

**IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)**

Between

**STEPHEN MARK BREHAUT
MARTYN JOHN BREHAUT
NICHOLAS JAMES BREHAUT**

Applicants

-v-

KATIE MARIE BREHAUT

Respondent

**Determination on the papers of Respondent's Costs
Application**

Judgment handed down: 19th December 2019

Before: Richard James McMahon, Esq., Deputy Bailiff

The Applicants were not represented

Counsel for the Respondent: Advocate Clare A Tee

Cases, Texts & Legislation referred to:

The Royal Court (Reform) (Guernsey) Law, 2008

The Royal Court Civil Rules, 2007

The Civil Procedure Rules

The Royal Court (Costs and Fees) (Guernsey) Law, 1969

Shaham v Lloyds TSB Offshore Treasury Limited [2007-08] GLR 323

Brawley v Marczyński [2003] 1 WLR 813

R v Holderness Borough Council, ex p James Roberts Developments Ltd (1992) 66 P&CR 46

Boxall v London Borough of Waltham Forest (2001) 4 CCLR 258

Maurice v Chief Executive of the States of Alderney [2011-12] GLR Note 7

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

Introduction

1. On 21 December 2010, the Court appointed Herbert Brehaut ("Herbert") and Katie Brehaut ("Katie") as the Joint Guardians of Pearl Collins Brehaut ("Pearl"), with power to the survivor to act alone. The members of the family council who recommended that the application for

joint guardianship be granted were Jane Torode (“Jane”), Martyn Brehaut (“Martyn”), Stephen Brehaut (“Stephen”) and Nicholas Brehaut (“Nicholas”). At the time, Herbert and Pearl were married. Katie, Jane, Martyn, Stephen and Nicholas are Herbert and Pearl’s five children. Herbert died on 28 March 2018.

2. By two Applications first before the Court on 16 October 2018, Stephen, Martyn and Nicholas applied first for Katie to be removed and discharged from her position as guardian of Pearl and then Stephen applied to be appointed as sole guardian of Pearl. The usual form accompanying Stephen’s application to be appointed guardian completed by him listed Martyn, Nicholas and Vicky Biggins, who is the daughter of Martyn, as the proposed members of the family council. That document further explained that *“There is an ongoing dispute between Stephen, Martyn and Nicholas with their sisters Katie and Jane. Whilst Katie and Jane are not listed in the Family Council above, there would be no objection to Jane being included in the Family Council in addition to the abovementioned at a later date.”*
3. The Application to remove Katie from the office of guardian was supported by Stephen’s Affidavit sworn on 11 October 2018, in which he stated that he and his brothers had *“lost confidence in Katie to discharge her duties as guardian”*. On their behalf, he listed some 12 instances of alleged mismanagement of Pearl’s affairs and indicated that he and his brothers believed it was in Pearl’s best interests if Katie were to be removed as soon as practicable.
4. Katie swore an Affidavit in response in which she explained the manner in which she had conducted the guardianship of Pearl, largely with their father, Herbert, taking control of most aspects and what she had done since Herbert’s death. She indicated that she had no objection to a replacement joint guardian being appointed. She stated that she believed the Application to remove her as guardian of Pearl was motivated by her brothers’ disappointment and anger at the will made by Herbert in respect of his estate shortly before he died. Jane also swore an Affidavit on 13 November 2018, supplementing the information given in Katie’s Affidavit where Jane had more particular knowledge about events. Stephen swore his Second Affidavit in reply on 20 November 2018, in which he rejected the contention that the motivation for the Application was as suggested by Katie, but rather that events since their father’s death had enabled him and his brothers to become aware of how the guardianship of Pearl had been conducted from the outset.
5. The hearing of these Applications took place on 26 November 2018. The Applicants were represented by Advocate Paul Richardson. Katie was represented by Advocate Clare Tee. During the course of the hearing, Stephen, Katie and Jane gave evidence. At the end of the hearing, the Court reserved judgment. I had presided at that hearing and, in accordance with the powers available under section 14(2) of the Royal Court (Reform) (Guernsey) Law, 2008, chose not to direct the Jurats in open court but rather to retire with them in order to prepare the reasoned decision required pursuant to section 16(1) of that Law.
6. Before that reasoned decision could be prepared, the Court was informed by the Applicants’ Advocates that Pearl had died on 10 December 2018. Consequently, the Application to remove Katie from office became academic because the guardianship lapsed on the patient’s death. I indicated that there would, therefore, be no judgment dealing with the removal Application. I had hoped that the parties might be able to come to some agreement between themselves about how the costs of the proceedings should be paid.
7. No agreement has been forthcoming. Instead, Katie has made an Application dated 1 May 2019 for her costs to be paid by Stephen, Martyn and Nicholas on the indemnity basis, referring to rule 83 of the Royal Court Civil Rules, 2007. In support, she swore an Affidavit

on 4 June 2019. Her Application is opposed. Stephen, Martyn and Nicholas no longer instruct Advocate Richardson and their response has been prepared by Stephen. In the light of directions given on 7 June 2019, he swore an Affidavit on 26 June 2019, by which he invited the Court to make no order as to costs, after which the Application for costs was meant to be listed for a hearing. In the event, no hearing date was sought until Advocate Tee made an enquiry on 1 October 2019. I directed that Katie should first file a Skeleton Argument setting out the basis on which she claimed costs on the indemnity basis, thereby enabling Stephen, Martyn and Nicholas to respond. A Skeleton Argument prepared by Advocate Tee dated 15 October 2019 followed, along with a Skeleton Argument prepared by Stephen dated 23 October 2019, accompanied by what is described as a Third Affidavit sworn by him on the same day.

8. In the circumstances, I had indicated that I would, unless I felt a hearing was necessary, determine the incidence of the costs of the proceedings on the papers. I am satisfied that I am able to do so from the material provided and this judgment sets out my reasons for awarding Katie her costs against Stephen, Martyn and Nicholas, but only on the recoverable basis.

The law

9. Despite giving Stephen and his brothers the opportunity to set out any legal principles upon which they wished to rely, their Skeleton Argument indicates that they are unable to comment on the law, but hope that Advocate Tee has explained the position correctly.
10. Advocate Tee refers to rule 82 of the 2007 Rules, which provides that, in any action, the Court may make such order as to the costs of the proceedings, or any part of them, as it thinks just. She also refers to the way in which the Court has previously stated that it can be guided by the approach in England and Wales, particularly under Part 44 of the Civil Procedure Rules. The primary legislation governing the position in Guernsey is the Royal Court (Costs and Fees) (Guernsey) Law, 1969, which sets out that the costs of and incidental to all proceedings in this Court are in the discretion of the Court, which has the power to determine by whom and to what extent the costs are to be paid. There is, therefore, a wide discretion vested in the Court but it is a discretion that must be exercised judicially.
11. One of the main principles on which costs orders are based is that costs follow the event. (Although Advocate Tee did not refer to it, she could have highlighted the analysis undertaken in *Shaham v Lloyds TSB Offshore Treasury Limited* [2007-08] GLR 323 as to how the principle applies and the manner in which it may be departed from.) As she notes, where there is no judgment from the Court because the proceedings take a different route, it is sometimes difficult to ascertain who can be regarded as the winner, which is a necessary finding before the costs can follow that event. Instead, she has referred to *Brawley v Marczynski* [2003] 1 WLR 813 and highlighted what Butler-Sloss LJ had said in *R v Holderness Borough Council, ex p James Roberts Developments Ltd* (1992) 66 P&CR 46 (at page 56, quoted at para. 18 of the judgment):

*“It is not the function of the courts to make decisions on academic issues of law where there is no dispute to resolve. I have great sympathy with a view as to the undesirability of deciding an important issue in a dispute which no longer exists for the purpose of determining who pays the costs of litigation which has otherwise come to an end. In this case however there are now considerable costs incurred on both sides and, with regret, I cannot see how the court can bar the parties from obtaining a decision as to who should pay those costs. The issue of costs alone may keep litigation alive, see *Ainsbury v Millington* [1987] 1 WLR 379. The court is not in a*

position to assess the correct costs order without an evaluation of the prospects of success had the application for judicial review been heard and determined.”

12. Advocate Tee also draws attention to the first, third, fourth and fifth principles extracted at para. 21 of the judgment in Brawley from the case of Boxall v London Borough of Waltham Forest (2001) 4 CCLR 258, which were also cited with approval in this Court by Deputy Bailiff Collas (as he then was) in Maurice v Chief Executive of the States of Alderney [2011-12] GLR Note 7. The six principles are:

- “(i) the court has power to make a costs order when the substantive proceedings have been resolved without a trial but the parties have not agreed about costs;*
- (ii) it will ordinarily be irrelevant that the Claimant is legally aided;*
- (iii) the overriding objective is to do justice between the parties without incurring unnecessary court time and consequently additional cost;*
- (iv) at each end of the spectrum there will be cases where it is obvious which side would have won had the substantive issues been fought to a conclusion. In between, the position will, in differing degrees, be less clear. How far the court will be prepared to look into the previously unresolved substantive issues will depend on the circumstances of the particular case, not least the amount of costs at stake and the conduct of the parties;*
- (v) in the absence of a good reason to make any other order the fall back is to make no order as to costs;*
- (vi) the court should take care to ensure that it does not discourage parties from settling judicial review proceedings for example by a local authority making a concession at an early stage.”*

13. Rule 83 of the 2007 Rules provides that costs may be ordered to be paid on the full or partial indemnity basis where there are special circumstances or “*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.*” As the Court of Appeal has indicated in Investec Trust (Guernsey) Limited v Glenalla Properties Limited (unreported, 21 January 2015), adopting (at para. 15(d)) the approach set out in two 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 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.”

The parties’ contentions

14. On behalf of Katie, Advocate Tee submits that, having conducted a full hearing, but not delivering a judgment because of Pearl’s death intervening, the Court is in a better position to assess who the winner should be than in circumstances where nothing has been argued before the Court but the proceedings are no longer needed. This is not, for example, a case in which further court proceedings are required to hear evidence and/or submissions as to who the winner would be. Consequently, this is not a case where the alternative default position of making no order as to costs arises.
15. On the basis that the Court will proceed to make an order for costs in Katie’s favour, she further submits that the unreasonable conduct of Stephen, Martyn and Nicholas merits an award of costs on the indemnity basis. She highlights that their Applications were made when Pearl was foreseeably close to death and there was a strong likelihood that she would not outlive the determination of the Applications. In addition, Katie has questioned the Applicants’ motivations in bringing their Applications, which she suggests were not based on the best interests of Pearl but rather fuelled by her brothers’ resentment at the way Herbert had favoured Katie and Jane under his will, which led to the Applicants seeking to replace Katie with Stephen as Pearl’s guardian in order to obtain control over Pearl’s estate.
16. In support of her Application for indemnity costs, Katie’s Second Affidavit sets out these concerns, adding that she was “*put to great distress and enormous expense*” in responding to the Applications. She also states that, before she had even been told that her brothers had informed the Court of Pearl’s death, her brothers’ Advocates were writing to all firms of Advocates on 11 December 2018 enquiring whether they held any will for Pearl, which she considers supports her contention that they were simply interested in assuming control of their mother’s estate.
17. In response (and also on behalf of his brothers), Stephen contends that the outcome of the hearing would have been that the Applicants were justified in seeking the removal of Katie as Pearl’s guardian and that they had taken no steps to prevent the Court determining their Applications. Indeed, they would have preferred to have had a decision before Pearl died because he felt it would have been favourable to them. In his Second Affidavit, he points out that Pearl’s physical health was good until about two weeks before the hearing took place. In his Skeleton Argument he invites the Court to disregard Katie’s contentions made with the benefit of hindsight about the state of Pearl’s health and to focus instead on what was known at the time of the hearing in November 2018. The brothers deny that their motivation was anything other than through having regard to what they considered to be in Pearl’s best interests. Stephen’s Third Affidavit exhibits some e-mails sent first by Katie and then Jane to their siblings in September 2018 about financial planning in respect of Pearl referring to fixing bank account interest rates for one year, or even three years, from which he infers that there were no concerns about Pearl’s imminent demise and, because he also explains that this was the first occasion on which this type of discussion was taking place between Pearl’s guardian and the members of the family council, he suggests that this arose because Katie had become aware of her brothers’ concerns about how Pearl’s guardianship was being managed.

Discussion

18. Advocate Tee is correct to point out that I have the benefit of knowing what the outcome of the Applications would have been. It was no more than Pearl’s death so soon after the

hearing that has resulted in there being no substantive judgment. The Jurats concluded their deliberations at around the time of Pearl's death and, although it is unnecessary to set out in any detail all their findings, their conclusion was that the removal Application should be dismissed. The starting point for my consideration of the just costs order flowing from that conclusion is that the Applicants should be ordered to pay Katie's costs, ie, costs can follow the event because the Court is able to identify clearly who should be regarded as the successful party.

19. At its heart, this was a family dispute and I take the view that it is important not to lose sight of that fact. The majority of the members of the family council assisting the Court-appointed guardian of Pearl in the management of Pearl's financial affairs had lost confidence in Katie. It is always sad when family members fall out to the extent that their dispute requires resolution by the Court. I had hoped that there might be some reconciliation following Pearl's death. For example, the siblings may have agreed amongst themselves that the costs they incurred in these proceedings should be regarded as a cost of Pearl's estate. It is apparent, however, that no such family agreement has been capable of being reached, hence Katie's application that her brothers should be ordered to pay her costs on the indemnity basis. I have, therefore, first considered whether making an order for Katie's costs to be paid is a just outcome in relation to these proceedings or whether some departure from the principle that costs follow the event is more appropriate.
20. Although this judgment relating to costs does not need to resolve each and every factual matter raised by the Applications, it may be helpful to summarise briefly some of the findings that would have been made had a judgment been delivered, in particular on the removal Application.
21. The Court formed the impression that Herbert and Pearl operated in a traditional, some may even regard it as old-fashioned, way, with Herbert being the head of the family, dealing with business matters, and Pearl keeping the home. When Pearl's ability to manage her own financial affairs was such that she needed to be placed under guardianship, Herbert continued to perform the same role as he had previously, although Katie was appointed as joint guardian, with support from other members of the family, as a means of future-proofing the situation. In other words, Herbert continued to provide for himself and Pearl as such decisions fell to be taken, as he had always done, funding the joint bank account as it needed to be funded and spending monies as he saw fit. They continued to be a couple devoted to one another and nothing really changed in the manner in which Herbert ran their affairs. The Court was not persuaded that the criticisms levelled at Katie in this regard were justified because there was no need to segregate jointly owned funds in the manner suggested on the basis that just because one spouse is placed under guardianship does not mean that separate pools of assets have to be created. It is permissible for a couple to continue to run their affairs as they were previously managed.
22. When Herbert died and Katie became the sole guardian of Pearl, the Court was satisfied that Katie took appropriate steps to take control of Pearl's financial affairs. In any event, key decisions relating to Herbert and Pearl's former home and where Herbert would live had been taken in the full knowledge of all the siblings and that continued to be the case. By way of example, whilst Herbert was alive, the rental income could properly be treated as a joint asset of the couple and did not need to be ring-fenced into two pots as suggested by the Applicants. The Court would not have found that the Applicants had demonstrated that Katie should be removed from the office of guardian. As a result, Stephen's Application to be appointed as sole guardian would not have been reached, but some accommodation to identify a new joint guardian with Katie might have been discussed further amongst Pearl's children.

23. The other findings that potentially impact on Katie's costs Application relate to the dynamic within the Brehaut family. The Jurats would have commented that they regarded the reading of Herbert's will to be a pivotal moment. Although Herbert and Pearl's children were not necessarily all particularly close to one another, there was sufficient harmony for big decisions to be reached and supported among them. Herbert's decision not to appoint one of his children to administer his estate following his death is, in their view, a significant factor. In short, the terms of Herbert's will and the parties' reaction to it appear to have resulted in a heightened sense of resentment and embitterment towards Katie and Jane on the part of the Applicants.
24. Having considered the judgment that the Court would have delivered but for Pearl's death, I am satisfied that this is a case where it is obvious that Katie would have been the successful party and that, when viewed in the round, there is no good cause to depart from the principle that costs follow the event. Although this has been a family dispute and arguably for the benefit of Pearl and the management of her financial affairs, it had all the hallmarks of what would be described as hostile litigation in other areas, eg, in trusts cases. It would not be just in these circumstances to deprive Katie of the order of costs that would follow upon that outcome and so I reject the Applicants' suggestion that this is a proper case in which to make no order as to costs.
25. The second question to resolve is the basis on which the Applicants should be ordered to pay Katie her costs. Despite the Jurats having indicated that they would have found that Herbert's testamentary dispositions resulted in the breakdown of relations, I am not persuaded that all the circumstances take this case out of the norm to justify awarding costs on the indemnity basis. In my judgment, the appropriate and just order to make is the usual order in contested matters, namely that costs be payable on the recoverable basis.
26. In my view, it is important to put these Applications into their proper context. Most guardianship disputes will involve family members. There may be something, such as in this case, that leads to the breakdown in those family relationships and results in proceedings before this Court, but the fact that what can be viewed as hostile proceedings are instituted does not mean that this is out of the norm. Even though I have noted the clear antipathy towards Katie, as shown by her not even being included at the time of Stephen's Application to be appointed sole guardian or in the future as a member of the family council, I am persuaded that the Applications were not brought vindictively. I accept that the Applicants believed that there was a proper foundation on which they could question whether Katie should be removed as Pearl's guardian. At the time these proceedings were commenced, I do not find that they would inevitably have been pointless because Pearl would not live long enough to reap any benefit from whatever the outcome would be. I consider that what Katie now raises is only being raised with the benefit of hindsight. Had all Pearl's children thought that their mother would die so soon, I imagine they would not have wished to proceed with the hearing and the expense and upset it would involve. The fact that no one suggested that the proceedings be adjourned or stayed to await developments in Pearl's health is something I have borne in mind in that regard. I also do not regard the actions taken by the Applicants' Advocates immediately following Pearl's death as anything other than the steps that would be taken by family members in order to ascertain whether a relative had died leaving a will or intestate. As the guardianship had lapsed, this was not a task lying within the province of any former guardian, but something to be done by, or on behalf, of the family member who would be best placed to seek to administer the estate in the event of there being an intestacy. Accordingly, bringing the Applications themselves does not, in my view, constitute taking a step that was wholly unnecessary and so sufficiently unreasonable to be met with indemnity

costs. The Applicants lost in much the same way as an application to remove an office-holder might be dismissed on the basis of the applicant failing to discharge the burden imposed. I think they were entitled to put their concerns before the Court even if ultimately they would have been unsuccessful. The decision itself to make their Applications does not amount to an abuse of the type that justifies making an award of costs on the indemnity basis.

27. I have also considered how Stephen, Martyn and Nicholas conducted these proceedings because if the manner of how they conducted what I find were appropriate proceedings to bring took the case out of the norm that could justify awarding indemnity costs. The Applicants did not over-burden the Court with materials and, on their behalf, Advocate Richardson made his submissions in a succinct and measured fashion. In all the circumstances, I cannot find that the way the Applications were conducted takes the case out of the norm.
28. Although it is not an issue that either side has raised, I even went on to consider whether the expense to which Katie, as Pearl's guardian, has been put should properly be regarded as an expense of Pearl's estate, meaning that any shortfall between what she recovers from her brothers and what she has been required to pay to her Advocates should be capable of being taken from Pearl's estate. Whilst there is some attraction to viewing Katie's participation in these proceedings in that light, I have decided not to make any such order because I am concerned that this will only serve to introduce more friction between these family members and that whatever has happened to Pearl's estate already should not be affected by any order of the Court. By confining the costs outcome as to how it operates between the parties, as sought by Katie's Application of 1 May 2019, it affects only the parties' positions rather than possibly having unintended consequences for the distribution of any estate Pearl left. I simply mention that I did give consideration to this possibility as a result of what Katie set out in her Second Affidavit, even though it was not a form of relief she sought.

Conclusion

29. For the reasons I have given, I am satisfied that the outcome of the removal Application, had it resulted in judgment being delivered, would have meant that Katie succeeded and so is entitled to the costs order that would follow that conclusion. However, I am not persuaded that this is a case in which those costs should be ordered to be paid jointly and severally by Stephen, Martyn and Nicholas on any other basis than the recoverable one, because these proceedings were not out of the norm.