

Costs. Indemnity costs sanction imposed on unsuccessful Plaintiffs for (i) pleading in disregard of RCCR r 10 (2), and (ii) unjustified and unsuccessful allegation of fraud

[2023]GRC059

Civil Action No 2334

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

B E T W E E N:

- (1) AHMED KAZZAZ
- (2) SHEILA KAZZAZ
- (3) HANNAH KAZZAZ
- (4) LANA KAZZAZ
- (5) ASK ONE LIMITED
- (6) HAIDER ABDUL RIDHA KAREEM AL-KAWAZ (as Trustee of the Ask Trust)
- (7) ARI FAROOQ ABDULWALID (as Trustee of the Ask Trust)

Plaintiffs

-and-

- (1) STANDARD CHARTERED TRUST (GUERNSEY) LIMITED (in liquidation)
- (2) SONGBIRD LIMITED (in liquidation)

Defendants

Before: Her Honour Hazel Marshall KC Lieutenant Bailiff

Judgment handed down: 22nd November 2023

**Counsel for the Plaintiffs:
Counsel for the Respondent:**

**Advocate John Greenfield
Advocate Anthony Williams**

Legislation and cases referred to

Legislation

Guernsey:

Royal Court (Costs and Fees) Rules 2000

Royal Court Civil Rules 2007. rr 10 (2), 82 and 83

Cases

Guernsey:

Investec Trust (Guernsey) Limited and others v Glenalla Properties Limited and others
(2015) GCA Judgment 04/2015

ITG Ltd and others v Glenalla Ltd and others [2023] GCA 009

Kazzaz and ors v Standard Trust (Guernsey) Ltd (in liquidation) and anor [2023] GRC
049

England and Wales

Clutterbuck v Paton [2016] 1 Costs LR 13

JUDGMENT ON COSTS

Introduction

1. On 22nd September 2023 the court handed down its decision in the above case, (*Kazzaz and ors v Standard Trust (Guernsey) Ltd (in liquidation) and anor* [2023] GRC 049), in which it dismissed all the Plaintiffs' claims, and was not called upon, therefore, to consider the Defendants' counterclaim. As Lt-Bailiff, I invited the parties to agree an appropriate order in respect of costs, failing which I would receive submissions and give directions if necessary. The parties were not able to agree the costs and I consequently received written submissions from each side, dated 6th October 2023.
2. The Plaintiffs initially submitted that if the court were minded to make any order other than that they should pay the successful Defendants' costs on the standard basis, it should hold a hearing. However, when notified that I was in fact considering this, they stated that they were content that I should determine the matter on the papers, as were the Plaintiffs. This, I have therefore done.
3. Further details of the material facts, findings of the court and decisions in point of law are to be found in the substantive judgment to which this judgment is supplemental. Information given here is confined to what is necessary for an understanding of this judgment.

The parties' positions

4. Both parties agree that, given the outcome of the case, the successful Defendants are entitled to an order for their costs in principle. The parties' difference is as to the appropriate basis for such order.
5. For the successful Defendants, Advocate Williams submits that the Plaintiffs should be ordered to pay the Defendants' costs on the indemnity basis. He also applies for an interim payment on account of such costs in an amount of about 50% of an

estimated level of eventual recovery, and for the release of funds presently standing in court as security for such costs.

6. For the Plaintiffs Advocate Greenfield argues that there is no justification for departing from the usual order, namely that the Defendants' costs should be recoverable simply on the standard basis. He also resists any interim payment on the grounds that his clients are appealing the court's substantive decision and also, as the Defendants are both in liquidation, he submits that it would be inappropriate to order any payment for costs to be made to the Defendants or the funds in court to be released to them until the outcome of the appeal is known.

The law

7. The award of costs is in the discretion of the court pursuant to Rules 82 and 83 of the *Royal Court Civil Rules 2007*. Rule 82 (1) provides, in essence, that "*the Court may, in any action make such order as to the costs of the proceedings as the court thinks just.*". Whilst the *Royal Court (Costs and Fees) Rules 2000* regulate the costs recoverable on the standard basis, RCCR Rule 83 makes provision for the award of indemnity, or partial indemnity, costs, which are assessed on a basis more generous to the receiving party. Rule 83 (2) provides that this may be ordered:

"(a) where in the special circumstances of the case, it is the opinion of the Court that costs should be ordered otherwise than the basis provided by the Royal Court (Costs and Fees) rules 2000, or

(b) where any party has pleaded or otherwise pursued or defended an action claim or counterclaim unreasonably, scandalously, frivolously or vexatiously or has otherwise abused the process of the court."

8. It is well known that the basic principle is that costs orders "follow the event", ie the result of the case, but that the starting point is that a costs order will be made on the standard or "recoverable" basis only. It is for the party claiming that a different and more beneficial (to it) order in costs should be made to prove the circumstances justifying this. In particular, to establish a claim for indemnity costs under the above Rules, the applicant must demonstrate

"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 or unreasonableness"

see *Investec Trust (Guernsey) Limited and others v Glenalla Properties Limited and others* (2015) Court of Appeal Judgment 04/2015.

Defendants' submissions

9. Advocate Williams accepts that the Defendants must therefore demonstrate some feature taking the conduct of the case or the circumstances "out of the norm" in order to justify an award of indemnity costs to them. He submits that they can, and do, make this out, on one or more of the following facts:

- (a) The Plaintiffs' claims were impermissibly inconsistent with the findings previously made against the principal Plaintiffs, Mr Kazzaz and Sheila Kazzaz, in related proceedings in the High Court of Singapore previously taken by them against Standard Chartered Bank Ltd itself. These had decided that there was no dishonesty on the part of any official of Standard Chartered Private Bank in Dubai, (a subsidiary or division of Standard Chartered Bank, and an affiliate of the Defendants here) in relation to procuring the issue of the relevant Universal Life Insurance Policy on the life of Sheila Kazzaz which had been the cause of the claimed losses to the Plaintiffs, and that the source of apparently inaccurate financial information relevant to Sheila in the insurance proposal made to the insurer could have been no-one other than Mr Kazzaz or Sheila. The Plaintiffs' claims in these proceedings illegitimately tried to challenge or go behind such findings and were therefore an abuse of process;
- (b) The Plaintiffs failed to recognise and accept that their main substantive claims were time-barred, because of the time and the extent of their knowledge of the facts upon which they founded such claims. They ought therefore never to have commenced the proceedings in the first place, and they failed to engage with this point when it was raised in the Defendants' Defences, trying instead to take the (bad) point that this defence should not be admitted for not having been "properly" pleaded;
- (c) The Plaintiffs introduced unheralded accusations of fraud against the Defendants in their Re-Amended Cause in January 2023, in an attempt to avoid the consequences of limitation, and unreasonably persisted in these. Those accusations were unsustainable in law because they did not engage with the factual requirements of a plea of fraud against a corporate body, and this gave rise to an improper attempt to construct a scenario to cure this, only *in oral submissions in reply*, when the factual basis for this had therefore never been tested or adverted to in the Plaintiffs' case, or put to the Defendants' witnesses in any way in cross-examination. When a party makes allegations of fraud against another party which either fail, or are withdrawn, the usual costs order is then in fact, (it is submitted), an order for costs on the indemnity basis: see *Clutterbuck v Paton* [2016] 1 Costs LR 13;
- (d) The Sixth and Seventh Plaintiffs were unaware that they were even Plaintiffs in the action, until told this at the hearing itself;
- (e) Sheila Kazzaz' conduct in not giving evidence was unreasonable because the medical evidence submitted by her was insufficient to justify this, and because this intention, clearly (it is submitted) held all along, was not revealed until the eve of the original abortive hearing date in November 2022, showing a reprehensible disdain for the court;
- (f) Similar criticism applies to the Third Plaintiff, Hannah Kazzaz, who failed to give evidence despite propounding the claim on behalf of the Plaintiffs;

(g) The Plaintiffs' case was, (and the court so found) pleaded unreasonably and not in accordance with the RCCR, in that it was unnecessarily and regrettably prolix and deliberately pleaded matters of evidence.

10. The Defendants submit that the matters above, either alone or in combination, demonstrate a pattern of, effectively, abuse of the court process, and are sufficient to justify a general order for indemnity costs as regards the whole action. Alternatively, the court should order the payment of indemnity costs either from 8th November 2022 (being the aborted original trial date, at which the Plaintiffs caused an adjournment and the incurring of unnecessary and unreasonable costs through having failed to engage with the limitation point until then: see (b) above) or alternatively from 6th January 2023, being the point where the Plaintiffs introduced the improper and ultimately unsuccessful, allegations of fraud against the Defendants (see (c) above). Prior to such a date there should be an order for costs on the standard recoverable basis.

Plaintiffs' submissions

11. The Plaintiffs submit that there are no grounds for making any award of costs otherwise than the usual general order for costs on the standard basis.

12. Simply losing a case is not a ground for being ordered to pay indemnity costs. They submit that nothing in the conduct of the Plaintiffs in the course of the litigation can be described as “unreasonable” or “scandalous” or “out of the norm”. All that happened was that there was hotly contested litigation with points being taken and pursued forcefully but not unreasonably.

13. They argue that the essence of the action was that the First Defendant, as trustee, made the decision to invest in the ULIP which it took out on the life of Sheila Kazzaz, which was the decision which caused the losses to the Plaintiffs of which they had complained. The decision to make that investment was roundly criticised by the Plaintiffs' expert witness; the Plaintiffs were entitled to rely on this criticism and, believing that the Defendants owed them a duty of care, and that the decision had therefore breached that duty of care, it was reasonable for them to pursue their claim. This was quite justifiable although (it was said) the court appeared to have formed the view that the Defendants did not owe any duty to the beneficiaries, the first four Plaintiffs.

14. The Plaintiffs also argue that it was not the Plaintiffs but the Defendants who first introduced allegations of fraud into the action, making such allegation against the principal Plaintiffs shortly before the aborted trial in November 2022. It was therefore reasonable and justifiable for the Plaintiffs to respond by making the counter allegations which they had done, alleging participation in fraud on the part of the Defendants.

15. Furthermore, they submit that the cases where indemnity costs have been awarded for the mere pursuit of bad claims have been cases where the Plaintiff had not succeeded on any issue (such as *ITG Ltd and others v Glenalla Ltd and others* [2023] GCA 009), whereas here, the Plaintiffs had succeeded on some issues.

16. In essence, they submit, therefore, that their conduct imposed no additional burden on the Defendants which the mere defence of hard-fought contested litigation would not have imposed in the normal course, and any order for indemnity costs is therefore not appropriate.

Discussion

17. Contrary to the Plaintiffs' submissions, but in fact a point in their favour, is that the court actually did find a duty of care imposed on the Defendants (judgment, paras [196] [219], [221], [272], [345] etc) albeit that the content of such duty, which required reasonable steps to be taken, was governed by the surrounding circumstances (para [217], [220], [221], [223], [224], [244], [271], [343] etc) . It also found that there had been a breaches of that duty by the Defendants, although it found that such breaches were not a major or significant breach in all the circumstances, and that, in any event, they were not the cause of any loss to the Plaintiffs because they had not affected whether or not the ULIP would have been sought, taken out, and then maintained, as it in fact was (para [225], [233], [293], [347], [348] etc). It is therefore certainly the case, as Advocate Greenfield contends, that the Plaintiffs succeeded on some points, even if they did ultimately fail on decisive ones.
18. I accept that it is for the Defendants to establish whether, and to what extent, an award of indemnity costs is appropriately just.
19. I therefore turn to consider each of the factors cited by Advocate Williams, with a view to whether, alone or in combination, they exhibit the kind of conduct described in RCCR r 83 (2) or otherwise surmount the threshold of bringing the conduct of the case or the circumstances "out of the norm", as laid down in the *Investec* case (above). I use the word "culpable" below as a shorthand to describe conduct which I would consider sufficiently serious as to merit a costs sanction.
20. As regards point (a) (the Plaintiffs' attitude to the Singapore proceedings), I would not regard this as being culpable, as contrasted simply with taking permissible, if possibly unattractive, points. Both the line-up of actual parties and the actual legal issues were different in the Singapore proceedings from those in these proceedings, and the legal and procedural effects of interaction with the Singapore proceedings were procedurally intricate. Moreover, the Defendants did not, in fact, succeed in every respect in the objections and defences which they mounted on this aspect.
21. As regards point (b) (failure to engage timeously with the Defendants' plea of prescription), once again I would not regard this as sufficiently culpable as to merit a costs sanction, not least because the practical consequences of this were appropriately dealt with, in the usual way, by the court ordering the adjournment of the trial on 8th November 2022 on terms that the Plaintiffs should pay the Defendants' costs of the adjournment.
22. I regard point (d) as being insignificant in the scheme of things.
23. I dismiss points (e) and (f) as coming nowhere near the threshold for indemnity costs. It is a matter for the particular party to decide what evidence to call or not

to call in order to prove its case. The opposing party may get the benefit of being able to make submissions as to the drawing of adverse inferences from the absence of any particular witness, and even from a party's choosing not to give evidence in person, but evidential necessity, desirability, or strategy is a judgment within the discretion of the party presenting its case, and not one for which a party is to be penalised unless, perhaps it unreasonably increases costs. It is not actually suggested that the absence of Sheila, or of Hannah as witnesses, caused any additional or unreasonable costs to the Defendants.

24. The above matters would not, therefore cause me to make an award of indemnity costs, although it is fair to say that I would regard the presence of points (a) and (b) as potentially relevant background, if there were other points which appeared to cross the line. It is points (c) and (g), however, which are of more concern.
25. As regards points (c), Advocate Greenfield has several times in the case sought to suggest that the introduction of allegations of fraud against SCTG was reasonable because it was SCTG that brought the question of fraud into the case, by making such allegations against Mr Kazzaz and Sheila, and the Plaintiffs' response was simply a matter of reasonable defence.
26. I just do not accept that, for the following reasons.

(i) Pleading and proving that SCTG itself was guilty of being "*party or privy to*" a fraud on "*the Beneficiaries the Creditors and Manulife*" was not a necessary element of defending an allegation that Mr Kazzaz and/or Sheila had perpetrated such a fraud (on the insurance company) themselves.

(ii) The fact that one side alleges fraud is not an *ipso facto* justification for the other side to do so in return. Litigation is not a game of tit-for-tat.

(iii) In practice, the circumstances of the introduction of this unforeshadowed allegation of fraud against SCTG give rise to the irresistible inference that it was a response to the unwelcome discovery that the Defendants' plea of limitation under s 76 (2) of the Trusts (Guernsey) Law 2007 in their Defences was not going to be disallowed, and that there was likely to be no sufficient factual answer to it. This impression is reinforced by the fact that the Defendants had apparently given no thought to the factual requirements of proving fraud against a corporate entity (namely that fraudulent conduct had to be brought home to a relevant natural person), before receiving the Defendants' closing speech notes.

27. Turning to point (g), this contains well-founded criticisms of the Plaintiffs' pleadings. Moreover, the seriousness of this point is remarkable, and certainly "out of the norm" for being an absolutely flagrant disregard of the terms of RCCR rule 10 (2). This states, in clear terms that a cause

"... *shall contain*

“(a) a statement of the material facts on which the plaintiff relies for his claim, but not the evidence by which those facts are to be proved” (emphasis added).

Even if the word “contain” might be said to be permissive rather than constraining, the word “material” and the specific prohibition on pleading “evidence” show that the rule is stipulating that that content is all that the cause should contain.

28. The court commented on the deficiencies in the Plaintiffs’ pleadings in [82] - [83] of the judgment. Prolixity is to be deprecated, but apart from being unduly prolix (various of the facts of family history pleaded in the opening paragraphs of the cause, for example, are of no impact or relevance at all for the complaints ultimately made), the cause contains a whole section, amounting to some 20% by number of (lengthy) paragraphs, pleaded expressly on the basis that it is not relied on as any cause of loss, but as an alleged pattern of similar culpable behaviour. In addition certain later paragraphs such as 57 and 61 (see paras [329] and [333] of the judgment contained assertions of fact which were, again, not alleged to have caused any loss to the relevant Plaintiffs, and were not pursued in submissions. They too would appear to have been pleaded only as some form of evidence.
29. The vice of pleading at undue length, pleading immaterial matters, or pleading evidence is that it causes additional and potentially unnecessary work for the opposing party, and additional work for the court, through potentially over-complicating the case and the trial.
30. At the first case management conference I complained about this poor pleading to Advocate Greenfield and told the Plaintiffs that I was going to make an order disallowing 20% of the costs of the Cause in any event. However, as the Plaintiffs have lost the action, they will not be recovering the costs of the Cause from the Defendants in any event (I make no comment about the position between themselves and their clients). I still, though, consider it just to give some recognition to the court’s displeasure at this extreme departure from the proper scope of a pleading in the Royal Court, and the extra unnecessary general costs over and above a reasonable “norm” which I consider it will undoubtedly have occasioned.
31. In considering what costs order to make, therefore, I have had regard to all the above points and submissions. I have also had regard to the principle that costs orders should be simple to implement, so that orders relating to defined proportions of costs incurred, or costs payable from or to specified dates, are to be preferred to orders relating to the costs of issues, or parts of the proceedings only, or even specified steps, where these may be difficult to separate out, or identify.

Decision and order

32. Taking all the above into account, the costs order which I will therefore make is that

The Plaintiffs shall pay the Defendants’ costs of the Claims and the Counterclaim on the standard recoverable basis save that in respect of the Defendants costs incurred

(i) in the period from 5th June 2020 to 31st December 2020, and

(ii) in the period from 6th January 2023 until 25th October 2023

such costs shall be recoverable on the indemnity basis,

all such costs to be taxed if not agreed.

33. The first period of indemnity costs above is intended to cover the initial pleading stages in the action. It reflects my view of the appropriate sanction for the Plaintiffs' egregious failure to have regard to the terms of RCCR r 10 (2) in their initial pleading. This will have had an adverse effect on the Defendants' costs of dealing with that pleading in particular, and will also have had a "knock on" effect on the general conduct of the case at later stages, including down to trial. However, that effect will inevitably have become diffuse and incapable of sensible identification or separation. Conversely, there will be aspects of the initial pleading stages of the action where there will have been no adverse effects of increased costs. I consider, therefore, that this part of the order I have made reflects an appropriate and pragmatic balance between those effects, to recognise and sanction appropriately the Plaintiffs' disregard of the Rules.
34. The second period of indemnity costs, from 23rd January 2023 to the disposal of the action at first instance, I regard as appropriate to take account of the cavalier and ultimately unsustainable allegations of fraud made by the Plaintiffs, apparently in an attempt to circumvent a defence of prescription raised as regards the most substantial points in their case, and to which they had no real answer. That award is intended to cover the costs of the action incurred by the Defendants up to the close of submissions/correspondence after judgment, and down to the conclusion of submissions on costs.
35. The above order does not disturb any previous interlocutory order made in respect of costs in principle, (for example, on amendment, or with regard to the costs wasted by an adjournment), but any costs disposed of by such interlocutory orders will be assessed according to when they were incurred, on the basis appropriate to the time periods set out in this order.
36. For completeness I record that there have been no submissions that the incidence of costs liability should be different as between any of the Plaintiffs (or any of the Defendants). The order made is therefore on a joint basis.

Interim payment and release of security for costs in court

37. In principle I would regard it as appropriate to make an order for interim payment of costs, given the outcome of the case. Advocate Williams submits that an appropriate reasonable, but reasonably cautious, percentage award for immediate payment would be 50% of a figure for likely ultimate costs liability. This would therefore produce an interim payment of £750,000 (based on an estimated £1,536,136.00 liability if costs were awarded on an indemnity basis) and £550,000 (based on an estimated liability of £1,184,061.20 if costs were awarded on the standard basis).

38. Advocate Greenfield submits, that I should make no order for interim payment because his clients are appealing the court's judgment in the main action, (he actually suggests that they are seeking leave to appeal, but as this was a final judgment, I would have thought that they have an unfettered right of appeal), and the Defendants are in liquidation - although I do not think this is necessarily insolvent liquidation. He suggests that this latter point might mean that monies paid over to the Defendants would be dissipated.
39. He therefore submits that no interim payment should be ordered pending the final disposal of his clients' appeal, and for similar reasons, the court should not order the release of the funds standing in court, provided by the Plaintiffs as security for the Defendants' costs of the action, until the same time. He points out that if the appeal is successful, the Court of Appeal will make an order disposing of the costs of the case at first instance, in any event, so that the incidence of liability could well change.
40. He suggests, though (and this therefore appears satisfactory to his clients) that if an interim payment or release of funds were ordered, he would seek an undertaking - presumably from the Defendants' liquidators - to maintain sufficient funds in the liquidation to satisfy a successful appeal, including costs, until conclusion of the appeal

Decision

41. I would normally order an interim payment on account of costs if satisfied that this would not cause any unfair disadvantage to the paying party. Here, I would accept the appropriateness of the percentage proposed by Advocate Williams. On the basis of the order I am making, I would therefore think it appropriate to make an interim payment order of £650,000. I would also order that the funds in court be released to the Defendants to discharge that obligation *pro tanto*.
42. However, in view of Advocate Greenfield's submissions, to which I have not heard any response on behalf of the Defendants, I propose to make such an order, but to direct that it be stayed until the disposal of the Plaintiffs' proposed appeal, with liberty to the Defendants to apply to the court to lift that stay at some earlier time if so advised.

Her Honour Hazel Marshall KC

Lieutenant Bailiff

21 November 2023