

Supplementary judgment to substantive judgment handed down 26th April 2021, addressing the question of costs.

**[2022]GRC040**

**Between**

**IN THE ROYAL COURT OF GUERNSEY**

**Plaintiff**

**(ORDINARY DIVISION)**

**Defendant**

**FONDS RUSNANO CAPITAL SA**

**-and-**

**CRGF GP LIMITED**

**Hearing dates: 16 and 17 September 2021**

**Judgment handed down: 28 June 2022**

**Before: Richard James McMahon, Esq., Bailiff**

**Counsel for the Plaintiff:**

**Advocate S L Brehaut**

**Counsel for the Defendant:**

**Advocate A C Williams**

**Cases, Texts & Legislation referred to:**

The Limited Partnerships (Guernsey) Law, 1995

The Royal Court Civil Rules, 2007

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

*Shaham v Lloyds TSB Offshore Treasury Limited* [citation from GLR?]

*Re RN Pharma Trust* [2020] GCA 003

*Esure Services Ltd v Quarcoo* [2009] EWCA Civ 595

*Epsom College v Pierse Contracting Southern Limited* [2011] EWCA Civ 1449

*Manna v Central Manchester University Hospitals NHS Foundation Trust* [2017] EWCA Civ 12

Heaton-Armstrong, Shepherd and Wolchover, *Analysing Witness Testimony*

*Albon v Naza Motor Trading Sdn Bhd* [2007] 1 WLR 2489

**Introduction**

1. This judgment is also supplementary to the substantive judgment in this action handed down on 26 April 2021. It should be read with that judgment as the abbreviations used therein continue to be used herein. This judgment solely addresses the question of costs of the proceedings, concentrating on the costs of those main proceedings.
2. On behalf of the Plaintiff, Advocate Brehaut suggests that the appropriate order should be that the Defendant pay the Plaintiff 66% of its recoverable costs. The suggested reduction of one-third is intended to reflect that the Plaintiff was unsuccessful on its primary case seeking rescission of the LPA, but won its alternative case for a dissolution of the limited partnership,

CRGF LP, under the Limited Partnerships (Guernsey) Law, 1995 (“the LP Law”). It recognises that I gave an indication at para. 317 of the substantive judgment that I doubted the Plaintiff would be entitled to receive all its costs. The Plaintiff further applies for an interim payment on account and also applies for Pavel Erochkin to be joined as a party to enable the Court to consider whether to make any of the costs awarded in favour of the Plaintiff payable by him personally.

3. On behalf of the Defendant, Advocate Williams seeks an order that the Plaintiff pay all the Defendant’s costs of the proceedings and also on the indemnity basis. He submits that this was a fraud case brought by the Plaintiff in circumstances where the findings of the Jurats show that it was brought on a basis the Plaintiff’s main witness, Irina Rapoport, knew was false. It was a categorical and major victory for the Defendant to defeat these claims. He suggests that bringing such a claim is the worst and most wicked thing a litigant can do and so warrants an award of indemnity costs. Further, he argues that the provisional view I expressed about the inability for the Defendant, as the general partner, to indemnify itself out of the assets of the limited partnership pursuant to clause 13 of the LPA (read with clause 7.1.6) should be re-visited.

### Discussion

4. The Court has an acknowledged wide discretion when it comes to determining questions of costs. This is clear from the terms of rule 82 of the Royal Court Civil Rules, 2007, which enable the Court to make such orders as it thinks “*just*”, which reflects the generality of section 1 of the Royal Court (Costs and Fees) (Guernsey) Law, 1969, empowering the Court “*to determine by whom and to what extent the costs are to be paid*”. As explained in *Shaham v Lloyds TSB Offshore Treasury Limited* [citation from GLR?], wherever possible principle should guide the Court in deciding how to exercise its wide discretion.
5. As a starting point, I consider the first question to ask is which of the parties can properly be regarded as the successful party. That question will often give an indication as to which party should be the receiving party and which party the paying party. However, it is important to recognise that this is just a starting point and there will be scope to depart from such a starting point if the justice of the proceedings warrants doing that. In part, this may even extend to deciding whether an issues-based approach is justified.
6. In my judgment, the Plaintiff should be regarded as the successful party. It has obtained relief against the Defendant because it raised an alternative case for dissolution pursuant to the LP Law, which was successful. The question that follows is whether its loss of its primary case, or even its loss of the other bases on which it sought to obtain an order for dissolution and the appointment of a liquidator, should affect the amount the Plaintiff can recover beyond the concession it makes of a discount of roughly one-third. A subsidiary issue is whether any costs that might fall to be awarded to the Defendant should be on the indemnity basis pursued by Advocate Williams. Strictly, there is no need to consider that issue if the Defendant is not going to be the receiving party.
7. In reaching the conclusion as to the appropriate starting point, I am not persuaded that I should regard the Defendant as the successful party. I will address the rescission case of the Plaintiff shortly, but I take the view that it would be artificial to divide what has happened between these parties in the manner suggested by Advocate Williams. I accept the submission of Advocate Brehaut that, even if there had been no claim for rescission but rather an application brought under the LP Law for dissolution on alternative bases, the fact that the Plaintiff obtained an order dissolving the limited partnership should be regarded as it being the successful party. It would only be if the Defendant had successfully resisted the entire claim of the Plaintiff that I think it could be treated as having been successful, in the sense of being the obvious party to regard as the receiving party.

8. I have considered what the proceedings might have involved had the Plaintiff not pursued its claim for rescission. The first thing to note is that the hearing would, in my view, inevitably have been shorter. As an application under the LP Law, it is more likely than not that the hearing would not have involved oral evidence. To an extent, though, that is founded on a degree of speculation because it remains possible that either or both of the parties would have applied to cross-examine the witnesses whose Affidavit evidence would otherwise have been unchallenged. Quite how long the hearing might have been is almost impossible to say in those circumstances, but I am satisfied that it would have been shorter and I also think it would have been shorter by more than the one-third reduction proposed by Advocate Brehaut. The suggestion that only approximately one-third of the paragraphs in the judgment deals with the rescission claim is, in my opinion, to mis-read what would have needed to be covered in a judgment had there been no rescission claim. By way of example, if rescission had not been claimed, it would have been feasible for the judgment to have dealt first with the just and equitable ground and then said comparatively little about the other grounds advanced by the Plaintiff, such as para. (e)(i) and (i) of section 29(1) of the LP Law, because it would not have been strictly necessary to address them. However, the hearing itself would have involved submissions, and possibly evidence, on those alternative grounds and so the hearing may have run for some days, even if rescission had not been pursued. Although Advocate Brehaut suggests that the difference is that pleadings and expert evidence would not have been required, I take the view that there may still have been a need for expert evidence on Russian employment law if, as would probably have been the case, the Plaintiff had sought to show that this was an aspect of another basis on which dissolution was being sought by it. I also take the view that it is inappropriate, as Advocate Williams seeks to do, to separate from the dissolution application the successful just and equitable ground and argue that very little time was taken up by that issue. It is quite clear that dissolution would have been sought on the range of bases advanced by the Plaintiff and that it only needed to be successful on one of them to be regarded as the successful party.
9. Where I agree with Advocate Williams is that there must be significant consequences for the Plaintiff's decision to pursue the failed rescission claim that go beyond the one-third reduction proposed by the Plaintiff. Whilst I am not persuaded that it is just to start with that aspect and regard the Defendant as the successful party, because I consider that it would be wrong to compartmentalise the fraud aspects, particularly for rescission, from the alternative relief sought of dissolution, one approach would be to treat each element as issues-based, in which case the additional time and effort arising from the rescission claim could mean a discrete costs order in favour of the Defendant against the Plaintiff. I have made an assessment of what that outcome would be as a means of determining what a just overall order ought to be. However, neither party has proposed an issues-based approach, preferring an all-encompassing approach, save for the Defendant's submissions about the injunctions, which I will turn to in due course.
10. If only to form a view, if the dissolution application had not been pursued at the same time as the action to rescind the LPA for misrepresentation, as pleaded in the Cause, I expect that the hearing confined to rescission would probably have lasted seven days. I disagree with Advocate Williams that the hearing would have been as long as it was anyway because there would have been some time saved by just considering the pleaded case for misrepresentation. In particular, the time taken dealing with remedies would have been saved. Very roughly, therefore, a hearing of around 75% of the time taken would have resulted in the Defendant being successful in resisting that action. If viewed in isolation, the Defendant would be regarded as the successful party on the failed rescission claim, but I would not accept that the Plaintiff chose to turn the litigation into a fierce personal attack on Mr Erochkin, which it lost. He was so centrally associated with the Defendant and had largely been the individual making the representations on which the rescission claim depended that it was inevitable that he would be cross-examined robustly, just as Ms Rapoport was by Advocate Williams.

11. In this situation, viewing the Defendant as the successful party if the rescission claim were viewed in isolation, I would then have needed to go on to address the claim made that costs should be awarded against the Plaintiff on the indemnity basis. The test regularly used under rule 83 of the 2007 Rules is whether there is something out of the norm (and Advocate Williams has referred to *Re RN Pharma Trust* [2020] GCA 003 in support). He then refers to a number of cases to demonstrate why the conduct of the Plaintiff took these proceedings out of the norm.
12. He submits that the Plaintiff advanced a case on the basis of evidence that it knew to be false. Referring to *Esure Services Ltd v Quarcoo* [2009] EWCA Civ 595, where a paying party had pursued a dishonest claim, Waller LJ suggested that the court's disapproval could be marked with an order for indemnity costs. Further, relying on *Epsom College v Pierse Contracting Southern Limited* [2011] EWCA Civ 1449, he submits that the Plaintiff had refused to accept the Defendant's offer of a no-fault dissolution before the trial got underway and that its unreasonable resistance to a sensible solution to finding an outcome to the proceedings could also sound in an award of indemnity costs. Finally, Advocate Williams suggests that, had the Plaintiff succeeded on its misrepresentation claim it would have sought indemnity costs and "*What is sauce for the goose should be sauce for the gander*" (*Manna v Central Manchester University Hospitals NHS Foundation Trust* [2017] EWCA Civ 12).
13. Taking those points in reverse order, I rather doubt that the Plaintiff would have sought indemnity costs in the event it had won and, even if it had, I also doubt that it would have been awarded them. This was, in my view, a case where both sides advanced their evidence and the Jurats had to decide between them, which does not make this a case out of the norm. I have considered carefully the terms on which the Defendant offered that the limited partnership be dissolved and have concluded, agreeing with Advocate Brehaut's submission, that its offer was on different terms from that ultimately granted to the Plaintiff. Another way of putting this is that I am satisfied that the Plaintiff bettered the Defendant's offer (as is made clear from the outcome of the so-called consequential hearing). Accordingly, whilst an offer was made, which might have been accepted and resulted in hearing time being saved, the Plaintiff was entitled to reject the terms of that offer and try to outdo it, and, in my view, it managed to achieve that. In respect of the first point, I am not persuaded that this was a claim made for rescission that was known to be false and so dishonest. As the substantive judgment makes clear, neither party produced any documents that pointed one way or the other to an obvious outcome, so resolving the parties' dispute came down to which of the witnesses the Jurats believed. Although the Jurats preferred the evidence of Mr Erochkin over that of Ms Rapoport, I do not regard what happened as taking the case out of the norm. If only as an example, I recall Lord Bingham's foreword in *Analysing Witness Testimony* (Heaton-Armstrong, Shepherd and Wolchover) in which he wrote: "*Witnesses may be completely honest, entirely confident, very persuasive, but quite wrong*". I am not persuaded, therefore, to characterise the Plaintiff's evidence as necessarily having been fabricated, as Advocate Williams suggests it must have been. Having said that, it was really foolish of Ms Rapoport to have been out with Mr Kiselev when her evidence was part-heard and I share the dim view the Jurats formed of the potential for witness collusion as a result, but I am still not persuaded that this would be a basis for awarding indemnity costs to the Defendant. Further, as a matter of law, there was a misrepresentation on which the Plaintiff could rely, but the Jurats found that the Plaintiff's conduct showed it had affirmed the LPA. Further, the split decision of the Jurats, in my view, demonstrates that the more serious allegations made by the Plaintiff were not clear cut, meaning that I would not have been minded to award costs on the indemnity basis, finding that the "out of the norm" test was not satisfied, but would, if I were deciding costs on the Plaintiff's failed rescission claim in isolation, have considered awarding the Defendant its costs on the recoverable basis. As a result, I have to factor in that there might have been an award of costs in favour of the Defendant reflecting some 75% of the total the parties have incurred.
14. Although the Defendant suggests there is no jurisdictional bar to this Court making an order in respect of the costs the parties incurred in the BVI injunction proceedings, I prefer to leave the

parties to deal with those costs incurred before the court in the BVI if either wishes to seek a positive order. The injunction proceedings before this Court were, in my view, responsive to the orders already made in the BVI. Although the Jurats' findings in the substantive judgment show that the argument that was made to underpin the granting of relief was rejected, I still consider that the injunction granted served its purpose in maintaining a position in favour of both partners to the limited partnership in the meantime pending the trial. The restrictions placed on the Defendant meant that it could not act unilaterally in making any further drawdown requests or in respect of the one investment made by the limited partnership. It was permitted to take its management fee prospectively, although the consequences for it of having done so have been dealt with in the recent supplementary judgment. In short, the injunctions granted in favour of the Plaintiff held the ring in the interim and so I do not accept the submission that the Defendant should now be awarded the costs that were reserved and it follows that I would reject its claim for its costs on the indemnity basis.

15. I consider that the costs of the injunction I granted in 2018 can properly be viewed as part of the overall costs of these proceedings. The injunctive relief was not independent of the relief sought in the substantive proceedings. As I have just noted, I remain satisfied that the terms of the injunction were appropriate as a form of relief pending suit. As such, I think I can regard those costs as being costs that would be awarded to the Plaintiff, rather than the Defendant, on a similar basis to the overall approach I take to where the costs burden should fall.
16. Taking a step back, the fact that the Plaintiff is regarded as the successful party raises a presumption in favour of making an order that the Defendant pay the costs of the proceedings, which for these purposes include the pre-trial stages and the injunction proceedings. That is a presumption that can be displaced. It could in theory be so far displaced that the outcome could be that the Plaintiff has to pay some of the Defendant's costs. Ultimately, it is a case for weighing all the factors in the balance to achieve what I consider to be a just outcome. I emphasise that this is not an arithmetic exercise because I am minded to follow the broad brush approach both Advocates have suggested is practicable.
17. In terms of an order reflecting the way in which the Plaintiff has succeeded, I would have assessed the proper level of recoverability of costs by the Plaintiff at approximately 40% of the whole. The addition of the rescission claim, which was unsuccessful, inevitably complicated what would have been a fairly straightforward application under the LP Law. This is a further reduction from the 66% of recoverable costs proposed by Advocate Brehaut because I think she has under-estimated the impact that adding the rescission claim has had. In the first place, it caused the matter to proceed by way of an action, with pleadings, arguments about disclosure and inevitably evidence, whereas an application pursuant to the LP Law would have been progressed differently, but with the same eventual outcome. Accordingly, an award of 40% of the costs would reflect the fact that the Plaintiff won on its alternative case and that the injunction obtained has served its purpose.
18. The next issue to consider is whether there should be any further reduction from that 40% in respect of the conduct of the Plaintiff in pursuing the failed rescission claim. As I have already indicated, if I had been dealing with the costs of the rescission element in isolation, it may well have led to an award in favour of the Defendant of perhaps 75% of the overall costs on the basis that it had won. However, it is not a case of taking a further 75% off of the 40% of the costs payable to the Plaintiff meaning that I should award the Defendant 35% of its costs. That would be applying the arithmetic too inflexibly. Further, it would entail an element of double-counting because the 40% figure reached already takes into account that the rescission claim was not successful.
19. I have given serious consideration as to whether the proper award to make is no order as to costs. The attraction of doing so would be to reflect that, although the Plaintiff has been successful, its failed pursuit of a claim to avoid all the consequences of the LPA has to be

recognised as having contributed to the major aspects of the action in terms of the costs incurred. It would be a simple means by which to mark the fact that the Defendant has avoided the serious consequences that would have followed rescission, but that the Plaintiff obtained an order dissolving the limited partnership, by which the parties might be regarded as having shared the spoils of this litigation. However, I am not persuaded that that would produce a just outcome.

20. Instead, I take the view that the Plaintiff should receive some of its costs, because it would be unjust to deprive it of an award of some costs, although further reduced from the provisional figure of 40% mentioned. In doing so, I have also borne in mind that the outcome of the further hearing is closer to that sought by the Plaintiff than the Defendant, at least when considered in pure monetary terms. In each party's case, the extreme position taken was an unrealistic one for it to adopt, particularly that taken by the Defendant, which would have produced what would have amounted to a windfall to the Defendant and left little, if anything, for the Plaintiff making the investment in the Didi shares to receive as a return on its investment, and so this is a further reason why I am satisfied that the Plaintiff should receive a portion of its costs. Whilst this order relates only to the substantive proceedings, as I will explain, I think the same order could be made in respect of the subsequent hearing in 2021.
21. The conclusion I have reached is that the Defendant should be ordered to pay the Plaintiff 25% of its costs on the recoverable basis. I recognise that this amount inevitably means that the Plaintiff will have to fund a considerable amount of the costs it has incurred in seeking to bring about the dissolution of the limited partnership, but I am satisfied that there was a potential way for the parties to have reached an accommodation in that regard if both had wished to do so. The impression I have formed is that such an agreement was not reached because both sides were too greedy. By way of example, Mr Erochkine, on behalf of the Defendant, could have contented himself with a reasonable return for his efforts in relation to the investment made, but could have transferred that investment out of the limited partnership to the Plaintiff, or another Rusnano entity, recognising that the Tianjin Bohai Fund had not come to fruition. It seems to me that he would have salvaged the Defendant as a solvent entity and could have decided what to do with his vehicle for future business. Similarly, instead of pouring money into this and other litigation, the Plaintiff could have focused on extracting the investment for which it paid but also providing that reasonable return to the Defendant, and so effectively Mr Erochkine, for the benefit of doing so. By digging its heels in and not being pragmatic, it is likely to get a poor return on its investment in the overall picture. For both parties, it should be a salutary lesson that litigation really should be a last resort.

## Indemnity

22. I can also expand on the reasoning for my conclusion on the law given in the main supplementary judgment that the Defendant's indemnity in clause 13 of the LPA does not extend to the costs it has incurred in these proceedings. That clause provides:

*“The Partnership irrevocably agrees to the General Partner (including any officers, directors, managers, employees, agents or representatives of the General Partner) indemnifying itself out of the Partnership so as to discharge any liability incurred by it in respect of the Partnership.”*

The Defendant has relied in particular on clause 7.1.6, which deals with one type of “Partnership Expenses”: “The costs incurred in respect of any litigation or arbitration, where the Partnership is one of the parties, for the Partnership's interests”. It further refers to clause 7.2: “On an ongoing basis, the Partnership shall pay or reimburse the General Partner, as the case may be, for all Partnership Expenses.” In relation to the words “in respect of” in clause 13, Advocate Williams refers to what was stated in *Albon v Naza Motor Trading Sdn Bhd*

[2007] 1 WLR 2489: they “*have the widest possible meaning of any expression intended to convey some connection or relation between the two subject-matters to which the words refer*”.

23. As Advocate Brehaut points out, section 14(1) of the LP Law makes provision for “*Legal proceedings by, against, or otherwise in relation to a limited partnership (including proceedings to enforce a foreign judgment by or against the partnership)*” to be instituted by or against one or more of the general partners. More particularly, subject to the exceptions in subsections (2) and (3), “*no limited partner shall be a party to or named in such proceedings*”. The exceptions in those two subsections are not applicable and so the fact that the limited partner is actioning the general partner in relation to the dissolution of the limited partnership, or for rescission of the LPA, demonstrates why this action (or even an application for dissolution) is not covered by section 14. This is not litigation with a third party where the general partner is the representative of the limited partnership. The better way to regard these proceedings is that it was a dispute between the partners themselves, where each partner, subject to any order of the Court, is arguing for its own interests rather than those of the partnership itself.
24. Given the Plaintiff’s primary case, had the LPA been rescinded, it follows that there would have been no clause 13 on which the Defendant could purport to rely. Where that claim fails, I appreciate that it is open to the Defendant to argue that any costs it has incurred in these proceedings can be indemnified, but I reject that argument. A claim to bring the partnership to an end, on whichever basis that might be, which is resisted by the general partner, is not the type of situation that clause 7.1.6 seeks to address. The Defendant’s actions were not, in my judgment, partnership expenses. That is why these arguments about what the appropriate costs order is to be matter. If the indemnity applied, the Defendant would not have needed to make any submissions as its primary case that the order should be that the Plaintiff pay its costs. Accordingly, I am satisfied, as a matter of construction of the LPA, that the Defendant is unable to rely upon clause 13. This was a straightforward dispute between partners where the normal incidence of costs of litigating that dispute follow and this was not being done in the interests of the partnership. Put another way, there was no common cause between the partners that points to the indemnity applying in favour of the Defendant.

### **Interim payment on account**

25. Whilst I appreciate that it is permissible for the Court to make an order for an interim payment to be made by the paying party to the receiving party (as explained in the *RN Pharma Trust* case, to which Advocate Brehaut has referred, or to any of the cases in this Court that have accepted this principal), I will not make any such order at this stage. What had been sought by the Plaintiff was an order for half of the costs ordered to be paid. Although one half of one quarter could still represent a sizeable amount (with the Plaintiff’s costs schedule for this purpose showing that its costs on the recoverable basis exceed £1 million), and I accept that the receiving party should not be kept out of the monies it will receive for any longer than necessary, especially as interest thereon will start to accrue, I am conscious that the Plaintiff might still wish to join Mr Erochkin personally with a view to seeking that the order be made against him rather than the Defendant and, given the amounts likely to be involved, and noting Mr Erochkin’s evidence that any costs order enforceable against the Defendant is likely to put it into an insolvent position, I consider it is better to wait and see what the Plaintiff now chooses to do and whether any agreement can be reached between the parties. Accordingly, I will adjourn the Plaintiff’s application for an interim payment on account so that it follows any further hearing relating to its application.

### **Joinder of Mr Erochkin**

26. I understand that there is no opposition to the joinder of Mr Erochkin in a situation where a costs order is made against the Defendant. There is an application dated 15 September 2021

seeking such an order. However, before formally making such an order, I would welcome first confirmation from the Plaintiff that it still wishes to pursue an order for some or all of the costs it has been awarded against the Defendant to be made against Mr Erochkine and, if so, confirmation from the Defendant and from Mr Erochkine personally that there has been no change to the position set out in Advocate Williams' Skeleton Argument.

27. If Mr Erochkine is to be joined, it would also be helpful for the parties to attempt to agree a timetable by which he will make his representations about whatever the Plaintiff is seeking against him and the Plaintiff has the opportunity to reply. Clearly, an agreed timetable, with the parties liaising with the Greffe to identify a suitable hearing date, will be preferable to there needing to be a further hearing to deal with such matters. If there is to be such a hearing, I imagine that this will also be the time at which the Plaintiff's application for an interim payment on account could be addressed and anything else that needs to be resolved about the costs of these proceedings.

### **Costs of 2021 hearing**

28. Although both parties had concentrated on the costs relating to the proceedings up to and including the substantive hearing in 2019, resulting in the order I have made, I have further indicated that, subject to any further representations, I have attempted to look globally at the manner in which these proceedings have been conducted and would be minded to make the same order in relation to the additional hearing that took place in September 2021. In doing so, I am effectively treating this as part of the whole, where I have stated that I consider a positive award in favour of the Plaintiff is the just outcome. I recognise that, if viewed in isolation, the Plaintiff might argue that its further costs should be paid at a higher level than 25% of the recoverable costs. Equally, the Defendant may have some submissions that such an award would still be too generous. If the indication of costs at the same rate of 25% of the recoverable costs is not accepted by either party, then this should also be addressed at a further hearing and that must be the same hearing as any other matter outstanding between them. If all remaining issues are not addressed at the same time, there is a risk of this spawning unnecessary satellite litigation, which is contrary to the overriding objective.

### **Conclusion**

29. For the reasons I have given, the costs order I make in respect of the steps up to and including the substantive hearing resulting in the April 2021 judgment is that the Defendant shall pay to the Plaintiff 25% of its costs on the recoverable basis. I would be minded to make the same order for the subsequent proceedings, but the parties may wish to make further submissions to persuade me otherwise. The order made may be varied if the Plaintiff wishes to join Mr Erochkine and pursue some or all of the amount payable against him personally. I am adjourning the question of whether there should be an interim payment on account to await these further developments.