

Application by the Plaintiff seeking an order that the Defendant pays the Plaintiff's legal costs and disbursements, incurred from the time the Plaintiff first instructed lawyers up until and including the point in time when the Defendant consented to judgment in respect of liability, and such award is sought on the full indemnity basis or on such other basis as the Court deems appropriate.

[2020]GRC059

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

Between:

A (a Minor suing by A's parents)

Plaintiff

-and-

THE STATES OF GUERNSEY

Defendant

Hearing date: 29th May 2020

Judgment handed down: 28th September 2020

Before: Richard James McMahon, Esq., Bailiff

Counsel for the Plaintiff: Advocate P T R Ferbrache
Counsel for the Defendant: Advocate G S K Dawes

Cases, texts & legislation referred to:

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

The Royal Court Civil Rules, 2007

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

Hulme v Matheson Securities (Channel Islands) Limited (No. 2) (1997) 24.GLJ.80

Cepheus v GRE [1995] 1 Lloyds Rep 647

Thompson and Le Noury v Masterton and Bourne 2003-04 GLR 332

Le Moigne v Hargeton (unreported, 26 August 1998)

Excelsior Commercial and Industrial Holdings Limited v Salisbury Hammer Aspden & Johnson
[2002] EWCA Civ 879

Civil Procedure Rules (England and Wales)

Introduction

1. By a revised Application dated 13 May 2020, the Plaintiff seeks an order that the Defendant pays the legal costs and disbursements incurred on behalf of the Plaintiff from the time lawyers in Guernsey were first instructed up until and including 13 March 2020 when the Defendant consented to judgment in respect of liability (although not extending to causation) on a full indemnity basis or on such other basis as the Court deems appropriate. The Application also seeks indemnity costs in respect of the making of the Application.
2. The hearing of this Application took place on 29 May 2020, at the conclusion of which I indicated that I would reserve judgment and left open to Advocate Peter Ferbrache on behalf

of the Plaintiff the possibility that the Application might not be determined if those instructing him preferred to accept the offer previously made that there be an order for recoverable costs, rather than indemnity costs, for the period up to and including 13 March 2020, with the possibility of seeking an uplift in respect of the fees charged by the lawyers. By an e-mail sent on 5 June 2020 to the Greffe, I learnt that the Plaintiff prefers to have the Application as it stands determined, so I have proceeded to reach a conclusion on it and apologise to the parties for the delay in doing so.

3. The material placed before the Court on this Application comprises an Affidavit of Alison Antill sworn on 13 May 2020, which exhibits the documents on which the Plaintiff relies. There is a further Affidavit of the Plaintiff's father, also sworn on 13 May 2020, which sets out the family's circumstances and how it has been a struggle dealing with matters that are the subject of this action. In response, in a witness statement dated 22 May 2020 (which has been used in place of the usual affidavit due to the lockdown regime operating at the time, in respect of which the Plaintiff's Advocate takes no issue), Advocate Chantal Barrett refers to the inter partes correspondence that was submitted on behalf of the Defendant.

Legal principles

4. The parties' Advocates recognise that the Court enjoys a wide discretion in respect of costs. This is apparent from section 1(1) of the Royal Court (Costs and Fees) (Guernsey) Law, 1969. The power to award costs on the indemnity basis is spelt out in rule 83 of the Royal Court Civil Rules, 2007, which provides that full or partial indemnity costs can be awarded in the circumstances described in para. (2), which are:

“(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.”

5. In respect of the second limb, which is the one usually advanced, it is common ground, as indicated by the Court of Appeal in Investec Trust (Guernsey) Limited v Glenalla Properties Limited (unreported, 21 January 2015), that the approach to take derives from the guidance offered by the Jersey Court of Appeal in two cases, as set out in para. 15(d):

“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 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 respect of the predecessor rule couched in like terms, the Court of Appeal in Hulme v Matheson Securities (Channel Islands) Limited (No. 2) (1997) 24.GLJ.80 drew attention to the summary given in Cepheus v GRE [1995] 1 Lloyd's Rep 647:

“The power to order taxation on an indemnity basis is not confined to cases which have been brought with an ulterior motive or for an improper purpose. Litigants who conduct their cases in bad faith, or as a personal vendetta, or in an improper or oppressive manner, or who cause costs to be incurred irrationally or out of all proportion to what is at stake, may also expect to be ordered to pay costs on an indemnity basis if they lose, and to have part of their costs disallowed if they win. Nor are these necessarily the only situations where the jurisdiction may be exercised; the direction is not to be [fettered] or circumscribed beyond the requirement that taxation on the indemnity basis must be ‘appropriate’.”

In short, therefore, in order to award costs on the indemnity basis, the Court is required to find something taking the case, or the stage of the proceedings, out of the norm, which may be for any one or more of the non-exhaustive list of examples given.

6. There is comparatively little learning on how to approach the first limb. In Thompson and Le Noury v Masterton and Bourne 2003-04 GLR 332, the fact that an accident occurred at sea was found not to be a special circumstance enabling the Court to order indemnity costs. This was because it would mean that “*all litigation involving such accidents would be likely to attract indemnity costs, which, as a statement of principle, cannot be correct*” (para. 114). In Le Moigne v Hargeton (unreported, 26 August 1998), indemnity costs were awarded on a finding that there were “*special or unusual features for departing from the normal rule. This is a case for full indemnity costs, subject to a contribution by Mr. Le Moigne to take account of the principle that successful litigants in most jurisdictions have to pay something towards their costs, except where there is obvious litigious misbehaviour on the part of the other party.*” However, as Advocate Dawes (on behalf of the Defendant) notes, quoting from his own book, there were very limited costs available to claim if the order had been anything else until the costs regime was updated in April 2000. He suggests that recoverable costs would have been only approximately 14% of the total amount expended, which is why the order for indemnity costs was put the way it was to ensure that the successful party was not significantly out of pocket.
7. In an attempt to assist, Advocate Dawes refers to Excelsior Commercial and Industrial Holdings Limited v Salisbury Hammer Aspden & Johnson [2002] EWCA Civ 879 and cites a passage from para. 31:

“An indemnity order may be justified not only because of the conduct of the parties, but also because of other particular circumstances of the litigation. I give as an example a situation where a party is involved in proceedings as a test case although, so far as that party is concerned, he has no other interest than the issue that arises in that case, but is drawn into expensive litigation. If he is successful, a court may well say that an indemnity order was appropriate, although it could not be suggested that anyone’s conduct in the case had been unreasonable. Equally there may be situations where the nature of the litigation means that the parties could not be expected to conduct the litigation in a proportionate manner. Again the conduct would not be unreasonable and it seems to me that the court would be entitled to take into account that sort of situation in deciding that an indemnity order was appropriate.”

The context of that passage was commenting about where there has been a payment into court and the principle that there needs to be something more than merely non-acceptance of a payment into court, or an offer of payment, before it is appropriate to award indemnity costs.

The language used in the English Civil Procedure Rules about costs found in Part 44 does not have any direct equivalent of rule 83(2)(a) of the 2007 Rules. That said, as general examples of what might, in appropriate cases, be special circumstances, these examples may assist. However, they have no application in the present case.

Chronology

8. With those principles in mind, it is helpful next briefly to explain what happened prior to the commencement of proceedings and then up to 13 March 2020.
9. A detailed letter before action dated 21 April 2017 was sent to the Defendant. It referred to the various reports that were already in the Defendant's hands. In amongst the concluding paragraphs, the Advocates for the Plaintiff invited the Defendant "*to concede liability for the injuries caused ... by the negligent actions of the Midwives*". A response was requested by 16 June 2017.
10. When no substantive response had been received, the Plaintiff's Advocates sent a gentle reminder by e-mail on 28 June 2017, which received a response from Advocate Dawes on 4 July 2017, in which he indicated that the States' insurers were instructing him and he apologised for the fact that "*it will take us several more months to investigate fully the issue of breach of duty before reaching a conclusion and being able to say whether or not we concede such*". He also pointed out that there was the separate issue of causation and promised to revert "*with our conclusion on breach of duty as soon as we are able*".
11. In response to an e-mail from Advocate Ferbrache on 14 July 2017 seeking some answers to his queries, Advocate Dawes wrote on 21 July 2017 pointing out that this "*is a complex case with many issues upon which a great deal potentially turns*". He added that "*the question of breach of duty might be capable of being resolved within a comparatively short time but that doesn't really take matters much further. There is then the separate issue of causation; i.e. what injury, loss and damage was caused by any breach of duty.*"
12. There were then some exchanges relating to pre-action disclosure, but the question of a substantive response to the letter before action was once again raised towards the end of 2017, resulting in a response from Advocate Dawes on 14 December 2017 in which he wrote: "*I regret that we have not concluded our investigations as to liability. Matters have been delayed and I apologise for this. The departure of the associate previously looking after this case has not assisted. ... I fear it will be at least another three months before we have answers to the questions you raise and again I apologise for that; although again I point out that this case could not be concluded in any event for some years even if liability were to be conceded.*"
13. The Plaintiff's Advocate next wrote on 28 March 2018, indicating that there was due to be a meeting with those instructing that firm on 10 April 2018 and hoping for a response before then. The next day, Advocate Dawes replied, indicating that: "*As previously advised we have been progressing this matter with all proper speed but unfortunately we have not yet received all of the evidence our client needs to provide your clients with a substantive response on breach of duty. That has been chased and we are advised that we can expect to receive this evidence on Tuesday next week. Thus we hope to be in a position to respond to you regarding breach of duty prior to your meeting with your client.*" This was followed by a short letter dated 10 April 2018, which explained that "*Unfortunately and despite our best efforts, as a result of the Easter holidays we are not yet in a position to provide you with our client's position on breach of duty. We hope to be able to do so within the next 7 to 10 days and will revert to you as soon as possible to do so.*"

14. By letter dated 13 April 2018, the Defendant's Advocates gave the following response:

“Having given very careful consideration to the matter, unfortunately our client is unable at this stage to provide your clients with a response on breach of duty. Our view is that it is not possible to separate this issue from the complex issues of causation which, as already noted in our previous correspondence, will inevitably take further time to determine. There is also the question of the liability of the Obstetrician ..., which needs to be investigated further. As you will be aware, obstetricians are not employed by the hospital or the States of Guernsey and [he] will have his own medical defence organisation which will wish to carry out its own investigation.”

15. The Plaintiff's Advocates wrote on 31 July 2018 that very senior specialist counsel had been instructed and had expressed shock at the Defendant's “refusals to concede breach of duty, its refusal to divorce breach of duty from the issue of causation and its efforts to cloud the issue of liability by reference to [the obstetrician]”. That letter indicated that the Plaintiff's team was on the verge of instructing experts to report and invited a response within seven days in order to avoid the expense of doing so. The Defendant's Advocates replied the same day agreeing that the instruction of experts will inevitably increase costs but not changing its position from what had been set out on 13 April 2018.
16. There does not appear to have been any further correspondence prior to the Plaintiff's Advocates providing a draft Summons to the Defendant's Advocates in October 2019, after which the action was commenced the following month. The Cause was tabled on 15 November 2019. An extension of time for the tabling of the Defences was agreed between the parties and the Defences were duly filed on 31 January 2020, with the action going *en preuve*. Third party proceedings were also commenced by the Defendant, which went *en preuve* on 28 February 2020. On 13 March 2020, the Defendant consented to judgment in favour of the Plaintiff with damages to be assessed.

Discussion

17. In respect of the special circumstances of the case referred to in rule 83(2)(a), I find myself in a similar position to the way it was viewed in *Thompson v Le Noury*. To find at this stage that a case involving significant injuries to a baby during child birth is a case where indemnity costs follow would mean all such cases, and the further stages of this action, would justify awarding indemnity costs. I am not persuaded that that is correct as a statement of principle and would, in my view, be unjust because it would reverse the usual presumption about the reasonableness of costs claimed and remove the cap in relation to the costs associated with advice and representation in respect of the entire claim.
18. The arguments advanced on behalf of the Plaintiff include that the action is of immense significance; it is an action that has necessitated instructing experienced, specialist and expert professional assistance; and the costs incurred are being funded by a normal family with all the commitments such families have and not a large corporate conglomerate. Advocate Ferbrache also refers to the Defendant having access to lawyers who charge more than he and the firm with which he is associated do, but I do not consider that that factor can have any bearing at all on whether the first limb for awarding indemnity costs is engaged. Whilst I have carefully balanced whether any of the other arguments made on behalf of the Plaintiff can lead to this action, or at least this part of the action, warranting an award of indemnity costs, I cannot reach that conclusion. All actions for damages in respect of personal injury are of great significance to the person claiming those damages. The aim is to compensate the plaintiff so as to put the plaintiff as far as possible in a comparable position as if the injury had not occurred. Those who suffer very significant injuries, which change their lives, know

that whatever the amount of money eventually awarded, it is not the same as if the injuries had not occurred. In effect, it does not matter what those injuries are, and there will be other cases where significant injuries result from negligence where the quantum of damages could be a very large amount, but where the usual award for costs is appropriate, subject always to the manner of the conduct of the action. Accordingly, I do not find that this action, or even just this stage of this action, falls within rule 83(2)(a).

19. In relation to rule 83(2)(b), I have done my best to compare what has happened thus far in respect of this litigation, including pre-commencement steps, with what would have been ideal as well as with what would be acceptable. If I had concluded that the conduct of the Defendant had fallen within the range of acceptable litigation conduct, I would find that the costs to be awarded for the time up to 13 March 2020 should be awarded on the usual recoverable basis only. However, I have decided that there was a time when the conduct of the Defendant was such that it takes that element of what happened out of the norm and so warrants awarding costs on the indemnity basis for that period, with the remainder of the costs covered by this order being on the recoverable basis only.
20. During the course of the hearing, Advocate Ferbrache conceded that there have been steps in what has happened that were required in any event. The steps before proceedings were issued where the Defendant was being invited to acknowledge that it would not contest the basic requirements for liability inevitably entailed some legal work on behalf of the Plaintiff. Similarly, drafting a Cause and arranging for the proceedings to be commenced and follow their usual pattern were all steps that could not sensibly be regarded as being out of the norm. As a result, I have focused on the time between these stages to determine what was, and what was not, reasonable litigation conduct.
21. I find it was reasonable for the Defendant's Advocate to indicate that some time was needed prior to responding to the letter before action. I have borne in mind further that there is no procedural requirement for there to be any letter before action, although it is good practice to forewarn the other side of what may follow with a view to seeking to negotiate or at least to narrow the areas of dispute. However, having volunteered in the summer of 2017 to provide a response within several months, the failure to do so before the end of that calendar year for reasons that are, in my view, inadequate, starts to look like prevarication, where such conduct can be regarded as swinging the pendulum of what is reasonable towards it being unreasonable behaviour. There is, I think, a difference between recognising that an action, once commenced, may not be capable of being concluded for some time and explaining that and offering some assistance to the other party to understand what will and what will not be in dispute. This is particularly so where the Defendant's advisory team ought to have understood the importance to those advising the Plaintiff of understanding whether any of the typical pre-action work could properly be dispensed with.
22. Subsequently, the decision of the Defendant from around Easter 2018 not to provide a response on the question of breach of duty is when I am satisfied that the pendulum squarely continues to swing into the band of unreasonable litigation conduct. I reach that conclusion because, when the issue of breach of duty was eventually conceded around two years later, I have not been persuaded that any explanation offered on behalf of the Defendant has merit. Indeed, I fail to understand why that concession could not have been made much earlier. It would, in my opinion, have assisted the Plaintiff's team and would have saved some of the costs. In those circumstances, I find that there is a proper basis for awarding indemnity costs for a period of time, with the costs prior to that time and after it being awarded on the recoverable basis.
23. Accordingly, the next question is the appropriate time frame for such indemnity costs. There is no clear or scientific way of determining this question and so I will take a reasonably broadbrush approach. Giving some considerable latitude to the Defendant, its responses in

April 2018 might be regarded as the latest time at which the concession on breach of duty ought to have been made. In some respects, selecting an earlier date might be appropriate because the promise of a response by the end of 2017 had been made. However, I have noted from the information provided on behalf of the Plaintiff that the more significant costs, except those associated with preparing the letter before action and early correspondence in relation to it, were incurred after that time. As a result, I am satisfied that the starting date should be the day when that response was sent, being 18 April 2018.

24. In the light of Advocate Ferbrache's acknowledgement that preparing a Cause and arranging for service of the Summons were steps that would be required in any event, I have concluded that I need to try and identify a date when the costs associated with such work appears to have commenced in earnest. In that regard, it follows that the end date for the indemnity costs award must precede the provision of the draft pleading in October 2019. Looking at the billing information, I have noted that there is a larger amount in respect of costs prior to May 2019, whereas the disbursements element continues to August 2019. In an attempt to balance these costs out between what is awarded on the indemnity basis and what is to be on the recoverable basis, I have chosen to use 17 July 2019. As I have already stated, there is no magic in that particular date, but it does have the benefit of being the end of a period of 15 months from the starting date for the indemnity costs. I have chosen it as a means of reflecting a "blended" approach to the time during which the Plaintiff should receive the benefit of the reversed presumption as to the reasonableness of the costs incurred (as well as the removal of the cap that would otherwise operate in respect of Advocate's costs). It recognises that the parties should have been in a different position during this time, with the Defendant conceding that breach of duty was not disputed and the effect that has had on the steps the Plaintiff was forced into taking.
25. For these reasons, I am satisfied that it is just to order the Defendant to pay the Plaintiff's costs up to and including 13 March 2020 and that, for that 15-month period from 18 April 2018 to 17 July 2019 inclusive, those costs are to be paid on the indemnity basis.

Costs of application

26. Although the Plaintiff seeks an order for indemnity costs in respect of this Application, I see no reason to depart from the usual order of those costs being payable on the recoverable basis. The Defendant had offered to pay the Plaintiff's costs on the recoverable basis. I have decided not to award indemnity costs for the full period sought by the Plaintiff. I regard this as meaning that the Plaintiff has been successful in getting some indemnity costs (and potentially more of the Plaintiff's costs on this basis than on the recoverable basis) and so should be treated as the successful party. (It would clearly have been different had I concluded not to award any costs on the indemnity basis, where the Defendant, having offered that outcome, would be the successful party.) As a result, the costs of this Application can properly follow that event, but there has been no suggestion that the Defendant's opposition to this Application amounts to unreasonable conduct and so I am satisfied that it does not take its position on the question of the proper costs order to make out of the norm. There is no basis for awarding the costs of the Application on the indemnity basis and so I will confine the order to one that the Defendant pays the Plaintiff's costs of the Application on the recoverable basis.