IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between: **GRAHAM EDWARD HINDLE** **Plaintiff**

-and-

IAN KITCHING **Defendant**

Decision in respect of costs previously reserved (made on the papers)

Judgment handed down: 15th February 2018

Before: Richard James McMahon, Esq., Deputy Bailiff

Counsel for the Plaintiff: **Advocate M G Ferbrache**
Counsel for the Defendant: **Advocate S L Brehaut**

Cases, Texts & Legislation referred to:

The Royal Court Civil Rules, 2007
The Royal Court (Costs and Fees) (Guernsey) Law, 1969
Hulme v Matheson (Channel Islands) Limited (No. 2) (1997) 24.GLJ.75
Investec Trust (Guernsey) Limited v Glenalla Properties Limited (unreported, 21 January 2015)
Shaham v Lloyds TSB Offshore Treasury Limited [2007-08] GLR 323
Popat v Popat (unreported, 28 February 2017)

Introduction

1. This case concerns a Jaguar XK 150 motor car and, since the proceedings commenced in May 2016, I have already delivered two interlocutory judgments (20 March and 12 September 2017). On both occasions, I reserved the costs. The third application in respect of which the costs have been reserved is the Defendant's application of 5 May 2017 seeking replies to his request for further information, which was withdrawn by way of a Consent Order made on 20 October 2017.

2. In respect of all three applications, the Plaintiff now seeks an order that the Defendant pay his costs. His Application, dated 17 November 2017, is made pursuant to rules 50, 51 and 82 of

the Royal Court Civil Rules, 2007. A timetable to progress that application was agreed and an order made by consent on 1 December 2017. At the same time as filing his response to this application, the Defendant has made an application dated 22 December 2017, in which he seeks an order that the Plaintiff pay his costs of the Plaintiff's summary judgment application, which was dismissed when I gave judgment on 20 March 2017, alternatively that those costs be left in the Cause, an order that the costs of the Defendant's application for leave to amend Les Defenses be paid in the proportion of 70:30 between the Plaintiff and the Defendant, alternatively left in the Cause, and finally that the costs of the withdrawn application for responses should continue to be reserved. Although Advocate Mark Ferbrache, on behalf of the Plaintiff, has pointed out that there have been no directions to progress the Defendant's cross-application, when the action was last before the Interlocutory Court, it was accepted by both sides that they had filed the materials on which they wish to rely, and I am content that I can, as Advocate Brehaut, on behalf of the Defendant, had invited me to do, resolve these costs applications on the papers.

3. Because I have set out the background in the two previous judgments to which I have referred, I do not propose to repeat any of the background. I have the benefit of the Plaintiff's Skeleton Argument dated 8 December 2017, the Defendant's Skeleton Argument in response dated 22 December 2017, which also argues for the outcomes in the Defendant's cross-application, and the Plaintiff's Skeleton Argument in reply dated 10 January 2018.

Legal principles

4. There is, as one would expect, no difference between the parties as to the principles that are applicable to these applications. Costs are in the discretion of the Court. Rule 82 of the 2007 Rules develops what is provided in the Royal Court (Costs and Fees) (Guernsey) Law, 1969, and provides that the Court orders costs on the basis of what it "*thinks just*". It is acknowledged that the Court enjoys a wide discretion in these areas, which must naturally be exercised judicially.

5. In his Skeleton Argument, Advocate Ferbrache also refers to the ability of the Court to award costs on a full or partial indemnity basis as set out in rule 83. He proceeds to elaborate on that by reference to what the Court of Appeal indicated were the applicable principles for such an award in *Hulme v Matheson (Channel Islands) Limited (No. 2)* (1997) 24.GLJ.75. Advocate Brehaut refers further to the basic test endorsed in *Investec Trust (Guernsey) Limited v Glenalla Properties Limited* (unreported, 21 January 2015), that there must be "*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 as an order for indemnity costs*".

6. Advocate Brehaut also refers to the general guidance that can properly be derived through reference to the *Civil Procedure Rules* in England and Wales that was mentioned in *Shaham v Lloyds TSB Offshore Treasury Limited* [2007-08] GLR 323. Consequently, there is often a starting point that costs follow the event, but that is an outcome from which the court can depart when appropriate. The modern approach is often to consider costs on an issue by issue basis. Having initially reserved the costs, the parties are now really inviting me to make decisions on such an issue by issue basis. It is clear that it is permissible to do so, always bearing in mind that the requirement is to reach an outcome that is just and Advocate Brehaut has reminded me of the approach I took in *Popat v Popat* (unreported, 28 February 2017).

Discussion

7. Any observer of the way these proceedings have been conducted thus far will, I am fairly confident, consider that there have been a number of false starts in reaching the position that has recently been reached. That is why the costs decisions are not as straightforward as they

might otherwise be. The value of the Jaguar that is at the heart of this dispute is an amount that potentially means that the costs involved in this case are likely to be disproportionate, whatever else happens. Sadly, that is often the case where the parties' positions become as entrenched as both sides appear to be in the present action. I am persuaded that it will assist the parties to know the costs orders that flow from the three interlocutory applications which are the subject of the current applications rather than leaving them to be dealt with at the end of the proceedings. Accordingly, I do not believe that any further reservation of these costs or leaving any of them in the Cause would be helpful and so I reject all of Advocate Brehaut's suggestions to either effect.

8. The simplest of the three issues relates to the Defendant's withdrawn application for responses to requests for information. The Defendant has explained that this step was taken in order to reach the position where the parties could agree to mediate. The Defendant further indicates that he is considering whether to make the same application again (or a similar one) now that the proceedings are being pursued once again more actively. Whilst I recognise that it would be open to me to depart from the usual order to be made where a party makes an application and is then granted leave to withdraw it, I do not think that it would be appropriate to do so here.

9. Any party who makes an application that is not then pursued should realise that the consequences of being granted leave to withdraw the application is that the costs associated with the bringing of that application will usually be ordered to be paid by the withdrawing party. It is an aspect of the general principle that costs follow the event. The other party will have been put to some expense considering and dealing with the application which is not then pursued. In my view, it is just that the withdrawing party should be required to pay the costs that have been wasted through that exercise. If the party seeks to make the same, or a similar, application again, subject to the propriety in doing so, costs will start to arise again and can be dealt with accordingly. However, the mere intimation that there may be a second application should not, I think, affect the costs to be awarded in respect of the first, abandoned application. In the context of the present proceedings, I am satisfied that the Plaintiff's application for his costs of the withdrawn application should be granted.

10. I can touch briefly on the issue of the basis on which those costs should be paid here, because the Plaintiff may, through his Skeleton Argument, be inviting an order for indemnity costs of all aspects of the three applications. I take the view that he cannot seek indemnity costs because his application dated 17 November 2017 makes no reference to rule 83. The Defendant is, in my view, entitled to take that application at face value. It is an application confined to costs on the standard recoverable basis.

11. In any event, in relation to the withdrawn application for responses, I do not find that there was anything in the conduct of the Defendant that takes the case outside of the norm. As I see it, the Defendant had a choice as to whether to pursue that application or to abandon it and the decision to abandon it does not mean that it was unreasonable to have brought it in the first instance. I am firmly of the opinion that the just order to make is to award the Plaintiff his costs on the recoverable basis as this will clear that issue away before the action progresses further. In respect of the two applications that resulted in contested hearings and judgments, for the reasons that follow, I am similarly of the view that there is no justification for awarding the costs on the indemnity basis, even if I had felt that the Plaintiff's Application enabled me to consider such an order. Accordingly, there has been no need for me to enquire as to whether the Plaintiff was really seeking his costs on any form of indemnity basis.

12. The Plaintiff's summary judgment application was unsuccessful. It led to the Defendant's application for leave to amend Les Defenses pursuant to rule 59 of the 2007 Rules. Although

they were two distinct phases of the proceedings, I consider that they are sufficiently inter-linked that I can address them together before making orders in respect of each.

13. The Cause pleads a simple allegation of conversion. However one looks at Les Defenses as originally tabled, they were inadequate. The case that the Defendant wished to pursue was not the case that had been pleaded. This became quite apparent during the hearing either side of Christmas 2016 of the Plaintiff's application for summary judgment. Those inadequacies led to the condition I attached to the dismissal of the application for summary judgment and in turn led to the Defendant's application for leave to amend. The fact that some of the amendments for which the Defendant sought leave were refused points to there still being some confusion on his part as to what the areas of dispute properly could be.

14. At first blush, the Defendant should be viewed as the successful party on the summary judgment application. However, as I noted in the postscript (at para. 53 of the judgment of 20 March 2017):

> "*... I can indicate that my provisional view on costs is to depart from the frequent order that costs should follow the event. I will take some persuasion that the Defendant should receive his costs from the Plaintiff in respect of this Application. In the circumstances that have arisen, there is an argument that the Plaintiff, even though his Application has been dismissed, should receive his costs from the Defendant. Another option would be to leave the costs in the cause, recognising that the final outcome will show where the justice of this case really lies. I suspect that that is the most generous outcome that the Defendant can realistically expect.*"

In that postscript, I was attempting to dissuade the Defendant from seeking the usual order that costs follow the event and to be more realistic about how the application came to be dismissed. I was not pre-judging any order that might subsequently be made and I have been open to the possibility that a different outcome from any of those I indicated might be possible as the most just.

15. Having had time to reflect, I remain of the view that the Plaintiff's application for summary judgment was brought about by the inadequacy of Les Defenses. Had the case been pleaded as it now is, I am confident that the application would not have been made. I do, however, wonder about the wisdom of bringing the application in any event. To that extent, I have noted the way Advocate Brehaut highlights that, had the application not been dismissed for another reason, it would have been dismissed on the novel point ground. I have borne this in mind when assessing the parties' respective contentions. If successful, that application would have resolved one issue between the parties, but would still have required a trial. The combination of the summary judgment application and the ensuing trial itself may not have produced much of a saving in time. Of course, the making of the application "smoked out" the case that the Defendant really wishes to advance. To that extent, I can see that it has produced benefits for both parties. I have, therefore, concluded that it was not unreasonable for the Plaintiff to have brought the summary judgment application. It could well have succeeded on the basis of the pleadings as they then stood.

16. Having been justified in bringing that application, I find that the Plaintiff was not successful, as I have set out, because of the way the Defendant's case was then explained. I recall inviting Advocate Alison Ozanne, who was then representing the Defendant, to consider whether she wished to amend Les Defenses to plead matters differently. Had she acceded to that invitation, I think it more likely than not that Advocate Ferbrache would not have been able to pursue the application for summary judgment, but the opportunity was not grasped by Advocate Ozanne. Had that opportunity been taken, the possibility of leaving the costs in the Cause would have been significantly more attractive than it now is or even making no order

for costs so that both parties would bear their own costs for what had turned out to be a false step for which both could take some share of the blame. Forcing the matter to a decision was, in my view, capable of being equated to conducting the Defendant's case with a degree of unreasonableness. I think it can properly be reflected in the costs order to be made.

17. When Les Defenses were amended, the amendments that the Defendant wished to make went beyond those that could be agreed by the Plaintiff, hence the need for the application to amend. I regard this as a further example of the unnecessarily complicated way that those acting for the Defendant had chosen to approach these issues. I accept the submission of Advocate Brehaut that the Plaintiff had failed to identify those straightforward amendments to which there was no opposition prior to the hearing. However, I also agree with Advocate Ferbrache that the issues that required the larger amount of time and effort to resolve were those that went in favour of the Plaintiff rather than the assessment offered by the Defendant that the balance lies in his favour.

18. Taking these matters in order, as I have indicated, I find that there was good enough reason to bring the summary judgment application so that I cannot be overly critical of the Plaintiff. With the benefit of hindsight, it was probably a step that could have been avoided. I am conscious that the starting point is that the Defendant was successful, meaning that the costs order could be in his favour. However, I am satisfied that it would be unjust to award the Defendant his costs on the basis that it was his poorly pleaded Les Defenses that precipitated the summary judgment application. I consider that a sufficient causal link to the costs to which both parties have been put has been established by the Plaintiff. In my judgment, the best that the Defendant can pursue is that there be no order as to costs. However, I am also satisfied that the Plaintiff should not be deprived of the whole of his costs given that this was a false step in the proceedings for which I find the Defendant to be principally responsible. Given the failure of the Defendant to address what I regard as the deficiencies in his pleading in a reasonable manner, I consider this to justify a further departure from the starting point that costs follow the event, leading to an award to the Plaintiff of some of his costs. As I say, it would be too generous to award him all his costs, so I have adopted a broad brush approach to the assessment of how much each party is to blame for the costs that were incurred by them both in what turned out to be an abortive procedural step. I have concluded that the Defendant is about twice as culpable as the Plaintiff. Accordingly, from a starting point that the Plaintiff pays the Defendant's costs, I reach the conclusion that actually the Defendant should be ordered to pay one-third of the Plaintiff's costs of the unsuccessful summary judgment application. By way of further explanation, the range runs from ordering 100% of the Defendant's costs to be paid by the Plaintiff to 100% of the Plaintiff's costs being paid by the Defendant, with an assessment of them being equally to blame producing an outcome that there be no order as to costs.

19. Moving on to the Defendant's application for leave to amend Les Defenses, I bear in mind that some of the amendments were permitted. However, the more significant amendments covered by the application were not. This makes identifying the successful party harder. I have decided that the Plaintiff should be regarded as just being the more successful, but this is where the approach I took in *Popat v Popat* (supra) also has a bearing. I think the an outright award of costs to either party would produce an unjust outcome and so have balanced how far I view each as being successful and adjusting the proportion of the costs to be awarded accordingly.

20. Having decided that the Plaintiff had marginally the better of the issues that was disputed, I take as my starting point that the costs follow that event. However, I have to discount the order for costs to reflect that the Plaintiff's opposition to the amendments was not wholly successful. The parties have referred to the way I divided the amendments into five categories for the purpose of deciding the Defendant's application for leave to amend. In

respect of the costs of the Defendant's actual application, my assessment of what the just order is involves applying a discount of 40% to factor in those aspects of the amendment application on which the Defendant succeeded, in particular that the substitution of para. 1 of Les Defenses was permitted, where the opposition to that outcome mounted by Advocate Ferbrache was in effect an attempt to re-argue the points that had already been articulated and rejected in the Plaintiff's own summary judgment application. Although Advocate Ferbrache has referred critically to the confusion at the start of the hearing of that application, which Advocate Brehaut refers to as disruption and acknowledges was regrettable, on the basis that the Defendant will have paid the fees associated with that hearing, I do not consider it necessary or desirable to adjust further the discount of 40% which reflects the respective levels of success and incorporates how the application was actually conducted.

21. I have noted that the Defendant made an open offer on 22 November 2017 in an e-mail that these three sets of reserved costs be generally left in the Cause. The orders I am making demonstrate that this offer has not been matched or exceeded by the Defendant and so does not affect the costs to be awarded in respect of the present Application (and cross-application). On the basis that the Plaintiff sought costs in his favour on each of the three sets of reserved costs and has succeeded, albeit in two cases the costs to be awarded are being discounted, I take the view that the Plaintiff has won and the Defendant lost and that the Plaintiff should have all of his costs of this exercise paid by the Defendant without any discount.

Conclusion

22. For the reasons I have given, I grant the Plaintiff's Application, subject to applying the discounts that I have covered, and dismiss the Defendant's cross-application. The effect is that the Defendant is ordered to pay to the Plaintiff on the recoverable basis:

    (a) one-third of the costs of the Plaintiff in respect of the Plaintiff's application for summary judgment;

    (b) 60% of the costs of the Plaintiff on the Defendant's application for leave to amend;

    (c) all the costs of the Plaintiff in respect of the withdrawn application for further replies; and

    (d) all of the costs of the Plaintiff in respect of these costs proceedings.