

Costs awarded on the Indemnity basis following proceedings in this matter in the Royal Court.

[2024]GRC048

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

**IN THE MATTER OF FIM LONG-INVEST PORTFOLIO LIMITED (IN LIQUIDATION)
AND FIM LONG-INVEST PCC LIMITED (IN LIQUIDATION)**

AND

**IN THE MATTER OF THE COMPANIES (GUERNSEY) LAW, 2008
("COMPANIES LAW")**

Between:

MATTHEW JAMES WRIGHT AND ANDREW DUNCAN

**(IN THEIR CAPACITIES AS JOINT LIQUIDATORS OF FIM LONG-INVEST
PORTFOLIO LIMITED and FIM LONG-INVEST PCC LIMITED)**

Applicants

-and-

ADJURE GLOBAL LIMITED (IN VOLUNTARY LIQUIDATION)

First Respondent

-and-

ADJURE (GLOBAL) SUISSE S.A.

Second Respondent

**Costs decision (made on the papers)
Judgment handed down: 6 February 2024**

Before: Jessica E Roland, Deputy Bailiff

Counsel for the Applicants: Advocate M C Newman

Counsel for First Respondent: Advocate L Thibeault

Submissions on behalf of the Second Respondent were received from its Director Mr Paul Pybus

Cases, texts & legislation referred to:

Royal Court Civil Rules, 2007

The Companies (Guernsey) Law, 2008

Re Med Vineyards (in compulsory liquidation) [1995] 20 GLJ 7

Inalux SA v. Old Crown Trust Ltd., Royal Ct., June 16th, 2000

Fountain Street Developments Limited v Companies (Guernsey) Law, 2008 Costs 51/2018

Jefcoate v Spread Trustee Company Limited et al 44/2014

Introduction

1. This costs judgment is a decision on the papers without hearing from the parties following proceedings in the Royal Court in the above matter. The parties indicated that they were content for me to adjudicate on the question of costs without there being an oral hearing. I am satisfied that I can reach a just conclusion without the need to convene the parties and so have considered this matter on the papers only. The Applicants who are the current Joint Liquidators of FIM Long-Invest Portfolio Limited (in liquidation) and FIM Long-Invest PCC Limited (in liquidation) (collectively the Companies) have filed submissions, a response to the First Respondent's submissions and a further reply to the Second Respondent's submissions and the First Respondent's response. The First Respondent similarly filed submissions, a response and then a reply. The Second Respondent filed a response and a final submission. Following the filing of the bundles, the Court then received further correspondence from the Applicants, but I did not receive nor did I invite further submissions from any parties relating to the contents therein.
2. The Applicants seek indemnity costs on a joint and several basis from the First and Second Respondent. The First Respondent seeks recoverable costs against the Applicants. The Second Respondent seeks a dismissal of the Applicants' costs against it and costs against the Applicants.

Background

3. The original application (the "Original Application") was first heard in the Royal Court on 30 September 2022, in front of Lieutenant Bailiff Roberts. The First Respondent was the sole Respondent to the action. The matter was returned to Court on 14 October 2022, when an application for Leave to Amend the Original Application was granted (the "Amended Application"). Leave to re-amend the Amended Application (the "Reamended Application") and to join the Second Respondent was granted at a hearing on 28 October 2022, as well as leave to serve out of the jurisdiction on the Second Respondent. The matter returned to Court on 18 November 2022. At that hearing the Applicants sought orders against the First and Second Respondents for delivery up of the updated Share Registers and provision of documentation relating to the matter. The third element of the Reamended Application against Mr Paul Pybus and Mrs Dawn Pybus was not pursued, although the Applicants reserved the right to pursue that later, if necessary.
4. In an ex tempore judgment handed down on 2 December 2022, I ordered that the Second Respondent deliver up the Share Registers by 4.00pm on that day, appropriately updated to reflect legitimate transactions to date and to provide all documentation relating to June and July Share Transfers, including evidence to show those transfers had been properly sanctioned by the Joint Liquidators by 4.00pm on 5 December 2022. No orders were made against the First Respondent at this stage, although I left open the possibility of making orders against the First Respondent and Mr and Mrs Pybus.
5. The Second Respondent ignored the Court order and therefore, on 9 December 2022 the Applicants sought orders against the First Respondent and an order against Mr Pybus, compelling him, in his capacity as a former joint liquidator of the company, to answer interrogatories about the Share Registers. I granted both those applications with the option to return to Court to seek an order for cross-examination of Mr Pybus before a Commissioner of

the Court, should that become necessary. On 26 January 2023 the Applicants wrote to the Court indicating that they were not pursuing the matter further. The First Respondent has been placed into voluntary liquidation on 30 December 2022.

Brief Summary of the Submissions

6. The Applicants apply for an order that all of their costs, and the costs of this costs Application should be paid for by the Respondents on an indemnity basis. They submit that whilst indemnity costs are “*out of the norm*” they are justified in this case. They rely on five main arguments which they expanded in their extensive submissions: (i) the ultimate success of the Applicants in the face of a protracted and vexatious defence (ii) the Respondents’ reliance on jurisdictional arguments which were judged by the Court to be defeated by evidence; (iii) the unreliability of Mr Olley’s sworn witness evidence and the contradiction with contemporaneous events (iv) the failure of the Respondents to fully comply with the orders made against them, including a total failure by the Second Respondent (v) the Respondents’ reliance on the lien argument long after it was indefensible.
7. The Applicants reject the submission by the First Respondent that they have abandoned the proceedings against it or that they rejected a series of increasingly generous settlement offers which they should have accepted whilst costs continued to accrue unnecessarily. The First Respondent says that if the Applicants had accepted the “*without prejudice*” offers made by the Respondents most significantly that of 31 October 2022 which would have achieved the provision of the information and all parties walking away stopping the accrual of further costs, this would have resulted in a much better result for much less expense to the Applicants. The First Respondent says that I should take into account the failure by the Applicants to take the correct steps in particular, the pursuit of the wrong party and that the Original Application was blighted with errors. Further, it says it has always been open to the Applicants to pursue self-help once they refused to pay for the services under the agreement dated 23 April 2013 (“the 2013 Agreement”) which was purportedly assigned to the Second Respondent on 12 April 2021 (“the April 2021 Assignment”). This, the First Respondent says, was acknowledged as an option by Mr Wright in his second affidavit. It is the Applicants’ conduct of the proceedings and their decision not to address matters themselves which has caused the costs. The First Respondent says I should dismiss their application for indemnity Costs and award costs to the First Respondent on a recoverable basis.
8. The Second Respondent’s submissions largely echo those of the First Respondent. It also relies on the indemnity (for the benefit of itself and the First Respondent) contained within the 2013 Agreement between the First Respondent (then known as Price Bailey Fiduciary Limited) and the then liquidators of the Companies (Anthony Sanderson and Paul Pybus). In the first set of submissions in reply the Second Respondent asks for the Applicants’ costs applications to be dismissed. In the reply submissions the Second Respondent appears to have moved from its original position and is seeking orders against the Applicant “*to pay any element of the parties’ (which I presume to mean the Respondents) costs which are not recovered through this costs process*” (which I think is a reference to the indemnity in the 2013 Agreement); and that “*if the Court awards costs against either the First or Second Respondent that the Court also issue a Recovery Order of such costs*”.

Discussion

9. The Court’s discretion as to the making of an order in costs is very wide. Put simply it is a discretion to do what appears just and reasonable in all the circumstances of the particular case, including both the result of the actual proceedings and the conduct of the parties involved, both

as regards to the subject matter of the proceedings and the conduct of those proceedings. The Court can award costs on the indemnity basis pursuant to rule 83 of the Royal Court Civil Rules, 2007 "where any party has pleaded or otherwise pursued ... an action, claim or counterclaim unreasonably".

10. In Jefcoate v Spread Trustee Company Limited et al 44/2014 Lieutenant Bailiff Marshall said:

"Although the English Civil Procedure Rules (Part 44) rules are far more elaborate than the Guernsey rules, the general basis of this court's jurisdiction to make orders with regard to costs is similar; and the Guernsey court will look to English authority (as well as Guernsey and Jersey authority) for useful guidance as to when it is appropriate to exercise the court's power to award indemnity costs: see per Southwell JA in Hulme v Matheson Securities (Channel Islands) Limited (No.2) (Unreported 28th November 1997, Court of Appeal (Gsy)) and per Collas DB in Shaham v Lloyds TSB (2007-8) GLR 323, followed in De Putron v De Putron and De Putron (Royal Ct Civ No 1667, 29 May 2013, McMahon DB). Hulme emphasised that it is not merely where proceedings are pursued or conducted with an ulterior or improper purpose that indemnity costs may be awarded, but also where they are pursued oppressively or in such a way as to cause costs disproportionate to the amount at stake to be incurred."

11. I have also borne in mind the eight principles extracted from the authorities by Tomlinson J in Three Rivers District Council v Bank of England [2006] EWHC 816 (Comm):

"(1) The court should have regard to all the circumstances of the case and the discretion to award indemnity costs is extremely wide.

(2) The critical requirement before an indemnity order can be made in the successful defendant's favour is that there must be some conduct or some circumstances which takes the case out of the norm.

(3) Insofar as the conduct of the unsuccessful claimant is relied on as a ground for ordering indemnity costs, the test is not conduct attracting moral condemnation, which is an a fortiori ground, but rather unreasonableness.

(4) The court can and should have regard to the conduct of an unsuccessful claimant during the proceedings, both before and during the trial, as well as whether it was reasonable for the claimant to raise and pursue particular allegations and the manner in which the claimant pursued its case and its allegations.

(5) Where a claim is speculative, weak, opportunistic or thin, a claimant who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails.

(6) A fortiori, where the claim includes allegations of dishonesty, let alone allegations of conduct meriting an award to the claimant of exemplary damages, and those allegations are pursued aggressively inter alia by hostile cross examination.

(7) Where the unsuccessful allegations are the subject of extensive publicity, especially where it has been courted by the unsuccessful claimant, that is a further ground.

(8) The following circumstances take a case out of the norm and justify an order for indemnity costs, particularly when taken in combination with the fact that a defendant has discontinued only at a very late stage in proceedings;

(a) Where the claimant advances and aggressively pursues serious and wide ranging allegations of dishonesty or impropriety over an extended period of time;

(b) Where the claimant advances and aggressively pursues such allegations, despite the lack of any foundation in the documentary evidence for those allegations, and maintains the allegations, without apology, to the bitter end;

(c) Where the claimant actively seeks to court publicity for its serious allegations both before and during the trial in the international, national and local media;

(d) Where the claimant, by its conduct, turns a case into an unprecedented factual enquiry by the pursuit of an unjustified case;

(e) Where the claimant pursues a claim which is, to put it most charitably, thin and, in some respects, far-fetched;

(f) Where the claimant pursues a claim which is irreconcilable with the contemporaneous documents;

(g) Where a claimant commences and pursues large-scale and expensive litigation in circumstances calculated to exert commercial pressure on a defendant, and during the course of the trial of the action, the claimant resorts to advancing a constantly changing case in order to justify the allegations which it has made, only then to suffer a resounding defeat.”

12. The Court’s discretion is very flexible and according to the requirements of the case, however, and I note Lieutenant Marshall’s words in Fountain Street Developments Limited v Companies (Guernsey) Law, 2008 Costs 51/2018, “*the exercise of arguing for and making a Costs Order ought to be in itself proportionate, and not elevate the issue of costs to the equivalent of a trial in itself, except where the costs are so great as to be of major significance. A just and reasonable outcome with regards to the instance of costs can and even must, because of the requirements of proportionality and practicality, be appropriately based on the relatively broad brush and high-level approach*”. In making their submissions about the costs of this matter, it seems to me that the parties have forgotten the element of proportionality. There is considerable repetition in the submissions of the parties compounded, it would appear, by the need to have the last word. I remind the Respondents in particular, that the costs submissions are not an opportunity to reargue what has been decided in the unappealed substantive proceedings. Nevertheless, I have read all the submissions carefully, as well as the evidence filed in support of the substantive matter and the correspondence that has emanated since. I have reminded myself by reading the transcripts about what happened during the hearings. This was necessary, as there was a considerable difference in the submissions about what was said to have happened in those hearings.

13. At that hearing of the Original Application, Lieutenant Bailiff Roberts intimated without deciding it, that the Applicants were unlikely to be able to use section 426 of the Companies Law in order to obtain the relief sought. At the same time, Advocate Thibeault on behalf of his client requested a six week adjournment to consider the Original Application. A two week adjournment was granted and the matter came before me on 14 October 2022. The Applicants were granted leave to amend the Original Application to include an application for a mandatory injunction. The application for leave to amend was not opposed by the First Respondent. At that hearing, I indicated without determining it that I was in agreement with Lieutenant Bailiff Roberts that section 426 of the Companies Law could not be used to compel the First Respondent to take steps. I also indicated that I considered a mandatory injunction was not the right route either.

14. At the hearing Advocate Thibeault argued that information being sought was not within the First Respondent's gift, but rather that of the Second Respondent as the assignee under the April 2021 Assignment. Advocate Thibeault argued that the pursuit of the First Respondent rather than the Second Respondent was to "*lay waste to quite fundamental legal principles, and the first of these is to totally disregard separate legal personality*". Nevertheless, he was able to set out that, despite not being instructed by the Second Respondent, the Second Respondent may "*be entitled to withhold the Register of Members*". This alleged entitlement was based on the express terms of the contractual lien contained in the 2013 Agreement. This position was also reflected in the correspondence from Advocate Thibeault to the Applicants' Advocates which was in evidence before the Court. He also said that there was no actual Share Register as that was at the registered office. The Second Respondent would only have updating information. A Transfer Agent did not hold statutory records. It holds data and that data is fed to the liquidators in order for them to maintain their statutory records. It was towards the close of that hearing that Advocate Warrilow decided that she would need to join and serve the Second Respondent, although she maintained that the First Respondent was still a proper party. The matter was adjourned initially to the afternoon but in the event was not brought back by the Applicants until 28 October 2022 before the Bailiff. At that hearing, there was a further amendment to the Application to join the Second Respondent and leave was granted to serve the Second Respondent with some finessing of the draft order by the Bailiff. The matter was then relisted before me on 18 November 2022.
15. No one appeared for the Second Respondent at the hearing on 18 November 2022, although good service had been obtained and I was in no doubt (due in part to the shared officers of the First and Second Respondents) that it was fully aware of the Reamended Application before the Court as well as of the previous hearings. The First Respondent filed an affidavit from Mr Olley, a director of the First Respondent to support its position that it was the wrong party. As set out above, I gave an ex tempore judgment on 2 December 2022 and granted orders against the Second Respondent. At this hearing I did not make orders against the First Respondent but left open the possibility of making orders against it and against Mr and Mrs Pybus in due course. Relevantly, I did not dismiss the case against the First Respondent on the basis that it was the wrong party because I was unimpressed by the affidavit evidence of Mr Olley, which did not, in my view, support the argument maintained by the First Respondent that it did not have documentation required. Importantly, when I made the orders firstly against the Second Respondent, and then against the First Respondent at the hearing in December, I did so relying on the principles set out in *Elite Properties PCC v Trident* 35/2016 ("*Elite*") that where there is a statutory requirement to keep certain documents at a company's registered office, or such place as the directors see fit, and where these obligations are subject to some form of criminal sanction, as a matter of public policy the Court could not permit a lien to be operated over them and that the documents should be delivered up. I also said:

"The Elite judgment refers to the case of Inalux v Old Crown Trust, which is a case where a summons was issued for the delivery up of documents. This could, and possibly should, have been the route taken by the applicants. Sir de Vic Carey, former bailiff, at page 6, paragraph G of the Inalux judgment, refers to this being an "action for delivery up of papers, in effect an action in detinue" which is an action which still exists under Guernsey law, see Hindle v Kitching [2020] GCA 1. However, mindful of the overriding objective, I do not consider that it would be proportionate for me to require the liquidators to restart the application again as the purpose of their application is evident to both respondents. I am also mindful of the words of Sir Richard Collas in Montenegro in relation to the needs of the Court to assist the liquidators in the way it deals with matters in liquidations."

However, to be clear I do not consider that this can be characterised as "*the Court's rescue*" as the First Respondent submits, rather it was setting out the basis upon which LB Marshall made her decision in *Elite* with which I agreed.

16. On 9 December 2022, the matter came back before me again. Again, the Second Respondent did not appear, although it had been served. At this hearing it became apparent that the Second Respondent had not had the courtesy of responding to the Court Order I had made on 2 December 2022. As I said at that hearing, I found it “*extremely disappointing that the Second Respondent has not seen fit to even respond to the Court Order.*” I said I found it “*disrespectful to the Royal Court of Guernsey*”. I made clear that “*even if Adjure Global Suisse Limited did not agree with the Order, the way to deal with this was not to simply ignore it*”.
17. In relation to the First Respondent no further evidence was filed by it despite my criticism in my 2 December judgment of Mr Olley’s affidavit. There was evidence before the Court that the First Respondent was holding itself out as the Transfer Agent and was undertaking the work and acting as Transfer Agent. Therefore, I considered that it was more likely than not that it had the documentation that was required. There were also arguments during the hearing about the underlying contractual documentation, including the efficacy of the purported April 2021 Transfer, however, these did not form part of my decision. As I have said above, based on the same principles that had been set out in *Elite* and my judgment of 9 November, I made orders against the First Respondent in relation to the delivery up of the up to date Register of Members and documentation in relation to share transfers in June and July. In my ex tempore judgment on 9 December 2024 I set out that “*the basis upon which I am requiring the First Respondent to provide and deliver up the documentation which I will be shortly ordering, is because it has retained documents. I believe, and I think it probably does still have them (sic) in their custody.*” I also made a direction that the Applicants serve interrogatories on Mr Pybus, as former liquidator of the Companies, leaving open the ability of the Applicants to come back to obtain directions in relation to a summons upon Mr Pybus to attend a hearing before a Commissioner.
18. No appeal was made in respect to those decisions. The Applicants did not proceed to apply to summons Mr Pybus to Court in the circumstances, although he gave a response to the interrogatories. I understand that the First Respondent says it subsequently complied with the orders made against it, so far as it was able although the Applicants refer in their submissions to the “*Respondents’ lack of compliance with those orders*”.
19. In considering what are the right costs orders, there are a number of competing factors in this matter, firstly the Applicants did appear to have a number of false starts in relation to this Application. Whilst ultimately they were successful in obtaining orders against both Respondents, I do not consider I can ignore the strong direction from a number of Judges about the routes by which the Applicants were attempting to seek their relief.
20. However, given the relief I granted on 9 December 2022 against the First Respondent, the First Respondent’s argument that proceedings should not have been commenced against it, is not sustainable. Further, contrary to the First Respondent’s position, whether it won or lost is not characterised by the amount of information that was obtained from the First Respondent by the Applicants but rather the Applicants successfully persuading me that relief should be obtained from it. Initially, I considered it a fair criticism of the Applicants that they should have commenced the Original Application from the start against the Second Respondent, however, given the information that was received after the submissions which I set out in more detail below, I do not consider this is clear cut, and in any event the First Respondent was a proper party. However, I do take into account that the First Respondent was neutral with regard to the addition of the Second Respondent and did not object to the amendments to the Original Application or the Amended Application. The First Respondent’s position is different from the Second Respondent as it did take part in the proceedings and appears to have complied at least in part with the orders made against it. However, in the post-submissions correspondence the Applicants have advised that during the course of reconstructing the Share Register of FIM Long-Invest Portfolio Limited (in members’ voluntary liquidation) that it has become apparent

that Share Transfers were completed on 30 June 2022. The Transfers were completed by the First Respondent and apparently signed by Mr Pybus on behalf of the First Respondent. The Applicants say that this was all without its knowledge or consent. This was when Mr Pybus was no longer appointed as liquidator of either of the Companies and the First Respondent completed the Share Transfer Confirmations as 'Transfer Agent'. Relevantly for my decision this will have been in the knowledge of the First Respondent throughout the proceedings and contrary to the position it maintained during the proceedings. I also take into account that the basis that the order was made against the First Respondent (as it was the Second Respondent) was the delivery up of information which the liquidator needed to perform its statutory duties and therefore, the failure to provide the information was unreasonable even without the new information.

21. Although there is “*without prejudice*” correspondence that includes a “*drop hands*” offer made by the First Respondent on behalf of both Respondents, in many respects it supports the Applicants’ position more than it does the Respondents. I consider that it is fair for me to take into account from the correspondence that the offer must have been made on the basis that the Second Respondent had the documents and information required, but that it subsequently flouted the order of this Court order to provide them. The failure by the Second Respondent to abide by the Court order also gives credence to the Applicants’ position that such an agreement would not be honoured properly by the Second Respondent. Further, it cannot be ignored that this is not typical adversarial litigation. The offer fails to take into account the basis upon which they were being sought by the Applicants against the Respondents i.e. in order to perform their statutory duties as liquidators. Therefore, I do not consider these offers outweigh the conduct of either of the Respondents during these proceedings, I do not consider that the indemnity contained within the 2013 Agreement has any relevance to the Costs orders made in this matter. As I have said, the orders I made against the Second and First Respondent were not on the basis of the contractual position between it and the Applicants, as I have set out above and in my substantive ex tempore judgments. I also note that on 19 August 2023, a Civil Restraint order was obtained against Mr and Mrs Pybus for Guernsey property held and controlled by them. I do not consider that this is relevant to the issue of costs.
22. In all the circumstances of the case, I have come to the conclusion that in relation to both Respondents, they have exhibited conduct “*which takes the case out of the norm in a way which justifies an order for indemnity costs,*” (see *Investec Trust (Guernsey) Limited et al v Glenalla Properties Limited et al* 4/2015).

Conclusion

23. I have decided that the Second Respondent should be liable for indemnity costs from 31 October 2022 until the 26 January 2023 when notice was received that the Applicants were not pursuing the matter further. I am not going to make an order against the Second Respondent in respect of the period prior to it being joined as a party and being served the Reamended Application. Further, despite the Second Respondent’s conduct I do not consider it would be fair for it to cover costs incurred by the Applicants in relation to the unsuccessful arguments run by the Applicants. In relation to the First Respondent, even though its conduct is different to that of the Second Respondent, I still consider that it passes the threshold for the awarding of indemnity costs for the Applicants. However again, account should be taken of the Applicants’ unsuccessful arguments in the award against the First Respondent. Therefore, using the broad brush and high level approach advocated by LB Marshall, I will make a costs order as against both Respondents for 80% of the Applicants’ costs of and incidental to the proceedings awarded on an indemnity basis with the First Respondent’s costs order from the commencement of the proceedings and the Second Respondent’s from the 31 October 2022 with both orders running to the 26 January 2023. I am satisfied that there is sufficient overlap in the conduct and positions of the Respondents and that in all the circumstances that the risk should not be on the Applicants for the recovery of the costs. Therefore from 31 October 2022, the costs orders

against the Respondents are on a joint and several basis with the First Respondent being solely responsible until 30 October 2022. I also order that the Applicants should be responsible for the First Respondent's costs on a recoverable basis only for the application to amend and reamend the Original Application (including joinder of the Second Respondent). In relation to the costs of the costs' application, these are awarded to the Applicants on a recoverable basis against the First and Second Respondents jointly and severally. All costs to be taxed if not agreed.