

Application for costs on the indemnity basis.

[2022]GRC058

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between: 1) **EEA FUND MANAGEMENT (GUERNSEY) LIMITED**
 2) **EEA LIFE SETTLEMENTS FUND PCC LIMITED**

Applicants

-v-

COVENTRY CAPITAL US LLC

Respondent

Decision on the papers relating to costs

Judgment handed down: 11 May 2022

Before: Richard James McMahon, Esq., Bailiff

Advocate for the Applicants: Advocate M C Newman

Advocate for the Respondent: Advocate M J Adkins

Cases, Texts and Materials referred to in Judgment:

The Evidence (Proceedings in Other Jurisdictions) Act 1975
The Evidence (Proceedings in Other Jurisdictions) (Guernsey) Order 1980
Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (18 March 1970)
In re Asbestos Insurance Coverage cases [1985] 1 WLR 331
Universal Trading & Investment Co. Inc v Bassington Limited and others (unreported, 17 December 2014)
The Royal Court (Costs and Fees) (Guernsey) Law, 1969
Nelson's Yard Management Company v Eziefula [2013] EWCA Civ 235
Brookes v HSBC Bank plc [2011] EWCA Civ 354
Marange Investments (Proprietary) Limited v Le Generale des Carrieres et des Mines sarl 2013 (2) JLR Note 21
Cotrel v Christmas and Lewis 2013 (2) JLR Note 3
Investec Trust (Guernsey) Limited v Glenalla Properties Limited (unreported, 21 January 2015)
Ladbroke plc v Galaxy International Limited (unreported, 10 November 2008)
Maurice v Chief Executive of the States of Alderney (unreported, 18 April 2011)
Newmarket Holdings (Guernsey) Limited v Musa Holdings Limited (unreported, 15 December 2014)
Hulme v Matheson Securities (Channel Islands) Limited (No. 2) (unreported, 28 November 1997)
Brink's Mat Limited v Elcombe [1988] 1 WLR 1350
Shaham v Lloyds TSB Offshore Treasury Limited [2007-08] GLR 323
R (Boxall) v Waltham Forest London Borough Council (unreported, 21 December 2000)
Emezic v Secretary of State for the Home Department [2013] EWCA Civ 733
Wates Construction Limited v HGP Greentree Allchurch Evans Limited [2005] EWHC 2174 (TCC)
In re a Guernsey Company (2011, unreported, anonymised 30 April 2013)

Jackson v Dear (unreported, 8 July 2013)

Broadhead v Spread Trustee Company Limited (unreported, 26 November 2014)

Introduction

1. By para. 3 of an Application dated 11 November 2019, the Applicants, EEA Fund Management (Guernsey) Limited and EEA Life Settlements Fund PCC Limited (referred to as the “Manager” and the “Fund” respectively), seek an order that the Respondent, Coventry Capital US LLC, pay the costs they incurred on the indemnity basis. This Application came before the Court on 20 November 2019. In addition to dealing with the other relief being sought, about which I will explain further in due course, I fixed a timetable for written submission to be filed and served. The Applicants were required to lodge their materials by the end of 3 December 2019. The Respondent was to respond by the end of 17 December 2019. Any reply from the Applicants was required by noon on 24 December 2019. I indicated that I would determine the issue of costs on the papers unless I felt I needed to convene Counsel to make any oral submissions.
2. The parties complied with that timetable. The Applicants rely on the Second Affidavit of Michael Rogers, sworn on 3 December 2019, together with the written submissions and authorities prepared by Advocate Newman. The Respondent relies on the Affidavit of Quentin Bregg, affirmed on 17 December 2019, together with the written submissions and authorities prepared by Advocate Adkins. The Applicants’ written submissions in reply from Advocate Newman are dated 24 December 2019.
3. Thereafter, to my deep embarrassment, reading and considering all these submissions has been completely overlooked. I have to accept personal responsibility for that oversight, but it also demonstrates some internal procedural flaws within the Court and Greffe, which will need to be addressed so that something like this cannot happen again. Although it will be of little comfort to the parties, the events in the early part of 2020 have inevitably impacted. The coronavirus pandemic and my move between offices resulted in this set of papers being misfiled by me. I lost sight of the fact that this judgment remained outstanding. Periodic enquiries made by Advocate Newman or his colleagues to the Greffe about when judgment might be expected did not result in this coming to my attention again until an e-mail sent on 25 April 2022. I have immediately turned my attention to this application and can only apologise most profusely for the inordinate delay in addressing this. It was entirely unintentional and I would have turned my attention to this costs issue much sooner than I have.

Brief facts

4. This Application for costs arises in the context of proceedings before this Court pursuant to a letter of request issued in relation to substantive proceedings before the United States District Court for the Southern District of New York dated 12 August 2019. Those proceedings are Civil Action No 17-7417-VM-SLC. The plaintiff in those proceedings is the Respondent before this Court. The Defendants are EEA Life Settlements Inc., Hiren Patel and Vincent Piscaer.
5. The Respondent applied *ex parte* for effect to be given to that letter of request to require both of the Applicants to attend before a Commissioner of the Court to produce the documents in 14 categories set out in a Schedule to that letter. The application was made pursuant to the provisions of the Evidence (Proceedings in Other Jurisdictions) Act 1975, as extended to Guernsey by the Evidence (Proceedings in Other Jurisdictions) (Guernsey) Order 1980. This legislation gives effect domestically to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (18 March 1970).

6. The Respondent's application dated 9 October 2019 came before me on 11 October 2019. Advocate Adkins appeared. The evidence in support of that application was in the form of an Affidavit of Advocate James Tee, sworn on 9 October 2019. Following a discussion with Advocate Adkins about the procedure being adopted, the application was granted. The witness summonses to be served on each of the Applicants convened them to attend through one of their officers at a hearing I fixed to take place before me, as Commissioner, on 20 November 2019. I took the view that it was expedient to appoint myself as the Commissioner in case either or both of the Applicants wished to apply to set aside the witness summons served on it. I ordered that each witness summons needed to be accompanied by the letter of request, Advocate Tee's Affidavit, the Respondent's application and the skeleton argument and authorities on which the Respondent had relied.
7. Service of both witness summonses was effected on 18 October 2019.
8. By a letter dated 31 October 2019, Advocate Newman wrote on behalf of the Applicants to Advocates Adkins and Tee, informing the Respondent that he had been instructed. That letter first raised a concern about the firm acting for the Respondent being subject to a conflict of interests. It then dealt with the substantive opposition likely to be raised by the Applicants, highlighting that there is an authority (*In re Asbestos Insurance Coverage cases* [1985] 1 WLR 331) about what is expected of a summons to produce documents, indicating that the Applicants had grounds to challenge the letter of request. A transcript of the hearing that had taken place on 11 October 2019 was requested. Because the return date of the witness summonses was not going to be practicable, this letter suggested that "*the hearing on 20 November 2019 be utilised as a date for an inter partes hearing before the Deputy Bailiff, so that the Fund and Manager are given an opportunity to fully articulate their position in relation to the LoR and afforded the opportunity to challenge them.*"
9. The Respondent's Advocates replied on 5 November 2019. That letter enclosed a copy of the file note from the *ex parte* hearing on 11 October 2019 rather than the transcript requested. It suggested that raising possible conflicts of interest where the firm had no relationship with the Applicants betrayed concern that the Applicants' substantive position was weak. It also indicated that instructions would be sought about an adjournment, but asked the Applicants' Advocates to clarify whether there was a general challenge to the letter of request or whether the challenge was to oppose individual requests therein and, in any event, whether the Applicants "*intend to make formal application outlining the exact nature of the relief they are seeking and articulating their position in sufficient detail in advance of that hearing in order for our client and the Court to properly understand your clients' position.*"
10. Advocate Newman responded by letter dated 11 November 2019. He clarified the Applicants' position relating to the possibility that there was a conflict of interest meaning Advocate Adkins should not act for the Respondent. He referred to the way in which I had previously indicated in *Universal Trading & Investment Co. Inc v Bassington Limited and others* (unreported, 17 December 2014, para. 21) that it might be "*a more efficient and cost-effective use of resources to proceed by way of an application on notice when it is envisaged that there will be opposition to any order made.*" Had there been engagement with the Fund and Manager, a timetable could have been agreed to enable both sides to put their positions before the Court, thereby minimising costs. The letter spelt out that the Fund and Manager would be challenging the letters of request and so would not be attending on 20 November 2019 in answer to the summonses to produce documents. The letter enclosed the Application, which principally sought a stay of the effect of the order I had made relating to the witness summonses and invited the Respondent to agree that. Paragraph 2 of the Application sought the dismissal of the letter of request on five bases, "*the whole of which will be elaborated by supporting evidence and*

submissions from Applicants' counsel in due course". The letter proposed a timetable leading towards a one-day hearing early in 2020 and that the hearing on 20 November 2019 be used for case management purposes if the proposed timetable were not agreed. A response was requested by noon on 13 November 2019.

11. At 12.02 pm on 13 November 2019, the Applicants' Advocate sent an e-mail to Advocates Adkins and Tee enclosing a signification dated that day giving notice of an application for directions dated 13 November 2019 to progress the Application dated 11 November 2019 on the same terms as had been proposed in the letter dated 11 November 2019. Paragraph 3 of the application sought costs in the cause. That e-mail also attached an Affidavit of Michael Rogers sworn on 13 November 2019 in support of the application for directions, which exhibited the correspondence that had passed since the serving of the witness summonses and to which I have just referred.
12. A letter dated 13 November 2019 was sent by the Respondent's Advocates by e-mail timed at 2.54 pm. It responded briefly to the alleged conflicts of interest. (That issue has not since been pursued, so I say nothing further in relation to it.) This letter explained that United States District Judge Marrero handed down a judgment on 1 November 2019 ("the appeal decision"), the effect of which was understood to be that the second and third defendants to the New York proceedings (Messrs Piscaer and Patel) "*are obliged to disclose documents encompassing at least all of the documents requested in the Letters of Request.*" The Respondent's Advocates were aware, therefore, of "*a significant prospect of duplication*" and so "*in order to save costs, our client would propose a general stay of the Order and the Guernsey proceedings until such time as disclosure has been completed in the New York Proceedings.*"
13. There were subsequent e-mail exchanges that afternoon. Advocate Newman noted that the deadline for lodging papers for that Friday's Interlocutory Court was fast approaching, so the Applicants would lodge their directions application, but it could be withdrawn if there was agreement to the proposal of a general stay. Advocate Tee suggesting adjourning to the hearing already convened for the following week (although he inaccurately used the wrong date, which he then quickly corrected). Advocate Newman responded querying why this was the first time that mention had been made of the possibility of using that hearing for directions, when that had not been included in the file note of the *ex parte* hearing. Advocate Tee's response was that they understood it to be implicit in what had been recorded about if there was to be objection to complying with the terms of the witness summonses, "*they can make an application*".
14. These exchanges continued during the afternoon of the following day. Advocate Newman suggested agreeing the directions proposed to enable the parties to consider their positions. He raised the possibility that the Respondent "*Should simply withdraw the letters of request in Guernsey altogether*", adding for the avoidance of doubt that "*all our clients' rights, in particular in relation to costs remain reserved.*" After further toing and froing a Consent Order was agreed and made by the Bailiff on 15 November 2019, adopting the suggestion from the Respondent's Advocates that there be a stay of the Order made about witness summonses pending determination of the application to discharge and that the rest of the application for directions be adjourned to the hearing before me on 20 November 2019.
15. On the afternoon of 15 November 2019, Advocate Tee sent an e-mail to Advocate Newman indicating that the Respondent had "*instructed us to withdraw its application to move the letter of request and seek the setting aside of the Summonses*". Advocate Newman promised to take instructions and responded substantively on 18 November 2019 indicating that the Applicants would "*not oppose the withdrawal of the Letters of Request/setting aside the summons on the basis that your client pays all of our clients' legal costs incurred to date on the indemnity basis.*"

If this cannot be agreed then please record our clients' position in your letter to the Court, so that the arguments can be aired at the hearing on Wednesday."

16. By a letter dated 19 November 2019, the Respondent's Advocates wrote to HM Greffier indicating that the Respondent would be seeking leave to withdraw its Application to move the letter of request and seeking the setting aside of the summonses issued. The reason given was that, subsequent to the issuing of the summonses, the judgment from the New York Court dated 1 November 2019, a copy of which was enclosed, had the effect that all the documents covered by the letter of request had been ordered to be disclosed, so "*there is no benefit to the parties in Guernsey in incurring the costs of these contested proceedings.*" The Respondent did not agree to pay the Applicants' costs on the indemnity basis, and that remains the only issue to be dealt with.
17. Because there was no agreement as to the manner in which to proceed, there was a short hearing before me on 20 November 2019. It was agreed that the stay imposed by the Consent Order of 15 November 2019 should be lifted and that, by consent, the two witness summonses arising from the *ex parte* hearing on 11 October 2019 should be set aside. The timetable for the parties' submissions on the Application for indemnity costs was fixed.

The parties' arguments

18. Advocate Newman refers to the wide discretion afforded to the Court by section 1(1) of the Royal Court (Costs and Fees) (Guernsey) Law, 1969, which provides:

"The costs of and incidental to all proceedings in the Royal Court shall be in the discretion of the Royal Court and the Royal Court shall have power to determine by whom and to what extent the costs are to be paid."
19. He submits that, in the absence of some unreasonable conduct on the part of a defendant, a plaintiff who discontinues a claim will be liable for the defendant's costs up to the date of discontinuance (*Nelson's Yard Management Company v Eziefula* [2013] EWCA Civ 235). The applicable principles have been expanded in *Brookes v HSBC Bank plc* [2011] EWCA Civ 354. In relation to any suggestion from the Respondent that the judgment handed down on 1 November 2019 amounted to a change of circumstances, that argument should be rejected because the Respondent knew there was a possibility that the Hague Convention route advocated would be displaced by such a decision and, in any event, resulted from its own appeal.
20. There are examples of indemnity costs being awarded by the Royal Court of Jersey in cases where plaintiffs have withdrawn proceedings (*Marange Investments (Proprietary) Limited v Le Generale des Carrieres et des Mines sarl* 2013 (2) JLR Note 21 and *Cotrel v Christmas and Lewis* 2013 (2) JLR Note 3).
21. The Respondent had chosen to proceed in the first instance *ex parte* where the guidance given in the *Universal Trading* case is such that a different course was open to the Respondent to proceed on notice. There had been no engagement with the Fund or Manager beforehand. By proceeding *ex parte*, the Respondent was under a duty to give full and frank disclosure, with which it had not complied.
22. As a consequence, there was sufficient material from which to conclude that indemnity costs should be awarded pursuant to rule 83 of the Royal Court Civil Rules, 2007 by applying the usual rule that there was something taking the proceedings out of the norm (see, eg, *Investec Trust (Guernsey) Limited v Glenalla Properties Limited* (unreported, 21 January 2015)). It is suggested that no order would have been granted *ex parte*, had the Respondent informed the

Court that there was an appeal pending in New York. Further, the Advocates acting for the Respondent did not explain properly what had happened at that *ex parte* hearing in relation to the date chosen for the Applicants to attend to produce documents. Once the New York decision of 1 November 2019 was given, the Respondent should have been prepared to acknowledge that the witness summonses were no longer required and should have withdrawn, or at the very least sought to stay, the ongoing proceedings.

23. Because the Applicants had engaged the English solicitors, Simmons & Simmons, this was a situation in which the principles about recoverability of fees paid to foreign lawyers, found in *Ladbroke plc v Galaxy International Limited* (unreported, 10 November 2008) and applied subsequently, were properly engaged. Given the paucity of Guernsey authority, this is an area of the law where particular expertise from someone at the English Bar was also warranted.
24. The Respondent's primary position is that there should be no order as to costs. There has been no consideration of the merits of the assistance that this Court was invited to give to the New York proceedings and so no way to assess whether using the Hague Convention route would ultimately have been successful. Indeed, it was the conduct in the New York proceedings of what is termed "EEA" that resulted in this course of action being followed and the Applicants have, in any event, not conducted themselves appropriately in the proceedings before this Court, failing to clarify the basis on which the witness summonses should be set aside and bringing applications prematurely.
25. In the alternative, any costs ordered to be paid by the Respondent should be on the recoverable, and not the indemnity, basis, should not extend to the costs incurred instructing foreign lawyers and should be time limited, running from 18 October 2019, when the witness summonses were served, up until 15 November 2019, when the Respondent informed the Applicants that it would not be pursuing its case based on the letter of request.
26. The Respondent accepts that the Court has a wide discretion when it comes to costs. It notes that rule 61 of the 2007 Rules provides that a party may not discontinue an action, counterclaim or any claim therein "*except with the consent of all other parties to the action or by leave of the Court*". There is a line of cases domestically (starting with *Maurice v Chief Executive of the States of Alderney* (unreported, 18 April 2011) and including *Newmarket Holdings (Guernsey) Limited v Musa Holdings Limited* (unreported, 15 December 2014)) demonstrating that the default position is that there should be no order as to costs unless there is good reason to make some other order. Advocate Adkins suggests that the Court should have regard to the way in which EEA conducted the New York proceedings, resulting in the letter of request being issued, and then how the Applicants conducted themselves once the witness summonses had been served.
27. The Respondent further notes the amount set out in Mr Rogers' Affidavit that the Applicants indicate would be payable, in relation to more than 310 hours of work undertaken. Rather than anything being out of the norm, the manner in which the Respondent has conducted itself has been entirely reasonable, as shown by the exchanges of correspondence. The choice made to proceed initially on an *ex parte* basis is recognised as being available as set out in the *Universal Trading* case (para. 9) to which the Applicants have not referred. As regards when the Respondent informed the Applicants about the judgment dated 1 November 2019, the Respondent points out that one of the defendants in the New York proceedings, Mr Piscaer, is a director of the Manager, to whom appropriate knowledge can be imputed.
28. Turning to the issue of foreign lawyers' costs being claimable, the Respondent suggests that there was nothing novel about the order it obtained for witness summonses and the application that the Applicants would need to make to have them set aside. Accordingly, none of the

categories mentioned in the *Ladbroke's* case as potentially justifying instructing foreign lawyers to assist applies. The Applicants cannot rely on the fact that a letter of request had been obtained that might have resulted in proceedings in England because no such proceedings were commenced. Any pre-existing relationship of the Manager with Simmons & Simmons has no relevance to the issues that fell to be addressed once the witness summonses had been served and these became inter partes proceedings.

29. In his submissions in reply, Advocate Newman returned to the issue about whether the Respondent had complied with the duty to make full and frank disclosure. He referred to *Hulme v Matheson Securities (Channel Islands) Limited (No. 2)* (unreported, 28 November 1997), in which the Court of Appeal made an order for full indemnity costs *inter alia* because of the serious failure to make full and frank disclosure when applying *ex parte* for a *Mareva* order, especially as, if there had been full and frank disclosure, no such order might have been made. He further refers to *Brink's Mat Limited v Elcombe* [1988] 1 WLR 1350 setting out the principles applicable to where there is material non-disclosure when pursuing an application *ex parte*.
30. In relation to discontinuing proceedings, Advocate Newman refers to what I had stated at para. 23 in the *Newmarket Holdings* case about the general position that the plaintiff who has commenced proceedings has assumed the risk of doing so and the costs burden will usually fall on such a plaintiff. He also points out that the Respondent appears to have conflated the position of the corporate defendant in the New York proceedings with the Applicants, who should be regarded as separate legal entities who are not parties to those New York proceedings.
31. Advocate Newman also suggests that Simmons & Simmons had become aware early in September 2019 that letters of request had been issued and so began preparatory work in readiness for addressing them when they were progressed. This was done because the timescales in which to respond would inevitably be short and so work on what was needed to set anything aside could not have been progressed as swiftly as it then was. The Applicants do not accept that it is permissible for the Respondent to rely as it does on material that was not before the Court in the proceedings when seeking to justify the steps it took (ie, the additional detail of the stages in the New York proceedings as set out in the Affidavit of Mr Bregg).
32. These submissions raise a number of discrete, but inter-connected, issues. I consider that the logical order in which to deal with them is to determine first whether any costs order should be made against the Respondent and, if it should, the time period in respect of which costs would be payable and also the basis on which those costs should be awarded and finally to comment on the Applicants' submissions in respect of instructing foreign lawyers.

Costs in principle

33. I take the view that referring to rule 61 of the 2007 Rules is of no direct relevance, but may assist indirectly. The language used refers to discontinuing or withdrawing "*an action, counterclaim or any claim therein*". Although it is not material to the issue I am determining, rule 61(1)(b) refers to a party withdrawing "*his defences*". Rule 30(1) permits a defendant to set up a counterclaim against a plaintiff by the defences tabled in any action. For those reasons, I am satisfied that rule 61 extends only to the traditional form of "*action*" where a cause has to be tabled before the Court in accordance with rule 10(1) and the Rules then set out the further steps associated with the pleadings and matters ancillary to pursuing an action. What was in issue in the proceedings between these parties was not a classic action. It involved the Respondent seeking an order *ex parte* that it be permitted to serve witness summonses on both Applicants requiring an officer of each (and that might have been the same person) to attend to produce the documents listed in the letter of request, to which effect was being given. Such a

witness summons is governed by rule 85, but that makes no reference to any action being afoot and so is of more general application.

34. Although rule 61 is not directly engaged, the process that the Applicants needed to engage was to apply to set aside the witness summonses that had been served upon each of them in accordance with the order I made on 11 October 2019. In that regard, I think it is important to recognise that the order I made on 20 November 2019 was that the witness summonses be set aside by consent. In effect, this was granting the relief sought by the Applicants to have the witness summonses to which they were subject revoked so that they were no longer of any effect. In terms of winners and losers, I think this means that the Applicants won.
35. At para. 20 of the *Universal Trading* case, I dealt with the submissions that had been made relating to the wording found in Article 14 of the Hague Convention leading to the conclusion that this was something that could be equated to a contested matter:

“Whilst Guernsey may not follow the practice in England and Wales of having specific rules for this purpose, it is clear to me that, once the potential witnesses have engaged in the process, the Court is no longer engaging in the type of ex parte consideration where there can be no adverse consequences, but rather a contested matter of a type where there will be a winner or a loser or a combination of both extremes. Procedurally, I took the view, as I had done in the Perpetual Media case (supra), that it made sense to deal with the objections on notice rather than await the no doubt inevitable application to set aside any orders for the examination of the witnesses actually made. This was the course of action adopted by Moore-Bick J (as he then was) in United States of America v Philip Morris Inc [2003] EWHC 3028 (Comm). That judgment does not deal with the costs issues arising from the decision not to order the examination of a witness and there was no appeal from that part of His Lordship’s orders. However, just because the application to execute the Letter of Request was made on notice, I doubt that this would have prevented the court from making such award of costs as it considered appropriate to reflect the witness’s success.”

36. I am satisfied that the proceedings involving the parties became inter partes once the witness summonses had been served on 18 October 2019 and the Applicants took the stance that they would challenge the order granting the witness summonses and fixing the hearing on 20 November 2019. Strictly speaking, it was the Application dated 11 November 2019 that turned these proceedings from *ex parte* relief obtained, to an inter partes challenge. Although para. 2 of the Application was not couched as seeking to have the witness summonses set aside, but rather as being seeking an order that “*the Letters of Request are dismissed*”, I think the outcome is substantively the same. Accordingly, the claim at para. 3 of that Application for costs on the indemnity basis follows from the primary relief being sought and eventually granted by consent.
37. There is a general principle that costs will normally follow the event (eg, *Shaham v Lloyds TSB Offshore Treasury Limited* [2007-08] GLR 323). This outcome is not prescribed on the face of the 2007 Rules, but it remains a sound principle from which to start. In my judgment, the Applicants should, therefore, be treated as having succeeded in obtaining the relief being sought by their Application and it follows that this raises a presumption of making a costs order against the Respondent in their favour.
38. In reaching the conclusion that the Applicants can, in my view, properly be regarded as the successful parties, I have considered the various arguments that the Respondent has raised about the default position being that there should be no order as to costs. The first of these arises from the existing line of cases domestically adopting what was stated by Scott Baker J in *R*

(Boxall) v Waltham Forest London Borough Council (unreported, 21 December 2000), as quoted at para. 23 of the *Maurice* case:

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

39. In my view, the issue arising in that situation was slightly different from the present case. The appeal that had been instituted had become academic and so the Royal Court was not minded to determine the appeal substantively. The remaining issue related to costs and the default position was able to prevail, namely that, in the absence of good reason, there would be no order as to costs. In the present case, I consider that the position is more closely aligned to that I mentioned in the *Newmarket Holdings* case (at para. 19), referring to the position in English law found in *Emezie v Secretary of State for the Home Department* [2013] EWCA Civ 733: “*The starting point now is whether the claimant has achieved what he sought in his claim.*” Whilst these were also judicial review proceedings, I am prepared to treat the position of setting aside an order made *ex parte* on an inter partes basis as broadly akin to that situation. There was no need for the Respondent to resist the Applicant’s Application for the process that had been commenced to be reversed because the Respondent had already achieved what it wished to achieve through orders made in the New York proceedings. In those circumstances, I am satisfied that the Applicants achieved what they set out to achieve through bringing their Application. For the purposes of deciding the appropriate order as to costs, the outcome is clear enough to treat the Applicants as the successful parties.

40. In relation to what I said in the *Newmarket Holdings* case, para. 22 is not intended to say that the position under rule 61 of the 2007 means that there is such a degree of flexibility that the usual principles of where the costs should lie are displaced. In particular, the final sentence of that paragraph was addressing on whom the burden lies and nothing else. Here, the Applicants clearly have the burden first of establishing that a costs order should be made in their favour and then, if seeking indemnity costs, the burden of the appropriate basis for such an award of costs. The Respondent is not required to discharge any burden as to why costs should not be awarded against it, but would bear the burden of satisfying the Court that there should be some other order, including one that each side bears their own costs. More particularly, though, the fact that the parties reached agreement that the *ex parte* order for witness summonses should be set aside, I find was a concession on the Respondent’s part that the relief the Applicants

sought was effectively being granted by consent. In those circumstances, the Applicants have persuaded me that they should in principle benefit from a costs order in their favour.

41. The Respondent has also referred to the manner in which the wider group including the Applicants, which it terms “EEA”, conducted themselves in the New York proceedings. I am not persuaded that this is an appropriate consideration for the costs in the present proceedings. I understand that the parties to the New York proceedings could have volunteered to provide more materials. I further understand that the judge then seized of those proceedings created a situation in which a letter of request addressed to the Court to require the Applicants in Guernsey to produce documents to assist those New York proceedings through using the Hague Convention was then issued. Once the New York court had taken that step, it was open to the Respondent to give effect to the letter of request in the manner it chose to do so. That is all part and parcel of the procedural background that led to the *ex parte* order. However, once the witness summonses were approved by my order on 11 October 2019, they were served on each of the Applicants and those entities being required to attend to comply with the witness summons could reach their own decisions as to how to respond. I agree with Advocate Newman that each is a distinct legal person from the corporate entity which is the first defendant in the New York proceedings. Each is also a distinct legal entity from any of its officers. As is clear from the file note of the hearing on 11 October 2019, one option open to the Applicants was to volunteer an Affidavit producing the required documents. That would have been a means of complying with the order. An alternative form of compliance was to attend as summonsed and produce the documents to the Court in the manner ordered. However, it was clear that each Applicant could instead choose to take steps to set aside the witness summons, in whole or by reference to particular parts of it, in which case there would be a form of proceedings *inter partes* such as those that were commenced by the Application dated 11 November 2019. I take the view that the only relevant consideration for me in determining this application for costs will be the manner in which each of the Applicants dealt with the position in which it found itself once it had been served with the witness summons. Accordingly, I do not think it is relevant for me to consider just how the issuing of the letter of request came about. That would be a matter for those determining the New York proceedings within which that step was taken. I have, therefore, not taken into account the additional information set out in Mr Bregg’s Affidavit.
42. In relation to the conduct of the Applicants once they were served with the witness summonses, I agree that this becomes relevant, but I think the relevance arises at a later stage in the consideration of factors applicable to the final order to be made. That conduct does not affect this first stage of determining whether there ought to be a costs order made in favour of the Applicants because they obtained the relief they were seeking. The reasonableness of the conduct might result in some adjustment from what would otherwise be the order that follows, but the first question as to whether there should in principle be a costs order or no order as to costs is one where I am satisfied that the Applicants have discharged that initial burden. As the successful side, there should be a starting point that these costs follow the event.

Timescale for costs

43. The Applicants appear to be seeking costs from a time before when either was engaged in any proceedings before this Court. This is apparent from para. 24 of Mr Rogers’ Affidavit, where he refers to work being carried out by Simmons & Simmons on behalf of the Manager “*upon being notified that the Letters of Request had been issued by the US Court*”. To the extent that any costs order should be made, the Respondent argues that those costs can only start running from when the witness summonses were served.

44. I agree with the Respondent's submissions. The terms of section 1(1) of the 1969 Law clarify that this Court's discretion relates to the "*costs of and incidental to*" the proceedings before the Court. Although it is arguable that there were no proceedings involving the Applicants before the Court until they made their Application dated 11 November 2019, I prefer to treat the time from which such costs being incurred would be incidental to that Application as running from when the witness summonses were served.
45. The main reason why I take the view that any work undertaken before a witness summons was served on an Applicant, whether the Manager, the Fund or both, is that, if there had been no order permitting witness summonses to be served made, there would have been nothing to respond to and so no scope for this Court to make any order as to costs. It was, therefore, premature for the Applicants to be taking steps to ready themselves for something before either of them knew what it was that they would have to deal with. There may have been a more limited order made. Equally, if the appeal decision had been handed down earlier, the Respondent may have taken no further action. Therefore, to the extent that either or both of the Applicants chose to seek advice, doing so was a response to something that was happening elsewhere rather than a response to something in Guernsey. For example, it is clear from the evidence that the Respondent obtained, but chose not to progress, a letter of request addressed to the court in England in relation to another entity within the EEA Group. Any work undertaken in respect of a letter of request not pursued would rest with whichever entity chose to take that advice. Therefore, in order to ground a claim for costs pursuant to section 1(1) of the Law or rule 82 of the 2007 Rules, there must be some proceedings before this Court to which they relate.
46. As I have said, the proceedings really were those resulting from the service of the witness summonses pursuant to the order I made on 11 October 2019. Prior to that order being made, by adopting the approach of applying without notice, the Respondent was taking upon itself the risk that it would be responsible for the costs incurred. This is consistent with what I stated at para. 19 in the *Universal Trading* case. There is a distinction between the stage where a letter of request is being executed and where there are then some domestic proceedings relating to the letter of request. By way of example, had the Applicants chosen to comply with the order made, any witness attending to produce documents would be no different from any other witness. The person would not be a party to proceedings. The difference is that, instead of appearing as a witness, each of the Applicants chose to commence proceedings to set aside the witness summons served upon it. By an analogy with an application to set aside an order granting leave to serve out of the jurisdiction, the costs incidental to that application, brought by the person upon whom service has been effected, if successful, makes that person a party to those new proceedings and so costs associated with the step of setting aside can be dealt with as between the parties upon usual principles. If the application to set aside were to be unsuccessful, the costs associated with it get treated as a discrete application within the action already underway. Therefore, a similar situation arises here, with the Applicants choosing to apply to set aside after service, leading me to the conclusion that the costs incidental to their proceedings should be taken to have a starting point once service had been effected arising from the knowledge of what it was that each Applicant would otherwise be obliged to do and what it was seeking to have set aside.

Whether indemnity costs appropriate

47. There is no disagreement between Counsel as to the test applicable if the Court is to award costs on the indemnity basis. In the *Investec Trust* case, reference was made to the cases from the Jersey Court of Appeal, including the reference to what is now the relevant question: "*is there something in the conduct of the action by one of the parties or the circumstances of the case*"

which takes the case out of the norm in a way which justifies an order for indemnity costs, recognising that there will usually be some degree of unreasonableness?”

48. Advocate Newman further submits that there is additional guidance from Wates Construction Limited v HGP Greentree Allchurch Evans Limited [2005] EWHC 2174 (TCC) that supports the position that “to maintain a claim that you know, or ought to know, is doomed to fail on the facts and on the law, is conduct that is so unreasonable as to justify an order for indemnity costs.” In the present case, the Applicants submit that the Respondent knew that it had appealed the terms of the order made in the New York proceedings denying them an order against the defendants for production of the documents that were then the subject of the letter of request. That was not explained to me when I sat on 11 October 2019. Further, the Respondent must have known that if its appeal were to be successful, its pursuit of the letter of request against the Applicants would become otiose.
49. I agree with Advocate Adkins’ submission that the Respondent’s decision to seek to give effect to the letter of request by way of an *ex parte* application does not take these proceedings out of the norm. Whilst the Respondent might have chosen to give notice to the Applicants so that the proceedings began on an inter partes basis, it was clearly open to the Respondent to seek an order *ex parte*. I indicated as much in the Universal Trading case and that remains the position. Indeed, had I been persuaded on 11 October 2019 that it was wrong for the Respondent to obtain the *ex parte* order it sought, I would have required it to give notice to the Applicants before considering further the terms of the letter of request.
50. As regards the Applicants’ suggestion that the Respondent failed to comply with its duty to make full and frank disclosure at the *ex parte* hearing, this must be predicated on an underlying basis that the Applicants would not have been served with the witness summonses if the full picture had been given. This relates to whether the appeal proceedings in New York would have made a difference to what happened on 11 October 2019.
51. I think it is important to remember first that this Court seeks to respond positively to letters of request addressed to it from other courts seeking assistance in proceedings underway before such a court. This is an aspect of the comity of nations. The letter of request was granted by the judge who had previously refused the disclosure orders sought. I take the view that, at face value, the letter of request was an appropriate course of action for the Respondent to follow and giving effect to it domestically was an appropriate step to take. It is only with the benefit of hindsight that the position changes. The appeal was allowed and orders were made within the New York proceedings that meant that proceeding to require production of the same (or substantially the same) documentation through the Hague Convention route was no longer necessary. As far as the Group of which the Applicants are a part was concerned, the opposition of the defendants in the New York proceedings to the Respondent’s appeal should, I think, be viewed as showing that the Respondent could properly seek the letter of request to be issued in the meantime and proceed to have it executed here in Guernsey. If there was a time at which something could have been done to await the determination of the Respondent’s appeal, I think that should have occurred in the New York proceedings. For example, the judge seized of the case could have chosen to wait until the appeal decision was handed down before deciding that a letter of request was needed. However, once that letter of request was issued, I think it would have been quite bold for me to have determined on an *ex parte* application that the more appropriate course would be to await the outcome of any appeal, even if that information had been provided by the Respondent. I am not persuaded that that would have reflected the usual way in which letters of request are to be treated here as a means of lending assistance under the terms of the Hague Convention in aid of proceedings taking place in another Convention country.

52. The other way of approaching the Respondent's submissions on this issue is to consider whether the Respondent's failure to make full and frank disclosure would have been the basis on which to set aside the witness summonses. By the analogy with the approach taken in cases such as *Brink's Mat Limited v Elcombe*, non-disclosure of a material fact can give rise to the conclusion that the *ex parte* injunction obtained will be discharged. In this manner, it deprives the wrongdoer of the advantage improperly obtained and also operates as a deterrent to others who might in future make applications without notice. The seven factors set out in the judgment of Ralph Gibson LJ (at pages 1356-7) also demonstrate that something that is material for a judge to know falls to be decided by the court and not by the assessment of the applicant or the applicant's legal advisers. Further, whether any particular fact "*is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application.*" Although there is a risk here of trying to work out what the outcome of para. 2 of the Application would have been had there been a contested hearing in relation to it, I do not consider that the emergence of the fact that the Respondent's appeal was successful and that the existence of the appeal itself was omitted from the material before me *ex parte* on 11 October 2019 makes that non-disclosure of such materiality that it would inevitably have resulted in the order permitting witness summonses to be served being discharged. I need to have regard to the fact that there would only have been such a contested hearing if the appeal had failed and pursuing the letter of request to require production of material remained necessary. At that point, I would have been more interested in the merits of the Applicants' substantive arguments about whether the terms of the letter of request fell within what could properly be granted under the regime giving effect domestically to the Hague Convention rather than any non-disclosure at the *ex parte* stage. Accordingly, I am not persuaded that the Respondent's failure to mention the extant appeal means that the *ex parte* order granted fell to be discharged on the basis of non-disclosure.
53. Further, I think it is worth considering what the position would have been had the matter proceeded on notice from the outset. In October, when the first hearing would most likely have taken place, the appeal decision had not been handed down. It may not have been known at that time when the decision would be forthcoming. As a result, there would inevitably have been a timetable and, more likely than not, that timetable would have required the Applicants (as the respondents to the Respondent seeking to obtain orders to execute the letter of request addressed to this Court) to file and serve their materials within a period before the outcome of the appeal was known or digested. In other words, the work needing to be undertaken at the time would probably have been along the same lines as the Applicants did upon service of the witness summonses, although it is possible that it may even have resulted in them needing to do more before the appeal decision was handed down. In those circumstances, had the choice been made to commence inter partes, the Applicants could well have incurred even greater costs. It is clearly trite to note that the non-disclosure issue only arises because the Respondent chose to proceed *ex parte*. However, by comparing what the position would have been if proceedings had commenced on notice, it demonstrates why this issue does not support the Applicants' claim for costs on the indemnity basis. The non-disclosure of the appeal was not, in my view, something taking these proceedings out of the norm.
54. The better argument on behalf of the Applicants relates to what happened once the appeal decision was handed down. This relates to whether the conduct of the proceedings between the parties involves some element of unreasonableness. Giving the timing, I find it surprising that the Respondent, as a party to the proceedings in New York, did not act more quickly to alert the Applicants, where Advocate Newman had written the letter he sent on 31 October 2019, about the appeal being successful. Not doing so until the letter sent on the afternoon of 13

November 2019 rather than raising it in the previous letter sent on 5 November 2019 strikes me as an opportunity missed.

55. I think it is important to put what happened at this time into context. Advocate Newman had written on 31 October 2019 to inform Advocate Adkins that, following the service of the witness summonses, he was instructed by the Applicants. Because the Respondent must be taken to have known the significance of the appeal it had made against the earlier refusal for an order for disclosure in the New York proceedings, especially as it would affect its reliance on the letter of request obtained and addressed to this Court, I think the Respondent should have taken the opportunity when first replying to the Applicants' Advocate to have drawn attention to the likely effect of its appeal having been successful. I realise that the appeal decision was handed down on a Friday. Its effect may not have been considered properly until the Monday, 4 November 2019. Mr Bregg's Affidavit exhibits a letter sent on 5 November 2019 to the New York court on behalf of the first defendant to the Respondent's claim before that court in which, as he notes, reference was made to the documents being sought by the Hague Convention route being the same as now covered by the overturning of the denial of what is termed a motion to compel, relating to discovery of the documents within the New York proceedings. On the basis that the first defendant to the proceedings in New York was able to review and digest the effect that the appeal decision had so as to write this letter on 5 November 2019, and also having regard to the time difference between New York and Guernsey of it being five hours earlier in New York, I think it follows that when the Respondent's Advocates wrote their letter on 5 November 2019 and sent it during the afternoon, this was after close of business in New York. For that reason, I take the view that I can properly infer that by the time that letter was sent the Respondent must have been in a position to instruct its Advocates in relation to its view about the implications of the appeal decision. The Respondent's failure even to mention in that letter its awareness of the appeal decision provides a basis from which I can find that what follows is adversely impacted by that omission because it amounts to unreasonable conduct.
56. When considering the content of that letter, despite knowing the outcome of its appeal, the Respondent enquired as to the stance that the Applicants would be taking in respect of the witness summonses that had been served. The better course of action would have been to acknowledge that the success of its appeal meant that the landscape where it had obtained a letter of request had changed. If nothing else, the Respondent could have highlighted that it may no longer need to pursue obtaining documents through the witness summonses, thereby avoiding the Applicants considering what they might need to do to avoid being found non-compliant. The file note of the *ex parte* hearing that was enclosed with the letter was not as complete as it could have been. I regard that as less of an issue, though, because the impression I have formed is that requests for transcripts of hearings to be prepared are very commonplace and the Applicants, being interested in the outcome of the *ex parte* hearing, could, whether before or after receiving this file note from the Respondent's Advocates, have obtained a transcript so as to know exactly what happened at that hearing.
57. When considering the chronology that follows, I take the view that the Respondent's Advocate's letter provided little comfort to the Applicants. By then, it was just two weeks until the return date on the face of the witness summonses. There was, therefore, comparatively little time in which to do otherwise than to make their Application. Whilst it would just about have been feasible for the Applicants to have raised the successful appeal before having to take the step of commencing their proceedings by way of that Application, the timing was tight. I am conscious that different corporate entities are involved. The defendants in the New York proceedings are different persons from the Applicants. I cannot necessarily impute the knowledge each will have had about the appeal decision to the Applicants. Further, I do not think that the file note clarified adequately that the hearing on 20 November 2019 could be used

as the date on which such an Application could be made. In those circumstances, the Applicants needed to progress their Application in a reasonably timely fashion and there was little time available in which to engage in further correspondence. That said, there would have been nothing wrong in picking up the telephone and having a discussion about the most appropriate way forward as between the two sets of Advocates. To that extent, I have some sympathy with the position the Respondent advances that the making of this Application and, perhaps even more particularly, the further application seeking directions, was a bit premature. Equally, the work involved with producing the bare Application, noting that there was no evidence in support of it, should not have been extensive. Overall, I take the view that the conduct of both sides was not as it really should have been during this period of just under a week. The Respondent should have been more forthcoming with a view to avoiding unnecessary costs being incurred, but the Applicants appear to me to have pursued the route of the Application and in short order a further application without properly engaging with the Respondent's Advocates to discuss matters in a sensible fashion. Because of the faults that can be levelled against both sides, I do not regard the Respondent's conduct during this time as being so unreasonable that an indemnity costs order necessarily follows from what happened over this time. I do think that the way in which the Applicants approached matters similarly properly has to be weighed in the balance over these few days.

58. I have just commented on the manner and timing of the Applicants' Application, but I would add that I think the way in which indemnity costs was pleaded on the face of the Application without setting out the basis on which a costs order on that basis might be warranted is a poor way to proceed. Prior to sending the letter dated 11 November 2019 enclosing the Application, the only previous correspondence on behalf of the Applicants had been the initial response in the letter dated 31 October 2019. That had been a short letter, where the suggestion made by Advocate Newman was to use the hearing listed for 20 November 2019 as a directions hearing to enable the inter partes proceedings to commence. Of course, that was one of the options canvassed at the *ex parte* hearing, but it was not satisfactorily set out in the Respondent's Advocates' file note. As such, the letter dated 11 November 2019 was the first occasion on which a more substantive response to the serving of the witness summonses was given on behalf of the Applicants. The bare Application was enclosed as a means of eliciting a response to the proposed timetable for the Applicants' challenges to the use of the Hague Convention route to obtain documents. However, by pleading nothing more in para. 3 than a claim for costs on the indemnity basis, it inevitably raised the stakes between the parties so that that question of the costs appeared to be the objective in bringing the Application. At that point, bearing in mind the service of the witness summonses and the one round of exchanges of correspondence, I do wonder on what basis the proceedings to set aside those witness summonses (or dismiss the letter of request) could be said to justify seeking indemnity costs. The conduct of the proceedings, by that time inter partes, by the Respondent can hardly have been said to have been unreasonable, meaning that the primary case on behalf of the Applicants must have been that pursuing the Hague Convention route for any longer was doomed to failure (ie, the Wates Construction principle). Yet the Applicants' Advocates' letter did not mention the way in which the Respondent's appeal had been successful. By that time, I take the view that I can properly infer that both Applicants will have known the outcome of the appeal. Their failure to raise this in correspondence at a time when it would still have been possible to reach an outcome without there being any inter partes proceedings is, in my view, something that tips the balance against the Applicants being entitled to an indemnity costs order as it relates to this time period.
59. The final period of time about which to comment is from the Respondent's Advocates' letter of 13 November 2019, where the appeal decision is first mentioned, through the Consent Order made on 15 November 2019 to the hearing on 20 November 2019. The Respondent argues that

any costs ordered against it should end on 15 November 2019. At that time, the Court ordered the effect of the witness summonses to be stayed. Agreement was reached that the witness summonses be set aside by consent and so the contest between the parties was over. The Applicants argue that matters were not concluded until the hearing on 20 November 2019, at which the relief sought was granted and the timetable for the only remaining issues between the parties was fixed.

60. In my judgment, the Applicants are correct. The costs order I can make can include the preparation for that hearing on 20 November 2019. The parties' dispute had largely been resolved, but there is a difference between staying the effect of an order and then lifting that stay and setting aside the terms of the order previously made. Accordingly, in terms of the period for which a costs order can be made, I am satisfied that it can extend to the date of the making of the order on 20 November 2019. (Indeed, the costs of the steps taken thereafter to argue the parties' respective positions relating to costs could give rise to a further order.) However, I am not persuaded that the conduct of the Respondent during those further few days has been unreasonable and so there is nothing further to put into the balance as to whether the Applicants have persuaded me that there should be an order for costs on the indemnity basis.
61. Although I have found that the conduct of the Respondent once it knew about the success of its appeal in the New York proceedings can be regarded as unreasonable, and it might be said that the Applicants could have been told before they made the Application by which they seek an indemnity costs order that it was not needed, I am not persuaded that the justice between the parties should result in there being an order for full indemnity costs. In any event, I would only have been considering making an award of indemnity costs from an appropriate time following when the Respondent should have drawn attention to the appeal decision. The period of time prior to that date would not, in my judgment, warrant any indemnity costs order because I can identify nothing taking the proceedings out of the norm. Accordingly, it was the failure to mention in the letter dated 5 November 2019 anything about the appeal decision that would be the starting point for any indemnity costs and not earlier, which would always be covered by an order for costs on the recoverable basis. However, I have inferred that the Applicants must have been aware of the appeal decision before their Advocates wrote the letter on 11 November 2019, but must have chosen not to mention that fact. The balance is, therefore, that both sides appear to have unnecessarily delayed mentioning this important factor.
62. The difficulty for the Applicants for the two or so weeks following the Respondent's failure to mention the appeal decision is that I have found that the Applicants similarly failed to conduct themselves reasonably. In particular, the inclusion of a claim for indemnity costs at para. 3 of the Application strikes me as somewhat opportunistic. It appears to have been included to create increased pressure on the Respondent. Once the Respondent raised the issue of the appeal decision, the proceedings that had been commenced were resolved and, had the Applicants proposed that there be costs on the recoverable basis in their favour, the Respondent's rejection of that proposal might well have led to indemnity costs thereafter, because that is the order I will make in circumstances where I am not persuaded by the Applicants that they should not even have had to deal with the witness summonses served on them.
63. In summary, therefore, I am satisfied that the Respondent should be ordered to pay the Applicants' costs of the proceedings commenced by way of the Application, on the basis that these are costs following the event, but only on the recoverable basis. Had there been no need for the Application, the Applicants would not have been able to pursue any order for costs, so I have to factor that element to the overall justice position as to what order to make once the proceedings became inter partes. The costs should only run from the date of service of the

witness summonses because, until they were served, the Applicants did not know they were going to be required to attend to produce the documents under the terms of that order. The work undertaken thereafter can, in my view, properly be regarded as incidental to the proceedings the Applicants then commenced by way of their Application. The period for these costs ends with the hearing on 20 November 2019, which is when the equivalent relief being sought by the Application was granted by consent. I have decided that the order should not be for indemnity costs because, weighing up everything that happened during that time, I am not persuaded that there was conduct on the part of the Respondent that means such an order would do justice between the parties. Instead, the order reflects the normal order at the conclusion of proceedings, which I regard as being fair as between both sides for what occurred in Guernsey.

Foreign lawyers' costs

64. Whilst the question of the additional costs incurred by the Applicants through instructing Simmons & Simmons and English counsel can be resolved on a taxation, if requested, I will offer some brief comments in an attempt to assist the Applicants as to what they might wish to pursue in their Bill of Costs arising from the order for recoverable costs in their favour.
65. Paragraph 21 in *Ladbroke plc v Galaxy International Limited* (*supra*) sets out some examples of when the principle that the costs of external lawyers will be recoverable, but this needs to be put in the context of the preceding paragraph which found that “*the public interest of Guernsey requires that in the majority of cases only the fees and disbursements of Guernsey Advocates’ firms should be allowed*”:

“But that is not to say that in appropriate and exceptional cases (which will be relatively few) the fees and disbursements of external lawyers should not be allowed on taxation. I will try to give some examples of what are likely to be appropriate and exceptional cases:

(1) *In a small jurisdiction like Guernsey it is possible that in some highly specialised fields of law, which arise rarely for decision by the Guernsey Courts, Guernsey Advocates will not have the full range of specialist expertise. In such cases it might be entirely appropriate that specialist advice is obtained from external lawyers with the necessary full specialist expertise.*

(2) *In civil cases litigants from outside Guernsey may have existing long-standing ties with external lawyers, and use of such external lawyers in connection with proceedings in the Guernsey Courts may to some extent be reasonable so as to ensure that the existing knowledge held by the external lawyers of the client litigants and of the facts which underly the disputes are made available to the Guernsey Advocates conducting the cases for those litigants. I emphasise the words “to some extent” above, because in the great majority of cases there can be no justification for duplication of costs by the use of both Guernsey Advocates and external lawyers in all or most of the stages of Guernsey proceedings.*

(3) *Guernsey proceedings not infrequently involve consideration of principles of English law (or the laws of other jurisdictions in the Commonwealth, or, for example, France). In such proceedings it may be reasonable for help to be sought from external lawyers in establishing what are the relevant principles of English or other laws, and for allowance to be made on taxation for the costs of such assistance. Decisions such as *Morton v Paint* (1996) 21 GLJ 36 CA indicate that resort to the laws of England and Wales and other jurisdictions may be a necessary part of decision-making in*

the Guernsey Courts, and in my view it would be wrong to refuse allowance for costs reasonably incurred in legal research by external lawyers, in so far as that research could not readily be carried out by the Guernsey Advocates' firm. I enter this caveat because the use of internet resources relating to the main common law jurisdictions (including BAILLI [sic], WORL DLII and AUSTLII as well as LexisNexis and other commercial sites) has made the task of researching the statutes, case-law and jurisprudence of such jurisdictions much easier for Guernsey Advocates and their employed lawyers.

(4) *Often the cheapest and speediest way of reaching the heart of a problem involving complex facts and law is by taking the advice of the best lawyer or lawyers available. Sometimes, for example, it is entirely appropriate for Guernsey Advocates to place the problem before a specialist Queen's Counsel or barrister in England (which the Advocates can do directly) to obtain advice on the appropriate solution to the problem. In referring to barristers, I do not exclude the possibility of specialist expertise being that of an English solicitor, though that may prove to be less common.*

(5) *In cases involving large numbers of documents Guernsey Advocates may have to obtain help from large firms in England (or perhaps elsewhere) in the management of the document base, where such management is beyond, or would place undue burden on, the resources of the Guernsey firm.*

In (1) to (5) above I have simply tried to give examples of cases in which it may be reasonable and justifiable for costs incurred in the use of external lawyers to be allowed on taxation in Guernsey proceedings. These examples are not, and are not intended to be, exhaustive.”

66. Advocate Newman has also referred to *In re a Guernsey Company* (2011, unreported, anonymised 30 April 2013) and *Jackson v Dear* (unreported, 8 July 2013), (although the judgment included in the bundle is a different one), where this principle was followed on the basis that “*the reasonable costs incurred by the receiving parties in instructing or otherwise using the services of foreign lawyers in preparation for the hearing i.e. what, in a split profession jurisdiction like England, would be generally understood as being the responsibility of litigation solicitors, including (i) obtaining instructions from their clients and preparing their affidavits and other affidavits, (ii) preparing the many bundles used at the trial and (iii) making arrangements for the attendance in Guernsey of witnesses for cross-examination at the hearing, should be allowed as part of their recoverable costs.*” In the later case, it was acknowledged that the derivative action was a novel concept at the time in Guernsey.
67. The other example of where the question of the costs of instructing external lawyers was involved is *Broadhead v Spread Trustee Company Limited* (unreported, 26 November 2014), in which the argument was rejected on the basis that it had been “*a totally Guernsey case*” (para. 35). Consideration was given at para. 38 to the examples in the *Ladbroke* case:

“Considering the five example situations given by L-B Southwell (and no other category has been suggested) and which he himself stressed will be “rare”, only the first (lack of relevant expertise in the subject) and the third (need for foreign law research) appear to be impliedly invoked. I have dealt with the third. As to the first, I am perfectly satisfied that Ogier, particularly in the shape of Advocate Davies, a senior, experienced and eminently competent Advocate, possessed, individually or through in-house access, all the necessary knowledge, skill and expertise required to

conduct this case competently. Ogier are being either unduly modest or unnecessarily lacking in confidence in suggesting otherwise.”

68. The submissions of Advocate Newman concentrate on this being a specialised field of the law, with a very limited number of Guernsey cases, meaning that extensive consideration of the principles of English law was necessary, where the most economical way was to take advice directly from English Counsel. There were cross-jurisdictional issues entitling the Applicants to take advice from a firm capable of co-ordinating their response with others and where the Manager and the England-based entity had a long-standing relationship with Simmons & Simmons. Had that firm not been engaged, the costs of the Guernsey Advocates would have been higher. There was a large volume of documents potentially covered by the letter of request.
69. In response, Advocate Adkins points out that there was nothing novel about what was needed to set aside the witness summonses. Further, there was not a lot of documentation generated at all in the proceedings that were actually commenced and then compromised. This did not involve a specialist area of law.
70. I am more inclined to agree with the Respondent than the Applicants. I note, as in the *Broadhead* case, that Advocate Newman is using the examples given in the *Ladbroke* case and not advancing any different bases on which the costs of external lawyers should be recoverable on a taxation. Taking the final example first, I am not persuaded that this was a case involving lots of documents. It might have done if the Application to set aside the witness summonses (or dismiss the letter of request) had been lost, but for the purposes of making the Application itself, especially where no evidence in support was provided, does not result in this being a document-heavy case where external assistance might be cost-effective. Subject to what follows, I am not persuaded that this was a particularly English law situation. The main cases from England have previously been addressed in domestic decisions. This is not such a novel area of the law that seeking assistance from English lawyers was necessarily the most cost-effective way to proceed. Given that both Applicants are Guernsey companies, this is not, in my view, a situation where there are long-established relationships with English solicitors. I suspect that the relationship is more about the entity within the EEA Group based in England. I do not think that the Manager really needed to turn to Simmons & Simmons to deal with the witness summons it received, or even when feared being served with it, other than through convenience. The only lawyers capable of engaging in having the witness summons set aside would be the Applicants' Advocates. This was something that they should have been ready and able to address. The impression I have formed is that Simmons & Simmons were engaged without any real thought being given to what the position would be if the letter of request for the English court were not pursued. The firm's role was far less about how to deal with the applicable Guernsey law principles to respond to the service of a witness summons. That really was a Guernsey law issue and one that Advocate Newman would be competent to deal with.
71. This leads me to the final point to consider, which relates to the Applicants' Advocates' need to obtain specialist advice. It is here that it may more readily be argued that seeking English Counsel's advice was an appropriate and cost-effective step to take to assist the Applicants' Advocates to understand what could be pleaded in para. 2 of the Application. From para. 27 of Mr Rogers' Affidavit, it seems that the cost of that advice was £7,700, although it looks as though Counsel was instructed through Simmons & Simmons. If the Applicants were to seek to recover, in addition to the costs they incurred with their Advocates (on the recoverable basis) this amount as a disbursement, I could understand how that might be capable of being treated as an expense reasonably incurred on a taxation. I doubt that the much more extensive costs that it is suggested the Applicants incurred with Simmons & Simmons could be regarded as

anything other than unnecessarily duplicating the work that was carried out by Advocate Newman and his colleagues at his firm.

72. I offer these comments in the hope that both sides, but particularly the Applicants, might find them useful in deciding what is and is not going to be recoverable under the Applicants' Bill of Costs. I do encourage the Applicants to be realistic and pragmatic as to what can properly be recovered. Ideally, there would be agreement about what will be encompassed in such a Bill, thereby avoiding the need for the Respondent even to request that the Bill be taxed.

Conclusion

73. For the reasons I have given, the order I make is that the Respondent will pay the costs of and incidental to the proceedings, ie, of the Application, once they can be regarded as becoming inter partes until their conclusion on 20 November 2019 on the standard recoverable basis.
74. In terms of the costs of these costs proceedings, whilst I acknowledge that neither party has had the opportunity to make any representations, I thought I would also offer my provisional view on the basis of this outcome. Neither the Applicants nor the Respondent have achieved what they argued for on their primary case. The Applicants pursued indemnity costs when I have found that was not really realistic and the Respondent proposed that there be no order as to costs when I have decided that the Applicants should be paid their recoverable costs. I further doubt that the level of costs that the Applicants would have sought to recover to include those incurred with Simmons & Simmons would be allowed on taxation. It would be possible to award the Applicants their costs of dealing with the relief sought in their Application on the basis that they have achieved a costs order, albeit not on the basis they wished, but I think the better outcome would be that both parties pay their own costs of this stage of the proceedings. By proposing to make no order as to costs as between the parties in respect of pursuing para. 3 of the Application, I take the view that this reflects that the final order will most likely result in an amount considerably lower than that sought by the Applicants having to be paid to them by the Respondent and possibly even closer to the outcome proposed by the Respondent and where neither side can really be regarded as having succeeded.