



**Trident Corporate Services (No.1) Limited v LAM
Developments Limited**
Royal Court
12th April 2018

**JUDGMENT
18/2018**

Decision on Costs of the Administration Order Application

**IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)
CIVIL ACTION: 1939**

**IN THE MATTER OF AN
APPLICATION UNDER PART XXI
OF THE COMPANIES (GUERNSEY) LAW, 2008**

Between:

TRIDENT CORPORATE SERVICES (NO.1) LIMITED **Applicant**

-AND-

LAM DEVELOPMENTS LIMITED

-and-

LAM INVESTMENTS LIMITED

-and-

KHALED EL BISHLAWI

Respondents

**Interested
Party**

Decision on Costs of the Administration Order Applications

Application heard on: 7th March, 2018

Judgment handed down on: 12th April, 2018

Before: John Russell Finch, Esq., O.B.E., Judge of the Royal Court

Counsel for the Applicant: Advocate G K Bell

Counsel for the Respondents and Interested Party: Advocate T W McGuffin

Cases and Materials referred to in Judgment:

The Royal Court Civil Rules, 2007, rules 82 and 83 (2)(b);
The Civil Procedure Rules, 1998, Part 36.

Investec Trust (Guernsey) Limited v Glendale Properties Limited (Court of Appeal No. 4/2015);
Puma Brandenburg Limited v Aralon Resources and Investments Companies Limited & Nortrust Nominees Limited (Court of Appeal No. 29/2017);
C v P-S [2010] JLR 645;
Federal Republic of Brazil v Durant Intl. Corp [2012] JCA 160;
Barrow v Bankside Members Agency Ltd [1996] 1 WLR 257;
Brisbane City Council v A-G for Queensland [1979] AC 411;
Henderson v Henderson (1843) 3 Hare 100;
Johnson v Gore Wood & Co [2001] 1 All E.R. 481;
Re Peninsular and Oriental Steam Navigation Co. [2006] EWHC 3729 (Ch)

JUDGMENT

Introduction

1. This is the third costs decision that I have been asked to make in a series of cases before the Royal Court all concerned with the same dispute. The earlier ones are dated 19th August, 2016 (found at tab 7 of the Respondents' ("R's") bundle for the hearing) and 16th November, 2016 (tab 9). The order dated 16th November, 2016 should be read with the substantive decision on an application to set aside Statutory Demands at tab 8 of R's bundle dated 4th October, 2016. The latter shows the somewhat involved background to the various inter-linked proceedings.
2. The present matter concerns R's and the interested party's applications for costs in relation to applications dated 28th August, 2015 served by Trident Corporate Services (No. 1) Limited, the Applicant ("A"), seeking Administration Orders ("AO") in respect of the two entities LAM D and LAM I. On 24th March, 2016 LAM D and LAM I applied to dismiss the AO applications with costs on an indemnity basis. On 1st April, 2016 the relevant Act of Court set out the dismissal of the AO applications, with costs reserved in respect of them. The costs of the dismissal application were the subject of my first costs judgment and resulted in a 75% award of indemnity costs in favour of LAM D and LAM I and 25% on a recoverable basis against A. The costs of the set aside applications were the subject of my second costs judgment and resulted in an 80% award of indemnity costs in favour of LAM D, LAM I and Elite Properties PCC Limited and 20% on a recoverable basis against A and Trident Trust Company (Guernsey) Limited. What remains for determination in the present hearing are the costs of the interested party and R of the AO applications set out in paragraph 1 of the application on 4th May, 2016 (tab 2 of R's bundle) and paragraph 2 of the application dated 26th March, 2016 (tab 1) (to the extent not already covered by the order dated 19th August, 2016).

Applicable principles

3. First of all, the Royal Court Civil Rules 2007, Rule 82 applies and gives power for the court to make "*such order as to costs ... as the court thinks just*" and under Rule 83(2)(b) a power to award costs on the indemnity basis "*where a party has pursued proceedings unreasonably ... or has otherwise abused proceedings of the court*". In the judgment dated 16th November 2016, reference was made to the Guernsey Court of Appeal decision in Investec Trust (Guernsey) Limited v Glendale Properties Limited (Court of Appeal No. 4/2015) (tab 5 of the Applicant's bundle). This decision is helpfully encapsulated in paragraph 15 of Martin JA's

judgment. In particular the approach should be the same as that adopted in the Jersey Court of Appeal in C v P-S [2010] JLR 645 (tab 11 of A's bundle) and Federal Republic of Brazil v Durant Intl. Corp [2012] JCA 160. When considering these authorities, the common thread is plainly set out by Beloff JA at paragraph [12] of the C v P-S case:

“We therefore approach the cost contentions on the understanding that in an order for an indemnity award to be made there must be something to take the case out of the ordinary and a degree of unreasonableness (of which an abuse of process is but an example) but recognizing that there is an “infinite variety” of circumstances where it may be right and proper for a court to make such an award.”

4. There are a number of authorities which are to the like effect and there is little point in citing them, particularly in what should be a concisely-expressed costs decision. Accordingly, it is necessary to consider the facts and merits in the matter before the court and come to a decision judicially as the court ‘thinks just’. This is a wide discretion and in a matter such as this, where a set of different but closely-related hearings have been held it is appropriate to cast the net widely and consider the whole context of this protracted and time-consuming dispute. That is why at the oral hearing I related back to the substantive judgment of 4th October, 2016, even though the costs relating to the dismissal application were resolved, and (to use Advocate Bell’s wording), the party “*punished*” in costs: this was the essential factual backdrop to the present application. It might also help to keep the circumstances set out in paragraph 6 of A’s skeleton argument on costs (Tab A of A’s bundle) in mind and grasp that the AO applications were dismissed after being set down for a hearing when the interested party, as he was entitled to do, removed A as director of the companies, thus eliminating their standing.
5. In the course of argument, some reference was made to the decision in Puma Brandenburg Limited v Aralon Resources and Investments Companies Limited & Nortrust Nominees Limited (Court of Appeal No. 29/2017) (A’s tab 4). The facts were quite different and for the purposes of this application, it is only necessary to refer to Bompas JA’s endorsement of the approach taken in the English case of Re Peninsular and Oriental Steam Navigation Co. [2006] EWHC 3729 (Ch), at paragraph 15 of his judgment; approving Warren J’s observations that:

“It seems to me that, as in any other litigation, the courts are perfectly capable of deciding on a case by case basis, what the justice of the case demands in relation to costs ...”

That is the approach taken here. The exercise of discretion is only circumscribed by way of the familiar admonition to act judicially and not capriciously.

6. At the hearing a further bundle from A fell to be considered. Putting it shortly, proceedings in the Chancery Division in England between LAM D, A and its inter-related entity Trident Trust Company (Guernsey) Limited, were commenced on 25th August, 2016. The Pleadings are copied in A’s larger original bundle. These proceedings were compromised on 7th February, 2018, via an offer under Part 36 of the Civil Procedure Rules, 1998. They are stayed permanently except insofar as to enable the parties to enforce the agreed terms of settlement (see Advocate J A Tee’s affidavit in the smaller bundle). The terms of this settlement are, of course, not known by this court, nor will they be. But A raised *res judicata* as a result of this. It is correct that this concept applies when cases are settled, see Johnson v Gore Wood & Co [2001] 1 All E.R. 481 (tab 3 of A’s smaller bundle) at 500, g-h from Lord Bingham. But that only, in my judgment takes us part of the way. The principle invoked is the rule in Henderson v Henderson (1843) 3 Hare 100 at 114-5 from Wigram VC. It can be summarized as forbidding abuses of process in allowing a party to litigation to re-open the

subject where the cause of action or issue has already been decided. It is a rule of public policy to stop litigating “*dragging on for ever*” and avoid oppressive successive suits (see, e.g. Barrow v Bankside Members Agency Ltd [1996] 1 WLR 257, cited by Lord Bingham at 495-j to 496-a).

7. *Res judicata* is a dense thicket which I had no particular wish to hack my way through on a costs application in relation to Guernsey proceedings where judgment had been given in 2016. The current situation, with respect, is clearly set-out by Lord Millett’s speech in the Johnson case at 525-g to 526-e. He summarizes it by saying:

“... the doctrine now under consideration can be no more than a procedural rule based on the need to protect the process of the court from abuse and the defendant from oppression.”

And there then appears an observation from Lord Wilberforce, in Brisbane City Council v A-G for Queensland [1979] AC 411 at 425 that it:

“Ought only to be applied when the facts are such as to amount to an abuse, otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation.”

8. As Advocate McGuffin submitted in his reply, you cannot re-litigate the issues. The decision was given in 2016 and not appealed. The findings remain in place. If *res judicata* does apply, it operates to bind the parties, not this court. It seems to me that this settlement in England cannot somehow operate to inhibit a prospective costs award in earlier Guernsey proceedings. To do otherwise would be unjust and, on the facts, there is no question of oppression. Putting the matter in a perhaps rather over-simplified way, it is unjust that parties who incurred costs should not be entitled, due to a rigidly-invoked technical rule that is not based on the justice or circumstances of the particular case.

Decision

9. Applying the ordinary principles I do not favour Advocate Bell’s submission to the effect that it is dangerous to look at things in the round. This was, in reality, one contest waged on different battlefields and A has failed throughout. A radically inconsistent approach with the other orders is not merited. In particular, the AO proceedings were inappropriate and should not have been initiated. The general position is that parties who have incurred costs dealing with a failed application are, in justice, entitled to them. Any order now made should be consistent with the adverse findings in respect of the failed AO applications. Costs follow the event. In particular, R’s submission regarding the fees and legal costs of the failed AO applications is accepted. R would, if this was not the case, have to be burdened with liabilities for failed applications by the then directors, who were subsequently removed at the behest of the interested party.
10. Accordingly, it is ordered that A pays the costs of R and the interested party as follows:
 - (i) in respect of R’s costs, 80% on the indemnity basis and 20% on the normal recoverable basis;
 - (ii) in respect of the interested party’s costs, 80% on the indemnity basis, and 20% on the normal recoverable basis.

These proportions reflect the approach taken in the decision handed down on 16th November, 2016, for the reasons given there (tab 9 of R’s bundle). Taxation if not agreed.

J R Finch, O.B.E.
Judge of the Royal Court