

Application seeking a declaration that a paragraph of the Credit Conditions, applicable to the banking relationship between the parties, does not have the meaning or application that the Defendant seeks to apply, and the Plaintiffs seek the return of the amounts deducted from the account unlawfully.

[2021]GRC011

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between

**1. FIONA MORGAN
2. NEIL MORGAN
3. BLUE SKY EQUITY TRADING LLP**

Plaintiffs

-and-

**BANK JULIUS BAER & CO LIMITED,
Guernsey Branch**

Defendant

Hearing date: 13 November 2020

Judgment handed down: 10 May 2021

Before: Richard James McMahon, Esq., Bailiff

The Plaintiffs represented themselves

Counsel for the Defendant:

Advocate I K Mitchell

Cases, Texts & Legislation referred to:

The Royal Court Civil Rules, 2007

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

Guernsey Home Loans Limited v Le Couvey (unreported, 28 May 2015)

Canada Steamship Lines Ltd v The King [1952] AC 19

Gomba Holdings (UK) Ltd v Minorities Finance Ltd (No. 2) [1993] Ch 171

Cook on Costs (2019)

Church Comrs v Ibrahim [1997] 1 EGLR 13

The Royal Court (Costs and Fees) Rules, 2012

The Judgments (Interest) (Bailiwick of Guernsey) Law, 1985

Introduction

1. This action arises from a banking relationship that the Plaintiffs had with the Defendant. The Plaintiffs have not been represented by an Advocate. The account that is the subject of these proceedings was held by the Third Plaintiff, a limited liability partnership wholly owned by the First and Second Plaintiffs and their children. The First and Second Plaintiffs are authorised to act on behalf of the Third Plaintiff and the bulk of the submissions have been made by the Second Plaintiff. The prayer in the Cause seeks a declaration that paragraph 10 of the Credit Conditions applicable to that banking relationship does not have the meaning or

application which the Defendant seeks to apply to it, with the consequence that the Defendant must return to the Plaintiffs amounts that were deducted from the account unlawfully. The first amount is £120,096.40, which was debited on 3 November 2017. The other three amounts are £25,641.72, £1,698.49 and £3,333.34, the last of which was debited on 8 November 2017 and the first two of which relate to account fees, for the period from 2 August 2016 to 13 November 2017 and the smaller second amount relates to account fees for the quarterly period in the final part of 2017 when the account was closed. The Plaintiffs seek 8% interest on the monies deducted running from the date of deduction until reimbursement is made.

2. The Defendant denies that the Plaintiffs are entitled to any relief. Its Defences were tabled on 18 October 2019. The Plaintiff's Réplique is dated 3 December 2019 and joins issue with most of what has been set out in the Defences.
3. Because the outcome of these proceedings principally turns on a question of construction of the terms governing the banking relationship and then applying that construction to what are essentially agreed facts, the parties elected to have the matter heard by a judge sitting unaccompanied by the Jurats and there was no oral evidence. Instead, the facts are taken from two witness statements and the documents on which the parties have relied. The First and Second Plaintiffs produced a joint witness statement dated 26 May 2020, and the chief risk officer at the Defendant produced a witness statement dated 19 June 2020. On behalf of the Defendant, Advocate Mitchell has submitted that all the deductions about which the Plaintiffs complain were permitted under the terms governing the relationship.
4. The hearing of this action took place on 13 November 2020. At its conclusion, I reserved judgment and I also permitted the parties, if they wished to do so, to make further submissions in writing once the further documentation I directed should be provided to assist the Court had been filed. In particular, I wished to see the documents showing that the costs incurred by the Defendant with their Advocates had actually been billed and paid and Advocate Mitchell provided some documents in relation to those issues on 24 November 2020 and the materials to which the Plaintiffs had referred relating to correspondence with the Court and the Defendant's Advocates was provided by the Second Plaintiff on the same day. The Plaintiffs then made further written submissions dated 8 December 2020 and Advocate Mitchell indicated on the same day that the Defendant had no further submissions it wished to make. I have taken all the materials submitted into account as well as the oral submissions made by both sides at the hearing. The preparation of this judgment has taken longer than I would have liked, partly because of other matters that needed to take priority and the consequences of managing a second lockdown arising from the Covid-19 pandemic, so I apologise to the parties for the delay in setting out my decision.

Facts

5. The First and Second Plaintiffs both had banking relationships with the group of which the Defendant forms a part before the establishment of the Third Plaintiff. From the Corporate/Foundation Client Account Agreement attached to the Defences, it appears that the Third Plaintiff came into existence on 20 July 2015. At a meeting of the Third Plaintiff on 30 October 2015, it was resolved to open an account with the Defendant. The Defendant's General Banking Conditions would apply to the new relationship. A summary sheet indicates that the Third Plaintiff's account was opened on 19 April 2016, with the first transaction taking place on 24 May 2016 and the account was closed on 15 November 2017. This means that the relationship lasted just over 18 months. It was not a happy one.
6. A Facility Letter was provided by the Defendant dated 31 March 2016, by which the Third Plaintiff was offered a facility subject to the terms and conditions contained therein, including the Credit Conditions, which were attached. On the first page of the Facility Letter, in bold

type, it was explained that “*The Credit Conditions contain important provisions and you should read them carefully and in full.*” The purpose of the facility was described in para. 3 as being a “*Multipurpose multicurrency revolving loan, guarantee, foreign exchange (spot and forward) and derivatives credit facility for the Client’s investment and other general requirements.*” The Facility Letter was signed by the First and Second Plaintiffs on behalf of the Third Plaintiff on 16 May 2016. They have initialled each page, including each page of the Credit Conditions. This is known as “*the Lombard credit facility*”. A Security Agreement also dated 16 May 2016 was entered into between the Third Plaintiff and the Defendant. The First and Second Plaintiffs again signed this on behalf of the Third Plaintiff as Designated Members.

7. On 17 June 2016, the First and Second Plaintiffs sent by e-mail an instruction to Darren Porter at the Defendant to move all assets held in the three personal accounts indicated to the new account in the Third Plaintiff’s name and similarly to move all credit facilities held against those three personal portfolios to the new account. They asked for certain sums in cash to be transferred to their newly opened personal account, which had a different account number to that opened in the Third Plaintiff’s name, with the remaining cash being transferred to the Third Plaintiff’s account. Once those steps had been completed, they instructed the Defendant to close their three earlier personal accounts. Mr Porter responded some hours later with some further enquiries and sent a further chasing e-mail on 20 June 2016. He also sent to the First and Second Plaintiffs portfolio valuations for the three accounts being closed and the two new accounts.
8. On 21 June 2016, the Second Plaintiff and Mr Porter had a telephone conversation, the contents of which the Second Plaintiff set out in an e-mail to Mr Porter that afternoon, which included:

“I set out below what we previously agreed and as reconfirmed today concerning Blue Sky with fees, share trading costs and dividends;

- *All inclusive fee of £20,000 PA*
- *To include all custodial fees (regardless of value of stocks)*
- *To include 50 trades (buy and sell transactions) of shares per annum without further charge*
- *To be paid in quarterly instalments in advance of £5,000 and as we have already paid quarterly fees in advance through our personal accounts we will only be charged from September at the rate of £5,000 per quarter in advance and that the erroneous debit of £1,666 for a month’s fees in advance will be refunded because the account is not properly operational until you have made the transfers across.*
- *The Trading and dividend receipt accounts will all be bundled combined into one”.*

Shortly thereafter, Mr Porter responded confirming “*that the revised fee terms and account arrangements are as we previously agreed*”.

9. On 25 June 2016, the Second Plaintiff sent an e-mail to Mr Porter querying why there had been a charge for “external fees” when there was agreement for set fees of £5,000 per quarter with no more than 50 trades per annum included without further cost. He drew attention to the fact that they could trade through another route more cheaply than with the Defendant if

such costs were to be levied. As an alternative, if they did not trade through the Defendant, he proposed a reduction to the fixed fee to £3,000 per quarter. He concluded “*Kindly confirm that we have been charged fees for the portfolios up to 30 June 2016 and that the fee to be paid by Blue Sky will not be debited until late September and will cover the period 1 July to 30 September 2016.*” On 6 July 2016, Mr Porter replied explaining that such external costs could not be rebated and that “*the agreed custody fee of £5,000 (five thousand pounds) per quarter and £20,000 per annum, already includes a discount to our standard 0.35% custody fees. Therefore, we will not be offering any further discount.*”

10. On 2 August 2016, the Defendant sent to the Third Plaintiff a letter indicating that it had decided to discontinue the latter’s account, referring to article 45 of the General Banking Conditions, and demanded repayment of all indebtedness relating to the Lombard credit facility by 31 October 2016. The Third Plaintiff’s account would then be closed with effect from 14 November 2016.
11. Discussions followed and a revised demand was sent dated 26 October 2016 under which repayment was required by 31 August 2017 at which time the account would be closed. Aside from varying the dates, the remainder of the original letter for demand dated 2 August 2016 continued to apply. A reminder was sent by the Defendant to the Third Plaintiff dated 28 July 2017.
12. Under cover of a letter dated November 2016, Julius Baer International Limited (“JBIL”) informed the Third Plaintiff about the main charges which had been agreed with it following a recent amendment to the account of the Third Plaintiff. The documents attached included a Confirmation of Services and Fees, which had been printed on 28 November 2016 referring to the minimum fixed per quarter as being the fixed amount of £5,000 with a standard tiered rate for investment services transaction fees as set out in the Services and Prices document, which was also enclosed. A minimum fee per transaction of CHF200 was also mentioned.
13. The Plaintiffs commenced proceedings before the Court for injunctive relief to prevent the Respondents from foreclosing, suspending or otherwise bringing to an end the Lombard credit facility, which were returnable on 31 August 2017. The First Respondent to those proceedings was JBIL. Advocate Clare Tee was acting on behalf of the Plaintiffs and the status quo was maintained by way of a Consent Order made by Judge Finch, as he then was, on 31 August 2017. The Respondents agreed not to foreclose, suspend or otherwise bring to an end the Lombard credit facility before 5 pm on 2 October 2017 and would not before then close any accounts held by the Plaintiffs provided the value of security held by the Defendant (as Second Respondent) did not fall below 120% of the amount outstanding under the loan. A procedural timetable was also set towards a hearing on 29 September 2017.
14. On 6 September 2017, an offer pursuant to rule 62 of the Royal Court Civil Rules, 2007 was made on behalf of the Respondents to the Plaintiffs’ proceedings by which they would not seek their costs if there was a consent order withdrawing the proceedings by 4 pm on 12 September 2017, after which that offer would lapse and the letter, headed “*Without Prejudice Save As to Costs*” might subsequently be drawn to the Court’s attention.
15. At the conclusion of the hearing on 29 September 2017, the Court reserved its judgment and continued the terms of the order already in place until judgment was given. The judgment was then circulated in draft on 17 October 2017. It dismissed the application, because it appears the Court considered that damages would be an adequate remedy. The Plaintiffs were dissatisfied with that outcome and indicated an intention to appeal by way of a letter sent on 20 October 2017. On behalf of the Respondents to those proceedings, by letter dated 20 October 2017, a further offer to stay the proceedings and extending the deadline for repayment of the Lombard credit facility to noon on 20 November 2017 was made, on terms

that the Plaintiffs would be jointly and severally liable to pay the Respondents' costs in the sum of £100,000.

16. The judgment was formally handed down at a hearing on 25 October 2017, and the Court granted leave to appeal on that day. The position preserving the status quo was to continue by virtue of an undertaking given not to close out the Lombard credit facility until 2 November 2017.
17. In the meantime, the Plaintiffs obtained alternative financing with Credit Suisse (UK) Limited. This enabled the Plaintiffs to settle the indebtedness under the Lombard credit facility with the Defendant and exit the relationship. The Second Plaintiff sent an e-mail to this effect to JBIL on 31 October 2017. He instructed that the assets of the Third Plaintiff should be transferred to Credit Suisse in return for repayment of the loan. On the same day, the Second Plaintiff indicated that there was, therefore, no need to pursue any appeal.
18. On 3 November 2017, the funds to settle the loan were received from Credit Suisse, a debit of £120,096.40 was made, where the narrative refers to it being a payment to "GENERAL CREDITORS", a balance of £10,000 was kept in the account and £206,058.63 was paid to an entity with a similar name to the Third Plaintiff, although appearing as a limited company. On 8 November 2017, £3,333.34, representing two months of the all-inclusive quarterly fee payable was debited and had its value date on 18 October 2017, when the Third Defendant's account was closed. The Plaintiffs consider that the resulting balance of £6,666.66, being two lots of 666, the number of the beast, has been deliberately engineered by Advocate Shepherd, who was then acting for the Defendant.
19. The Court's judgment dismissing the application for an injunction invited submissions on costs within 14 days. On 6 November 2017, an e-mail was sent on behalf of the Defendant indicating that the Respondents would seek their costs on the indemnity basis, to be taxed if not agreed.
20. On 13 November 2017, Advocate Shepherd sent an e-mail to the Second Plaintiff, which refers to telephone calls and e-mails to the Defendant itself, querying the deduction of around £120,000 from the Third Plaintiff's account, referring to what had been stated in previous e-mails that "*the Credit Agreement entitles Bank Julius Baer to recover all of its costs, including legal fees, in connection with the enforcement and close out of the Lombard Loan.*" In a document provided after the conclusion of the hearing, the Second Plaintiff's e-mail response later that evening was one of outrage, also complaining that the conduct was dishonest. He noted that leave to appeal had been granted and the Defendant did not have the benefit of any costs order, where costs were "*solely in the jurisdiction of the court*". He objected to the Respondents to those proceedings dipping into people's bank accounts and stealing money. He did not believe that the Defendant's fees would be anything approaching that amount because the Plaintiffs' own lawyers had charged them significantly less. He made a number of personally disparaging remarks directed at Advocate Shepherd.
21. The following day, Advocate Shepherd referred to that telephone conversation and exchange of e-mails in a further e-mail:
 1. *The utility in appealing against the Injunction to which you refer must, logically, have fallen away by now. The Injunction which you sought, and which was denied, was to restrain Bank Julius Baer from terminating the Blue Sky Loan. Since that has now terminated, it is difficult to see on what basis that appeal would proceed.*
 2. *It is possible that, when you refer to the Court proceedings, you are referring to the underlying claim in respect of which a draft Cause was lodged as an*

exhibit to your Affidavit in the Injunction proceedings. That claim is not active because you have not filed that Cause.

3. *Whilst you say that Bank Julius Baer's entitlement to recover costs might only arise as a result of any court order, that is not true. Bank Julius Baer's entitlement is contractual, expressed in the indemnity set out in the Credit Agreement. We have referred you to that Credit Agreement on several occasions and you have said that it does not apply. To be clear, the deduction of Bank Julius Baer's legal costs is made pursuant to the Credit Agreement, not pursuant to any court order.*
4. *In that respect, the amount of Euros that Bank Julius Baer may hold is an irrelevance to their entitlement to recover the amount of costs incurred under the Credit Agreement.*
5. *Comments you or others may have about me personally are not relevant to your position or that of Bank Julius Baer.*
6. *Should you "refer this entire matter and this correspondence back to the Bailiff", kindly ensure that everything is copied to me. I should also be grateful if you would set out the legal basis upon which you refer such matters to the Bailiff. As I have indicated above, there are no live legal proceedings. Please also ensure that all correspondence between you and this firm and our clients, is exhibited to any correspondence with the Bailiff so that he has a complete picture of what has been said and done.*

I understand that the deduction of the costs may be a disappointment to you but, for the reasons set out in this and on a number of occasions in earlier correspondence, the deduction is entirely in accordance with the Credit Agreement and should not have been a surprise to you."

22. On behalf of the Plaintiffs, the Second Plaintiff responded a short while later, copying in various personnel who work at the Defendant and the Greffe. He objected to the patronising tone of the suggestion that the Plaintiffs take their own legal advice, noting that he had written two weeks previously pointing out that the appeal did not need to be pursued. He suggested that the question of costs needed to be "parked" pending any decision as to whether there should be a trial on the substantive issues, and offered the terms of a draft order dealing with certain matters. The reference to clause 10 should have been to the "*credit conditions*", which he suggested could not possibly apply to the circumstances of the proceedings, which were discrete proceedings taken because the bank had reneged upon its agreements with them. In the absence of any order from the Court relating to costs, nothing was legally due from either party. He clearly felt personally aggrieved at the attitude of Advocate Shepherd and repeated the possibility of reporting the matter to the regulatory authorities.
23. Also on 14 November 2017, the Court invited the Plaintiffs' response to the indication given on behalf of the Respondents to the proceedings that they were seeking an order for indemnity costs. The Plaintiffs responded the next day suggesting that costs be ordered on the standard basis.
24. The Plaintiffs did not take any further steps until 29 May 2019, when they requested that the Court assess the costs of the proceedings. That e-mail set out some of the history already described, noted that no formal order had been made following the hearing on 25 October 2017, and attached a proposed order and proposed a timetable for the provision of a bill of costs and comments thereafter thereon. Those proposed directions included that the

Defendant would repay to the Plaintiffs what had been deducted on 3 November 2017 with interest at 8%, which is, of course, the main issue in the current action.

25. In the post-hearing documentation provided by the Plaintiffs, the Greffe replied on behalf of Judge Finch on 12 July 2019 to further e-mail correspondence on behalf of the Plaintiffs that the Court had no jurisdiction to entertain proceedings in respect of allegations of breach of mandate with the Defendant, which would need separate proceedings. Thereafter, on 9 August 2019, a response to a letter of 5 August 2019 was provided, developing that conclusion “*that it is not a viable proposition for an unsuccessful party in litigation to try to compel the successful party to make an application for costs that it has not made and is not instructed to make.*” Accordingly, it was considered that there was no jurisdiction to make the directions the Plaintiffs sought. These matters were also referred to Bailiff Collas, who reviewed the position, and caused a response to be sent pointing out that any complaint should be dealt with by way of appeal and that an alternative approach had been suggested. As a result, these proceedings were commenced following an application made pursuant to rule 90 of the 2007 Rules sent in on 5 September 2019.
26. On behalf of the Defendant, a colleague of Advocate Mitchell forwarded copies of the e-mails sent to the Defendant on 7 September, 2 October and 1 November 2017 enclosing the invoices of Mourant Ozannes in the amounts of £16,778, £79,879.90 and £23,438.50 respectively. The material also included the payment advices dated 13 September, 11 October and 8 November 2017 showing that each amount billed had been paid on those dates. A breakdown of the costs as between different fee earners has also been provided.

Parties’ contentions

27. The Plaintiffs’ position is that the interpretation under which the Defendant deducted £120,096.40 on 3 November 2017 from the Third Plaintiff’s account is a misreading of clause 10 of the Credit Conditions as attached to the Facility Letter. Further, to permit the Defendant to act in this way entirely usurps the discretion of the Royal Court under the Royal Court (Costs and Fees) (Guernsey) Law, 1969. In relation to the other amounts it seeks to recover, these arise from a failure of consideration or have been taken in breach of contract.
28. In support of their arguments relating to the 1969 Law, they refer to *Guernsey Home Loans Limited v Le Couvey* (unreported, 28 May 2015), in which I indicated that it is not open to the parties by their contract to displace the Court’s discretion. In that judgment, I added that ordinarily the Court would consider exercising its discretion to reflect any contractual right to claim the costs of the proceedings. The Plaintiffs further question whether, had the Court in 2017 been called upon to make an order for costs, it would have been on the full indemnity basis or on some other basis, noting that any order for costs could then have been subjected to taxation at their request. Because there has been no costs order, no obligation to pay any costs has arisen, which means that the Defendant was prohibited from deducting any amount in respect of the costs it had incurred. Upon the return of the monies already deducted, the issue of costs would then be *res judicata*, preventing any further application for a costs order.
29. In relation to the interpretation to give to clause 10 of the Credit Conditions, the *contra proferentum* rule derived from *Canada Steamship Lines Ltd v The King* [1952] AC 192 should be applied so that the absence of any explicit reference to legal costs arising after completion of the facility would not be covered. This is because the ambiguity in the wording should be resolved against the Defendant, whose standard terms these are.
30. In respect of any costs order that could be made in respect of the application for an injunction, the Plaintiffs suggest that the Defendant should be denied its costs anyway because of its conduct. This submission relies upon the fact that the Defendant deliberately left in the Third

Plaintiff's account an amount of £6,666.66 and it sought its costs on the indemnity basis before then withdrawing its application.

31. In respect of the other amounts claimed in the Cause, the Plaintiffs argue that no fees in respect of the account should be payable once the Defendant had decided, as shown by its letter dated 2 August 2016, to close the account. This is because the trading activity ceased with the account effectively being frozen and so the services to which the account fees relate were not being provided. In any event, in respect of the two smaller amounts, these were not payable under the terms of the banking relationship because fees had already been paid in advance.
32. In their supplementary submissions on 8 December 2020, they submit that the Defendant is now unable to pursue any costs order in its favour because that question has already been determined by the Court, as shown by the e-mail correspondence in the summer of 2019. This means the issue is *res judicata*. The Defendant's Advocate had acknowledged in November 2017 that he took the view that no costs order was necessary so the costs application had been withdrawn or not pursued at that time. The Defendant is, therefore, estopped from pursuing the matter further.
33. In commenting on the materials produced by the Defendant relating to the invoices and payments made, they suggest that some of the material, by which I understand them to mean the breakdown of the costs, had only just been produced and so was not a document contemporaneous with the issues arising in November 2017.
34. On behalf of the Defendant, Advocate Mitchell has maintained the position set out in the correspondence at the time, relying principally on the terms of clause 10 of the Credit Conditions, insofar as it relates to the claim for repayment of the legal costs deducted on 3 November 2017. She points out that the claim in respect of account fees that were deducted from time to time involves a separate issue. It is common ground that those fixed fees were chargeable at £5,000 per quarter. However, the contractual arrangement between the Defendant and the Third Plaintiff was silent on whether these were payable in advance or in arrears.
35. As far as the Defendant is concerned, the deductions it made in respect of this fixed fee were permissible because the account remained operative until 15 November 2017, and so the fees associated with the account fell due. The fees were payable quarterly in advance, with the first quarter's fee paid in respect of July to September 2016. That pattern continued thereafter.
36. As well as relying on the express wording found in clause 10 of the Credit Conditions, the Defendant refers to clause 48 of the Client Account Agreement containing a right of set-off. When properly considered, clause 10 of the Credit Conditions is not limited in the manner for which the Plaintiffs contend to expenses of an administrative nature. The fees the Defendant incurred in the injunction proceedings fall squarely within the terms of clause 10 and so the Defendant was entitled to deduct them from the Third Plaintiff's account as it did. This arose because the Third Plaintiff had agreed that it was permissible for the Defendant to debit its account in this fashion. Further, the Defendant had forewarned the Third Plaintiff of its intention to do this in late October 2017 and, relying on clause 48 of the Client Account Agreement, it gave notice of the transfer having been made on 13 November 2017. There was nothing unlawful in these actions.
37. In respect of the previous decision in *Guernsey Home Loans Limited v Le Couvey*, referring as it did to the English case of *Gomba Holdings (UK) Ltd v Minorities Finance Ltd (No. 2)* [1993] Ch 171, Advocate Mitchell adopts the skeleton argument prepared by Advocate Duerden and suggests that the following principles can be derived:

- i) regardless of any contractual agreement between parties, the Royal Court always retains oversight of costs incurred in legal proceedings (giving effect to section 1(1) of the Royal Court (Costs and Fees) (Guernsey) Law, 1969);
- ii) where there is a contractual right to the costs, the Court's discretion should ordinarily be exercised so as to reflect that contractual right;
- iii) the Court may disallow the lender's actual costs, charges and expenses where the borrower can show a clear case of unreasonableness;
- iv) however, in the absence of a specific decision by the Court to that effect (ie, a costs order is made without reference to the contractual provisions or if there has been no adjudication as to whether or not the lender should be deprived of those costs), the lender is not to be deprived of its contractual right to recover its costs;
- v) the lender's contractual right of indemnity extends to all costs other than those which have been unreasonably incurred or which were unreasonable in amount.

38. In addition, the Defendant relies on some passages from *Cook on Costs* (2019). The first of those passages is para. 36.2, which states:

“Many contracts, particularly mortgages, contain provisions to the effect that one or other party will be liable for the costs incurred pursuant to the contract. Under the terms of the mortgage deed, the mortgagee is usually entitled to add to his security his usual and proper costs of proceedings between himself and the mortgagor or any surety. He does not require an order from the court to do so. ... However, the court has an equitable jurisdiction to disallow all or part of a mortgagor's costs as being unreasonably incurred or of an unreasonable amount, in fixing the terms of redemption.”

That paragraph also refers to the *Gomba Holdings* case, noting that there is a presumption that costs payable under a mortgage or any other contract are reasonably and properly incurred and such costs are to be paid on the indemnity basis. In the next paragraph, this work refers to the decision in *Church Comrs v Ibrahim* [1997] 1 EGLR 13 that *Gomba Holdings* is not confined to mortgage cases, before continuing:

“It held that in general the landlord is not to be deprived of a contractual right to indemnity costs. Although the court always retains a discretion on costs, that discretion should be used to reflect the contractual agreement between the landlord and the tenant unless the landlord's conduct is improper or unreasonable.”

39. The Defendant is critical of the Plaintiffs' delay in addressing these matters. Had they wished to argue that the Defendant (and, it seems also JBIL) should be deprived of any of the costs to which the Defendant was otherwise entitled, that should have been done at the time. The late references to the conduct of the Respondents to the injunction proceedings are, in any event opposed, especially in circumstances where the Plaintiffs had abandoned any appeal proceedings. The injunction proceedings would, in any event, have attracted an order for indemnity costs against the Plaintiffs applying the usual tests for such an order under rule 83(2)(b) of the 2007 Rules. Further, the Respondents to the injunction proceedings had made offers to settle those proceedings on terms favourable to the Plaintiffs which had not been accepted, providing further grounds for the award of indemnity costs.

Smaller amounts

40. Before turning to the main issue in dispute between the parties, I will deal first with the smaller amounts being claimed. This is because the Plaintiffs do not argue against the contractual obligation that fees were payable under the terms of the agreements they had with the Defendant, but assert that these amounts have been taken in breach of those terms or because there has been a total failure of consideration.
41. I reject the Plaintiffs' contention that there was a total failure of consideration following the Defendant sending its letter dated 2 August 2016. The claim for the return of £25,641.72, being the account fees taken between that time and the closure of the account, under paragraphs 41(c) and 42(d) will, therefore, be dismissed.
42. I have seen nothing to suggest that the Third Plaintiff's account was frozen, as the Plaintiffs allege. What was happening at that time was that the Defendant wished to bring its relationship with the Third Plaintiff to an end. The letter itself refers to the terms under which the demand for repayment was made. Clause 4 of the Facility Letter (referred to therein as "the Credit Agreement dated 31 March 2016") provided that the Facility was being made available until further notice but highlighted that "*the Bank reserves the right to make a demand for repayment at any time pursuant to paragraph 2.1 of the Credit Conditions*". The terms of that para. 2.1 were:

"All outstandings are repayable and/or payable on written demand and the bank has the right at its absolute discretion to determine the Facility at any time and to demand immediate repayment and/or payment whether or not an Event of Default has occurred as defined in these Credit Conditions."

The letter of 2 August 2016 gave notice of the account closure date pursuant to that provision, after which "*The Bank will not accept any instructions ... for any transactions or payments out, except for the purpose of transferring the remaining assets elsewhere.*"

43. It is clear from what the Third Plaintiff was told that the services for which the account fee was payable remained available pending closure of the account. Reference was also made to the Defendant's responsibility after that closure date being limited to holding in custody any assets that had not been transferred, supporting the conclusion that, until the closure date, the Plaintiffs could have used the Third Plaintiff's account in the same manner as before. There were negotiations to extend the date at which the account would be closed and so the situation continued throughout that period to be one where there was not the total failure of consideration alleged in the Plaintiff's Cause. For these reasons, the Plaintiff's claim in para. 41(c) of their Cause fails.
44. The other aspects of the account fees relate to whether the fees were payable in advance or in arrears and what fell to be paid at the termination of the relationship. In this regard, what matters first is what fees were actually debited in the first place. I accept the evidence on behalf of the Defendant which shows those amounts (as summarised in the table in para. 28 of the Affidavit and as shown on the account statements). On 17 June 2016, £1,666.66 was debited from the Third Plaintiff's account for an all-inclusive fee. On 23 June 2016, there was a reversal in respect of that fee, as shown by a credit in the same amount. On 16 September 2016 (with a value date a week later), £5,000 was debited as an all-inclusive fee. This happened again on 9 December 2016, on 17 March 2017, on 16 June 2017 and on 15 September 2017. On 8 November 2017, £3,333.34 was debited as a final all-inclusive fee, with a value date of 18 November 2017. Accordingly, for an account opened in April 2016, which started in earnest the following month and operated until November 2017, the Defendant debited fees in respect of 17 months.
45. The Plaintiffs contend that there was an agreement that fees be paid quarterly in advance. This was set out in the Second Plaintiff's e-mail to Mr Porter on 21 June 2016, to which the

latter replied that the arrangements for fees were as previously agreed. In their evidence, the Plaintiffs explain that their existing personal accounts also operated on the basis of fees being payable in advance. Fees had been taken in advance in respect of those accounts on 17 June 2016. I note that this is consistent with the date on which the first pro rata all-inclusive fee had been debited from the Third Plaintiff's account, which was then reversed. They have produced two statements relating to those personal accounts, one of which shows that £2,789.95 was debited on 17 June 2016 from a joint account of the First and Second Plaintiffs, and the second of which shows a debit of £1,372.38 on the same date from an account in the Second Plaintiff's name, but also referring to the First Plaintiff. This second statement also shows a debit of £1,363.20 as an all-inclusive fee on 18 March 2016.

46. The Plaintiffs argue that the reversal of the fee taken in June 2016 from the Third Plaintiff's account was made because they had already paid in advance for the following quarter from their personal accounts from which transfers were being made to the Third Plaintiff's account. The difficulty with that argument is that the amount to be deducted from the Third Plaintiff's account in the event that the fees were payable in advance should have been £5,000 and not just the equivalent of one month of the annual fee payable quarterly. Indeed, the deduction of what can be viewed as a pro rata amount implies that fees were being taken in arrears.
47. The evidence on behalf of the Defendant does not directly address the manner in which the fees shown as being taken from the First and Second Plaintiffs' personal accounts were payable. Similarly, aside from their assertions in their joint witness statement that they paid fees in advance rather than in arrears, the Plaintiffs have produced no documentation to support that assertion. The statements from their personal accounts could show payments in advance or in arrears. Accordingly, I have considered what other evidence there is about the manner in which the all-inclusive fees were taken by the Defendant. They have produced a series of Fee Advices sent to the Third Plaintiff, each of which shows clearly that the fee period relates to the quarter that is just about to end. This supports the Defendant's contention that the fees were payable in arrears. Further, I have noted what the Second Plaintiff wrote on 25 June 2016 to Mr Porter. By referring to the fees that had already been paid up to the end of June 2016, I infer that this relates to the fees shown on the statements of their personal accounts. However, it is what was then written by him that persuades me that, despite what he had written a few days earlier about fees being payable in advance from September, he understood the position he set out, seeking confirmation "*that the fee to be paid by Blue Sky will not be debited until late September and will cover the period 1 July to 30 September 2016*".
48. I do not find the Defendant's reference to the documentation sent in November 2016 to assist on this issue. First of all, it post-dates the start of the relationship with the Third Plaintiff and there is no indication that anything changed. Secondly, it does not spell out whether the fees are taken in advance or in arrears. The conduct of the Defendant shows that they operated on the basis that the fees were taken in arrears.
49. In circumstances where there are two findings that could be made, I have to decide which is the more probable. I have already referred to the inconsistent language used by the Second Plaintiff in his e-mail correspondence with Mr Porter of the Defendant. Accordingly, I am not persuaded that the Plaintiffs have discharged the burden on them as regards the terms of the relationship with the Defendant. The best evidence of the manner of payment of the fees comes in the Second Plaintiff's e-mail on 21 June 2016, but he appears to me to contradict that in his e-mail four days later. The Fee Advices show clearly that fees were being taken in arrears. The First and Second Plaintiffs could have been more expansive as to whether the fees actually paid from their personal accounts had been paid for the quarter ahead between July and September 2016, but have not dealt with that through any supporting documentation. This is why I have concluded that the fees taken in respect of the Third Plaintiff's account had not in general been overpaid because they were being taken in arrears.

50. This leads on, though, to what the Defendant was entitled to debit when the relationship with the Third Plaintiff terminated. The Defendant has debited an amount by reference to payment on a monthly basis. Given that the evidence on behalf of the Defendant explains that the fees for May and June 2016 had been subjected to an agreed discount, this cannot have been done to reflect the length of time the account was open. The issue, therefore, is what entitlement the Defendant had to deduct fees representing two months when the relationship ended part way through that second month.
51. The documentation sent to the Third Plaintiff in November 2016 draws a distinction between ongoing and one-off charges. In the section of the Advisory Services and Prices document, which is dated August 2015, relating to calculating ongoing charges, which is what the fee of £5,000 per quarter is, it states:

“Any ongoing charge is calculated as a fixed monthly, quarterly or half-yearly amount, or by reference to an annual percentage rate on the basis of the entire asset value of the portfolio concerned. Such percentage based charges are payable quarterly, but calculated monthly based on the asset value at the valuation point for that calendar month. The assets values used on this calculation are the asset values, excluding negative positions, for your securities accounts and cash and money market positions as shown in the portfolio valuations at each relevant valuation point (cash, money market and credit positions are not however included for the Execution Only Service or Product and Securities Recommendation Mandate). The valuation point for a calendar month is the close of business on the last business day of the prior month. When you open an account, the charges begin to accrue from the first valuation point following opening of the account.”

There is nothing in this document that assists in understanding what the Defendant was permitted to do on the termination of the relationship with the Third Plaintiff save that calculating the charge on a quarterly basis was an option.

52. Having determined that the fee payable was being collected in arrears, it begs the question as to what was payable on the termination of the relationship when the amount to be paid in arrears had not then become payable, being due only at the end of the quarter to which it related. Within clause 45 of the Defendant’s General Banking Conditions, dealing with “Duration and Termination of Business Relations”, to which the Defendant has made reference in para. 16(iv) of its Defences, there is provision stating:

“The Bank shall be permitted to complete any transactions initiated prior to receipt of notice of termination from the Client. The Bank shall be entitled to retain and/or settle transactions already initiated and to pay any outstanding liabilities of the Client. On termination, the Bank will arrange for delivery of the Custody Assets to the Client, or in accordance with the Client’s instructions, as soon as practicable, after deduction of all sums due. All fees, costs and expenses due and incurred up to the date of the final transfer of the Custody Assets to the Client, or in accordance with the Client’s instructions, shall be debited to the Client’s account.”

That final sentence refers to fees due and incurred up to the date of the final transfer of the Custody Assets and shows that the parties had agreed to these being debited to the Third Plaintiff’s account. However, what it does not do is to answer the question as to whether those fees can be treated as being monthly fees, pro rata fees or only those fees already becoming due at that time.

53. Applying the principle of construing the document as a whole, reference can also be made to clause 53, dealing with “Fees and Charges”:

“The Bank shall charge fees for its services according to its current Schedule of Fees with which the Client confirms agreement. Subject to any separate arrangement between the Bank and the Client, such fees will be debited to the Client’s Portfolio Account(s) held with the Bank. ...

The Bank shall issue monthly, quarterly, semi-annual or annual billing statements, at its discretion. In place of such periodic billing statements, the Bank may also issue daily billing statements.”

54. The combination of clauses 45 and 53 do not appear to me to entitle the Defendant to deduct an account fee, as it did, in respect of the whole of November 2017. The other two possibilities are that, because that fee payable in arrears had not fallen due, the whole of the amount deducted from the Third Plaintiff’s account on 8 November 2017 has to be repaid, as claimed in para. 41(e) of the Cause, although this would not be on the basis claimed that the fee for that period had already been paid in advance, or it is something that can only be dealt with on a daily basis. I am persuaded that the second of those options is preferable and is consistent with clause 53. As such, I reject the way it is put in para. 28.4 of the Defences that the fee was not payable on a per diem basis.
55. The best indication I have been able to find as to what happens when the relationship between the Defendant and a customer comes to an end is by reference to the possibility for the Defendant to switch from whatever periodic billing it had chosen should apply to daily billing statements, as referred to in clause 53. The relevant date for this should be by reference to daily fees incurred up to the date of transfer of the Custody Assets in accordance with the Third Plaintiff’s instructions. Looking at the relevant statement, it is apparent that the funds were received from Credit Suisse on 3 November 2017 and on the same date the balance, albeit leaving £10,000, was paid away to Blue Sky Equity Trading Ltd. As a result, I am satisfied that this is the date to which clause 45 points and so the daily fees accrued up to that date can properly be deducted from the Third Plaintiff’s account. This means that the deduction of £3,333.34 on 8 November 2017 was a greater deduction than that to which the Defendant was entitled. Instead, it was entitled to deduct for just 34 days of the account fee otherwise due in respect of the final quarter of that year. By reference to the annual fee of £20,000, the fee in respect of 34 days amounts to £1,863.01. I find, therefore, that the Defendant should be ordered to repay £1,470.33. I do so on the basis that para. 42(g) of the Cause invites the Court to make such other orders as it considers fit.
56. In summary, therefore, in relation to the smaller amounts claimed by the Plaintiffs, the only amount that I find can be awarded is this sum of £1,470.33. That is because the fee continued to be payable throughout the time that the assets were held, the fees were paid in arrears and not in advance, so it is not a case of £5,000 having been paid on 15 September 2017 in respect of the quarter to follow, but the contractual provisions governing the relationship between the Defendant and the Third Plaintiff did not entitle the Defendant to deduct in respect of the whole of November 2017, but just the three days to which I have referred.

Legal costs

57. The final issue to resolve relates to the question of the Plaintiffs’ claim for the return of the legal fees deducted by the Defendant on 3 November 2017. This is very much a question of the correct construction to give to clause 10 of the Credit Conditions, headed “Costs”, which provides:

“The Client will be responsible for all costs, charges, fees and expenses (including legal and professional fees, VAT etc.) arising at any time in connection with the Facility whether the matter proceeds to completion or not and the Client agrees to reimburse the Bank on a full indemnity basis all and any of such as have been

incurred by the Bank and to pay to the Bank its charges in accordance with the Bank's Charges Tariff as amended from time to time. By signing the Credit Agreement the Client authorises the Bank to debit the Client's account with any amount due to the Bank under the Credit Agreement."

The reference to "the Facility" means "any credit facility ... granted or made available by" the Defendant "in accordance with a Credit Agreement" (as set out in clause 1). This refers to the document dated 31 March 2016 accepted by the First and Second Plaintiffs on behalf of the Third Plaintiff on 15 May 2016.

58. In its Defences, the Defendant also relies on clause 48 of the General Banking Conditions dealing with its right of set-off:

"The Bank shall have a right of set-off extending to include a continuing right at any time and without prior notice or demand forthwith to transfer all or any part of any balance held by the Bank to the order of or standing to the credit of any account in the name of the Client with the Bank and to apply the same in or towards payment or satisfaction of all present or future joint or several indebtedness of the Client as aforesaid to the Bank on any current or other account with interest and bank charges and all other joint and several liabilities whatsoever of the Client to the Bank, present, actual or contingent; and all costs and expenses howsoever incurred by the Bank in relation to the exercise by the Bank of its right of set-off or such indebtedness or liabilities on a full indemnity basis.

Notwithstanding and without prejudice to the right of the Bank as stated above, the Bank agrees to notify the Client of any such transfer having been made."

The Defendant says that this notification was given to the Third Plaintiff on 13 November 2017, referring to its entitlement to deduct the costs it had paid to its Advocates under clause 10 of the Credit Conditions. No explanation has been offered as to why it took 10 days to give this notification. This right of set-off does not seem to me to create any standalone entitlement to deduct those costs, but supports the fact that, if there is such an entitlement, the Third Plaintiff had agreed that such a deduction could be made from a credit balance on its account by way of set-off.

59. The Defendant also pleaded a number of other provisions of its agreements with the Third Plaintiff, although these were not developed by Advocate Mitchell. In particular, reference was made in para. 16(v) of the Defences to clause 17 of the Security Agreement dated 16 May 2016 ("*The Debtor shall fully indemnify the Bank on demand against all losses, liabilities and damages suffered or incurred by the Bank arising out of or in connection with this Security Agreement and the exercise of any of its rights or the observance or performance of its obligations hereunder or pursuant to the Law.*"), but this would not be applicable to costs associated with resisting the injunction proceedings brought by the Plaintiffs and so I find it does not assist the Defendant. Similarly, reference was made to clause 50 of the General Banking Conditions, which deals with an indemnity in favour of the Defendant, which extends to other companies within the Group:

"The Bank shall not be held liable for any loss arising or incurred by the Client as a result of the Bank acting in good faith in respect of the Bank's banking, custody or other services. The Client (jointly and severally) shall be liable to the Bank for payment and/or repayment of all monies, obligations and liabilities at any time due, owing or incurred from or by the Client to the Bank together with interest, commission, charges and any expenses incurred by the Bank including interest on overdue amounts and all legal and other costs on a full indemnity basis which may be suffered or incurred by the Bank or any other company within the Julius Baer Group

arising out of or in connection with services provided or acts or omissions taken or made by the Bank in reliance upon any instruction request or order including those given or purported to have been given by the Client over the Internet.”

Whilst this clause expressly refers to “*all legal and other costs*”, the context is that they arise out of or in connection with the services provided or things done by the Bank on instruction. This does not cover the costs incurred in resisting the Plaintiffs’ injunction proceedings and so I find that this provision does not assist the Defendant.

60. In respect of the Plaintiffs’ contention that the proper meaning of clause 10 of the Credit Conditions is that it applies only to administrative expenses, I am satisfied that the clause is broader than that. As a means of de-constructing the clause, it is possible to remove the words “*whether the matter proceeds to completion or not*” because they are included to make it clear that the obligation to pay these costs exists even if the person to whom the offer of the facility is made does not accept it (see, eg, clause 10 of the Credit Agreement). It is clear that the matter did proceed to completion and so these words can be ignored for the purpose of construing the remainder of the provision. The final element of the first sentence in clause 10 is also not relevant here because it relates to the Defendant’s charges under the applicable Tariff. Accordingly, the key words are that the costs and expenses (including legal fees) must arise “*at any time in connection with the Facility*”.
61. I am satisfied that resisting the injunction proceedings can properly be said to be something arising in connection with the Facility. Those proceedings were commenced to seek to prevent the Defendant from ending the Facility in accordance with its terms. As I have already indicated, this started with the letter of 2 August 2016 by which the Defendant demanded repayment. Although the date for the account closure was extended by agreement, the injunction proceedings still sought to delay further that step being taken. As such, it seems to me to be unarguable that the injunction proceedings were indeed “*in connection with the Facility*”. As a matter of principle, therefore, having regard to the wording of clause 10 in its documentary, factual and commercial context, the parties had agreed that the Third Plaintiff would be responsible for these costs.
62. Having decided that clause 10 is engaged, rejecting the Plaintiffs’ arguments that it is inapplicable to the costs associated with their injunction proceedings, the next issue becomes what costs it is that the Third Plaintiff has agreed to indemnify, where the right of set-off against its credit balance enters into play. In that regard, I consider that the amount to be indemnified can only be known once it has crystallised. In the context of costs associated with legal proceedings, this means that there should be a costs order. In that manner, the paying party can request that the receiving party’s bill of costs can be taxed. The result is that either the bill of costs remains untaxed and so crystallises the amount due or it is taxed and the taxed amount is due. If the amount due does not crystallise in this manner, it would be tantamount to one party being able to decide unilaterally what is required to be paid, which is contrary to what was said in the *Le Couvey* case.
63. I have considered whether clause 10 is drawn sufficiently widely that, even if there should have been a costs order, thereby enabling the Plaintiffs to have any bill of costs taxed, anything spent by the Defendant would still be covered by this indemnity. If that were to be the case then the arguments of the Defendant would be correct. This arises if the word “costs” in the clause does not exclude the possibility that legal fees in any event fall under “expenses”. I am not persuaded that this is the correct interpretation of clause 10. The costs arising in relation to the injunction proceedings are those under the terms of an order of the Court. Whether there is a dispute before the Court between the Defendant and the Third Plaintiff “*in connection with the facility*”, I take the view that there is an agreement that the costs associated with those proceedings should be payable in favour of the Defendant on the contractual, and so indemnity, basis. If there had been any expenses in relation to those

proceedings that are found to be unreasonable in amount or unreasonably incurred, they would be disallowed on a taxation under rule 2(6) of the Royal Court (Costs and Fees) Rules, 2012, where there is a presumption in favour of finding for the receiving party. In my view, it would take this argument further than is permissible to say that all the costs, however unreasonable they might be, are payable by the customer, which in this instance would be the Third Plaintiff. I am satisfied that the Plaintiffs' argument that there must be some means by which any costs that would be found to be unreasonable in amount or unreasonably incurred would not fall to be payable by the Third Plaintiff. In other words, there must be some ability for another body to scrutinise the costs falling within the indemnity, noting that the costs concerned are stated to include legal fees.

64. During the hearing, I formed the impression that the Plaintiffs feel that they have been deprived of their ability to argue that the Defendant (and JBIL) should not have had an award of costs on a full indemnity basis and thereafter that they have not had the opportunity to have the bill of costs taxed. However, they now submit that there is no scope for any of this to happen, with the consequence that the only possible outcome is that all the monies taken by the Defendant from the Third Plaintiff's account must be returned, and with interest. In my view, that would produce an unjust outcome. Further, I am satisfied that the breadth of the discretion open to the Court under the terms of the 1969 Law and rules 82 and 83 of the 2007 Rules means that I can deal with these matters now. In doing so, I reject the Plaintiffs' argument that this matters are already *res judicata*. The correspondence they have produced does not, in my view, mean that there has been any judicial determination to date of the costs following the end of the injunction proceedings.
65. The starting point is that I do not agree with the Defendant's contention that the whole amount billed by its Advocates in respect of the injunction proceedings could be deducted without having any regard to representations that could be made by or on behalf of the Plaintiffs. Such unilateral action on the part of the Defendant went beyond what was permitted by the terms of the suite of contracts governing the relationship between the parties. For any set-off to operate, there needs to be clarity as to how the amount falling to be set-off arises. Equally, it would provide a windfall to the Third Plaintiff if there were no costs consequences arising from the injunction proceedings.
66. What is clear is that the Plaintiffs brought proceedings for an injunction and lost. They may have intimated their intention to appeal but the basis for any such appeal fell away once they found a different source of funding and so there was no appeal. Further, there were no other proceedings until this action before this Court. Any order as to costs relates solely to the injunction proceedings and I can see no basis for departing from the principle that costs will follow the event. The Plaintiffs brought proceedings, which they lost, and it is clear that an award of costs in favour of the Defendant (and JBIL) would have been the outcome.
67. In this context I think it is also important to remember that the Respondents to those proceedings made an offer under rule 62 of the 2007 Rules early on that there would be no order as to costs if the application for an injunction were withdrawn by the Plaintiffs. That offer was rejected and the bulk of the costs were incurred thereafter. The decision not to grant the injunction supports an argument that the Plaintiffs did not better this offer. There is, therefore, a further reason for finding that costs on the indemnity basis should be awarded, whilst at the same time recognising that the order maintaining the status quo for a period of time produced the benefit for the Plaintiffs they wanted so that other financing could be sourced.
68. I have considered the Plaintiffs' submissions that the Defendant (and JBIL) ought to be deprived of some of their costs. This has afforded them the opportunity to make the representations that they would have made had the Defendant (and JBIL) pursued the claim for indemnity costs. However, I do not agree with the Plaintiffs' submissions. Within the

context of those injunction proceedings, I am not aware of any conduct on the part of the Defendant (or JBIL) that would lead to a conclusion different from their reliance on the terms of the contracts, which afford them a full indemnity. As is clear from the cases to which I have referred and the way they are dealt with in *Cook on Costs*, where there is a contractual indemnity the most likely result will be that indemnity costs rather than just recoverable costs will be the default order. Whilst there will always be a discretion in the Court to modify that position, the costs of the proceedings must relate to the party's conduct of those proceedings. The Plaintiffs' comments about the balance left in the Defendant's account does not relate to litigation conduct. In any event, because of the deduction of two months of fees from a round figure amount, I do not accept that this was intended to refer to the number of the beast twice in the way suggested by the Plaintiffs. In summary, viewing the injunction proceedings in isolation, the order that should have been made at the time was the one for which the Defendant argued, namely that the Plaintiffs would pay the Respondents' costs on the full indemnity basis.

69. I do not accept that it is impossible for that order to be made now. It produces an order that means the Defendant (and JBIL) will advance a bill of costs based on what they paid to their Advocates. It is quite clear to me that those amounts were paid back in 2017. The narrative provided now is less than would be the case if a bill of costs has to be prepared, which will be needed if the Plaintiffs want to have the opportunity to request a taxation. What the Plaintiffs might wish to bear in mind, though, is that the costs of preparing such a bill of costs will be added to the amounts already paid under the fee notes rendered by the Defendant's Advocates, which is an issue to which I will return shortly.
70. Because it is also clear to me that the amount that will end up having to be paid by the Plaintiffs under the order for indemnity costs could be a large proportion of what has already been deducted by the Defendant on 3 November 2017, I am not minded to order that any payment be made at this stage to the Plaintiffs by the Defendant. Instead, the amount already deducted will represent a form of security against the costs now payable under an order of the Court and, once the figures have been finalised, and always subject to what follows, there can be paid whatever is then owing and in whichever direction it falls to be paid once all the amounts due as between the parties are calculated and netted off.

Interest

71. Paragraph 42(e) of the Cause claims interest at the rate of 8% per annum running from the date when the Defendant took the Plaintiffs' money to the date when it is returned. The only amount that I have found to constitute an overpayment to the Defendant of what it was entitled to in 2017 is the sum of £1,470.33. In relation to the much larger deduction of £120,096.40, it is possible if there is to be a taxation that the amount that was permitted to be deducted may reduce, but it is even possible that it will rise, so I am not considering interest in respect of any of that amount at this time.
72. Under the Judgments (Interest) (Bailiwick of Guernsey) Law, 1985, as amended, there is a difference between pre-judgment interest and the interest applying to a judgment debt. The latter is dealt with in section 2 and a judgment debt carries interest at 8% per annum. Section 1 deals with the power of the Court to award interest on debts and damages. The wording makes it clear that this is discretionary and that there can be included "*in the sum for which judgment is given interest at such rate as the Court thinks fits on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment*". The purpose of awarding pre-judgment interest is to compensate the party for being kept out of its money for this period of time.
73. I do not consider that awarding interest at 8% per annum can be justified. This was not an aspect of the case that was developed on behalf of the Plaintiffs, but given the small amount

of money involved, I will explain why I am minded to award interest only at the rate of 2% per annum on a simple interest basis. The amount of £1,470.33 should have been added to what was returned to the Third Plaintiff (or on its direction to be paid to another party). On 3 November 2017, the Defendant paid away monies to Blue Sky Equity Trading Ltd. The amount paid should have been increased by £1,470.33. The recipient of these monies has, therefore, been kept out of that small amount for a period of around 3½ years. In those circumstances, and in the absence of any indication as to the level of return that might have been achieved had some entity associated with the Plaintiffs been able to use just under £1,500, I am satisfied that it is just to use the interest rate of 2%, which is probably larger than would have been earned if the monies had simply been placed on deposit, but much lower than the post-judgment rate of 8% per annum, which is kept deliberately high to encourage settlement of judgment debts promptly.

74. As a result, the amount of interest payable for the period 3 November 2017 to the date of judgment will be £103.49, which means that judgment will be entered against the Defendant for the total amount, including interest, of £1,573.82. This should be a judgment in favour of the Third Plaintiff only because that was the account from which these extra monies were taken. That amount will now carry judgment interest at 8% per annum until it is paid.

Costs of this action

75. Although I have not been addressed on the issue of costs, I will offer my provisional thoughts because they may help the parties with any further discussion they may wish to have to resolve matters without needing to return to the Court. The Plaintiffs have, in my assessment, been the successful party. They have secured a small judgment in their favour and they have the possibility of requesting that the order for indemnity costs in the injunction proceedings be taxed, which might result in some of the costs claimed being disallowed, leading to a return to the Third Plaintiff of some additional monies. I recognise that the amount of the judgment is below the level that could be dealt within the Magistrate's Court as a petty debt, but there were larger amounts at stake and so do not consider that that aspect affects the approach I will indicate I would be minded to take on the incidence of the costs of this action.
76. More particularly, I regard the Plaintiffs as the successful side to discourage the Defendant from seeking any costs order in its favour. It is true that the Defendant has successfully resisted certain elements of the Plaintiff's action and this means that the Plaintiffs have not been completely successful. However, in overall terms, the Defendant did not succeed in having the Plaintiffs' action dismissed and so is most unlikely to secure any costs order in its favour. At best, the Plaintiffs might be deprived of some of their costs to reflect that they have not been completely successful. That said, the Plaintiffs have not been represented by an Advocate so the extent of their costs will most likely be confined to Court, etc fees and any other disbursements to which they have been put. Accordingly, it is quite possible that I would take the view that there should be no discount to the costs they have incurred in bringing these proceedings from their commencement in 2019.
77. If, despite this indication, the parties do not agree an order that the Plaintiffs should have their costs paid by the Defendant on the recoverable basis, then either party can bring the question of the appropriate costs order before the Court by arranging a suitable appointment for a hearing through contacting the Greffe.

The way forward

78. Given the comparatively small amounts involved, I am concerned that the further costs that could be incurred by both sides will mean that this becomes little more than a pyrrhic victory for the Plaintiffs. They could, for example, seek to agree a pragmatic solution with the Defendant or they could pursue what they are entitled to at this stage with a view to

requesting that the costs of the injunction proceedings can be taxed in the hope that there will be a reduction in what is found to be payable by them. Ultimately, only they can decide what is commercially acceptable to them, but I consider it may be helpful to set out what might happen if that second course were to be adopted.

79. As I have already indicated, if the costs of the injunction proceedings cannot be agreed, the Defendant (and JBIL) will have to prepare and submit to the Plaintiffs a bill of their costs on the indemnity basis. Although the costs associated with that exercise can only be guessed, I imagine that this may well run into low four figures. That amount will be added to the costs that will inevitably be included in the bill of costs, which are the £120,096.40 already deducted from the Third Plaintiff's account. I have referred to the fact that the current narrative of how those costs arose is not as complete as would be the case if there were a full bill of costs. However, only the Plaintiffs can decide if they want to put the Defendant (and JBIL) to that expense. The Plaintiffs might, for example, be satisfied with what is already set out in the material but seek to persuade the Defendant (and JBIL) to offer a percentage discount to reflect what might be deducted on a taxation. Assuming instead that the Plaintiffs then request that bill of costs to be taxed, it will most likely be referred to a Commissioner appointed under rule 6 of the 2021 Rules to conduct that taxation. Both sides will incur the expense of making representations to the Commissioner, where the presumption will operate that the amounts being claimed are reasonable. That is a consequence of costs being awarded on the indemnity basis. I do not mean to suggest that the Plaintiffs will not be successful in getting the Respondents' bill of costs taxed down, but the costs of that exercise will then have to be awarded one way or the other and, depending on the outcome, those costs could be found to be payable by the Plaintiffs, so there remains the possibility that any saving to be had will disappear into the costs of that exercise. In simple terms, there are risks associated with pursuing this route, which is why being realistic about what is involved might be of benefit to both sides.
80. Whatever happens in relation to the costs of the injunction proceedings, if the costs position in this action, in respect of which I have given my provisional view, could be turned into an amount of money that the Plaintiffs might receive for what they have expended pursuing this action (where they will know the amounts they have paid for each step taken, including the hearing, to date) and that amount is added to the judgment in favour of the Third Plaintiff, it would provide a base figure from which any ongoing negotiations about a mutually satisfactory outcome could take place. I do encourage both sides to embrace a strong dose of pragmatism at this point to see if something appropriate is capable of being agreed between them.

Conclusions

81. For the reasons I have given, the Plaintiffs are partially successful in relation to the relief they have sought. In relation to the Defendant's deduction of £120,096.40 from the Third Plaintiff's account on 3 November 2017, I am satisfied that the taking of this step unilaterally has deprived the Plaintiffs of the possibility of seeking to have any bill of costs taxed so as to crystallise the amount by which they were indebted to the Defendant (and JBIL) after the injunction proceedings, which affects the right of set-off, but that the position can be remedied by now making the order that the Plaintiffs pay those costs on the indemnity basis. Accordingly, that is the order made in relation to that aspect of this action. There is no order for the Defendant to return to the Plaintiffs any amount at this stage as what has been deducted constitutes the form of security for the costs now awarded in favour of the Defendant (and JBIL). Once matters have been resolved, whether through agreement or by further order of the Court, the amount falling to be paid by whichever side needs to make that payment can be ordered to be paid. However, as regards the other claims made by the Plaintiffs, the only element that succeeds is in respect of the account fee payable on the termination of the relationship. Including pre-judgment interest at 2% per annum, the amount

for which judgment is entered in favour of the Third Plaintiff against the Defendant is £1,573.82. This amount now carries judgment interest.

82. I have indicated that I would be minded to award the Plaintiffs their costs of this action on the recoverable basis. I have also offered some thoughts about how it might be better now for the parties to try to reach terms on which all matters between them are settled without the need to incur further costs before this Court. However, if agreement cannot be reached, the parties are at liberty to return the matter for a further hearing before me by liaising with the Greffe for a mutually agreeable hearing date to be fixed.