the event (see, eg, *Shaham v Lloyds TSB Offshore Treasury Limited* [2007-08] GLR 323). There is no doubt in my mind that the Defendants were the successful parties. In principle, therefore, there should be a costs order in their favour, unless the Plaintiffs persuade me that it is just to depart from that general principle.

15. I further reject Advocate Tee's submission that the Defendants were effectively representing themselves through choosing to be represented by Advocate Geall, who is now a partner in the firm. Advocate Geall submitted various English authorities under cover of a letter dated 20 December 2017. I am treating that letter as his submissions in reply to those of Advocate Tee. Albeit that the Court of Appeal decision to which he refers (*Scott Halborg v EMW Law*

*LLP* [2017] EWCA Civ 793) turns on the construction of the *Civil Procedure Rules*, which have no direct equivalent in this jurisdiction, in the particular circumstances where a solicitors limited liability partnership was acting for itself, the decision points towards the modern position being that a firm of solicitors representing one or more of the solicitors of the firm is not to be regarded as a litigant in person, and so subject to any restriction on the level of costs the receiving party can recover. A helpful summary of the position is rehearsed at para. 32 of *Zakirov v Newmans Solicitors* [2012] EWHC 90222 (Costs):

> "*a. At common law, a solicitor who acts for himself could usually recover his professional fees as costs. There was an implied exception to the indemnity principle to facilitate this: London & Scottish Benefit Society v Chorley (1884) 13 QBD 872 (CA).*
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> *b. Under the former Rules of the Supreme Court, this principle was expressly preserved. RSC Order 62 r18(6) stated: 'For the purposes of this rule a litigant in person does not include a litigant who is a practising solicitor.' Hence practising solicitors were not to be treated as litigants in person, and so were exempt from the special regime for the costs of litigants in person which was introduced by the Litigants in Person (Costs & Expenses) Act 1975.*
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> *c. Under the Civil Procedure Rules, this exception was abolished. CPR 48.6(6) provides that, 'For the purposes of this rule, a litigant in person includes … (b) a … solicitor … who is acting for himself.'*
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> *d. This provision is purportedly glossed by paragraph 52.5 of the Costs Practice Direction ('CPD'), which provides; 'Attention is drawn to rule 48.6(6)(b). A solicitor who, instead of acting for himself, is represented in the proceedings by his firm or by himself in his firm name, is not, for the purpose of the Civil Procedure Rules, a litigant in person.'*
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> *e. In Malikson v Trim [2003] 1 WLR 463 (CA), it was held that the effect of CPR 48.6(6) and CPD 52.5, in conjunction, was that where a solicitor acts in the name of his firm rather than in a personal capacity, then the rule in London Scottish Benefit Society v Chorley continues to apply.*"

As a result, the conclusion of Master Leonard (at para. 52) was:

> "*A solicitor is a litigant in person, like any other litigant in person, if he is on the court record as acting for himself. If the record shows that he is represented by a firm of solicitors, he is not. That is the case whether or not he is a partner in or employee of the firm on the court record.*"

16. In my opinion, these principles are equally applicable *mutatis mutandis* in Guernsey. An Advocate may become involved in litigation in a personal capacity. If he or she chooses to act as a litigant in person, then he or she will be so treated by the Court. However, if that Advocate instructs the firm in which he or she is a partner, or by which he or she is employed, the client-Advocate relationship arises and there is scope for an award of costs to extend to the amount payable to the firm in question in the same way as if the Advocate chose to instruct a different firm. Applying those principles to the present case, the Defendants chose to instruct the firm in which they are partners (or to which one of them acts as a consultant) and, in doing so, they moved away from being litigants in person to being represented by the firm. In those circumstances, any costs order can, subject to whatever might be said should there be a taxation, extend to the costs of the Advocate's fees (see rule 2 of the Royal Court

(Costs and Fees) Rules, 2012). Accordingly, Advocate Tee's submissions on this issue are rejected.

17. The next issue I need to address is the basis on which any costs payable to the Defendants by the Plaintiffs are to be awarded. The fact that the merits of the action were found to be in favour of the Defendants is obviously not, in itself, sufficient reason for the Court to make an award of indemnity costs. I do not consider that the position of the Plaintiffs was as hopeless as Advocate Geall now submits it was. Had the case genuinely been incapable of being argued by them, it could have been dealt with by way of an application from the Defendants to strike out or seeking summary judgment. As Advocate Tee has pointed out, once there was no scope for agreement between the parties, there was no other realistic option but for the action to be tried. To that extent, I am not persuaded that the Plaintiffs conducted themselves unreasonably in bringing the claim in the first instance or generally in pursuing it thereafter. I consider that the justice of this case is more nuanced than that because it would have been open to the Plaintiffs had they so wished to seek leave to particularise the alleged Defect in a different manner from that set out in the Cause, even as late as during the trial, although there may have been costs consequences in doing so. Put simply, there was, in my view, issues that needed to be tried in order to resolve matters between the parties, including the ultimate vindication of the Defendants, so I reject the hopelessness submissions of Advocate Geall.

18. On the issue of overstating the damages that could properly be claimed in any event, and as subsequently found by the Court, I also take the view that this is not a sufficient basis for treating the Plaintiffs as having conducted their action unreasonably. The impression I have is that the number of cases in which the amount claimed is not recovered is sufficiently large that care is required before regarding the inflation of a party's claim as being unreasonable conduct. I am satisfied that the Defendants were always in a position to make submissions as to why certain heads of damages claimed were irrecoverable and that the final outcome, rejecting those aspects of the claim in any event, with the consequential costs order, adequately reflects that position. The currency fluctuations point, being the most financially significant of the heads of damage that were rejected by the Court, was a matter left to the Jurats on the basis of the reasonable contemplation test. The Plaintiffs would have lost on this issue had it been necessary to reach a conclusion on it but, as I have already stated, that results in the costs following the event rather than it being unreasonable to have taken what turned out to be a bad point. As a result, I cannot find now that to have included this head of damage in the Cause amounts to unreasonable conduct on the part of the Plaintiffs.

19. Although the Plaintiffs may not have engaged as constructively with the Defendants in correspondence as would have been desirable, I have reached the conclusion that this is a further aspect where the Plaintiffs have just about stayed within the bounds of what was reasonable. Whilst it is permissible for Advocates to choose to instruct their own firm to represent them, one consequence is that the level of detachment usually evident in the client-Advocate relationship becomes blurred. Looking at the correspondence, and having had some experience of the style used by the various Advocates within the firm of AFR, I think that the author of certain letters differed from the signatory. Of course, there is nothing improper in that course of action, but it does rather reflect the position taken by Advocate Tee that the Plaintiffs may well have found themselves being worn down by the issues raised. In short, I do not find that the level of engagement between the parties takes this case out of the norm because in my experience there are plenty of other instances where a party's Advocate has not engaged fully and which have not resulted in additional condemnation by costs being awarded on a full or partial indemnity basis.

20. The position, however, is slightly different in relation to the Defendants' offers, made "without prejudice save as to costs", in the run-up to the trial in 2017. They were put, in Advocate Geall's terms, as being "drop hands" offers, ie, both sides would walk away from

the action bearing their own costs. This would have resulted in both sides saving the expense of preparing for and conducting the trial. The outcome of the case has been that the Plaintiffs have not bettered the offer made to them by the Defendants. In those circumstances, I am satisfied that this factor tips the balance towards making an order for some of the Defendants' costs to be paid on the indemnity basis. The appropriate date from which to run such an order is, in my view, the last date on which the Plaintiffs could have accepted the Defendants' first such offer, ie, 2 May 2017. I have further noted that the only offer to settle made on behalf of the Plaintiffs was for an amount of money that was, in the light of the Court's findings, unrealistically high. Accordingly, in terms of conduct with a view to settling the parties' differences, I am quite clear that what the Defendants did was appropriate and the Plaintiffs did not respond satisfactorily. The position would have been similar had the Defendants chosen to pay a nominal amount into Court, treating such an amount as the nuisance value to them of having to pursue this litigation further. I am satisfied that late April 2017 was a suitable time at which the parties could take stock and that the decision of the Plaintiffs to proceed rather than accept the Defendants' offer has since been found to have been an unwise one. As a result, having started from the position that the Plaintiffs should pay the Defendants' costs on the principle that they follow the event, their failure to better the settlement terms offered by the Defendants leads to the next stage that, at least provisionally, some of the Defendants' costs should properly be paid on the indemnity basis.

21. Advocate Tee has, though, drawn attention to certain alleged shortcomings in the Defendants' conduct at trial. In particular, she refers to the way that Advocate Ferbrache's evidence developed and to the late disclosure of a meeting note that Mr Woodward had in his possession.

22. Whilst I share her concerns about the late disclosure of that document, I am not persuaded that it had any real impact on the outcome of the case. I do not believe that the document was deliberately withheld with a view to gaining any tactical advantage. Although it seems rather odd that it was only produced so late in the day, and the explanation for this proffered by the Defendants was rather sketchy, I do not find that this amounts to unreasonable conduct on the part of the Defendants to the extent that it means there should be no order as to costs, as submitted by Advocate Tee, or even that it should affect my provisional conclusion that the Defendants should have some of their costs on the indemnity basis.

23. Similarly, when I consider the evidence given by Advocate Ferbrache, I do not regard that aspect of the case as taking it outside the norm. I have noted that Advocate Ferbrache's witness statement incorporated his earlier Affidavit, expressly without repeating its contents, so his evidence-in-chief on the papers was already fairly full. At the risk of over-generalising, Advocates giving evidence can sometimes fall into the trap of wanting to be more expansive than they need to be, believing that it will assist the Court. They can trespass into areas of legal argument rather than confining themselves to being witnesses of fact. If Advocate Ferbrache's evidence at trial is to be criticised, it will be for that type of reason rather than anything else. I believe he was attempting to assist the Court, although his time in the witness box was probably longer than was strictly necessary. Again, I cannot say that this was unreasonable conduct and it was, I feel, broadly consistent with the way contested hearings can often develop. I am not persuaded that there was anything, when taken individually or collectively, about the conduct of the Defendants' case that should result in the provisional view I have formed of the costs order to follow being modified.

**Conclusion**

24. For the reasons I have given, the just costs order following the conclusion of the action before this Court is that the Plaintiffs be ordered to pay the Defendants' costs on the basis that the Defendants were the successful party. Further, because of rejection by the Plaintiffs of

settlement terms which they did not then beat, I am satisfied that the basis on which those costs be paid should be split between the usual order for costs on the recoverable basis up to the time when that offer was open for acceptance and that the costs thereafter should be paid on the indemnity basis, ie, from 2 May 2017.

25. The conclusion I have reached means that the Defendants' Application is successful in part. I do not consider it appropriate that the costs of this costs Application should also be paid on the indemnity basis, but rather that the costs incurred post-trial should be paid by the Plaintiffs to the Defendants on the recoverable basis. Accordingly, there are three phases to the costs order, with only the middle phase, comprising post-offer trial preparation and the trial itself being payable on the indemnity basis, the remainder being on the recoverable basis.