

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 FINANCIAL SERVICES DIVISION

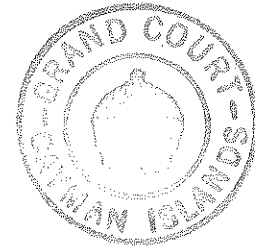
3 FSD 104 OF 2011 (AJEF)

4
5
6 IN THE MATTER of the Estate of John Samuel Hinds (Deceased) and the Estate
7 of Esther Rosalind Hinds (Deceased)

8
9 AND IN THE MATTER of the Grand Court Rules Order 85

10
11 B E T W E E N:

12 PHILLIP BRADLEY HINDS



13 Plaintiff

14 and

- 15
- (1) CLIVE MONTRIVELLE HINDS,
ADMINISTRATOR OF THE ESTATE OF ESTHER
ROSALIND HINDS
 - (2) CLIVE MONTRIVELLE HINDS
 - (3) JOHN LEVERETTE HINDS III
 - (4) THOMAS ANTHONY HINDS
 - (5) SHARON HINDS
 - (6) NORAHS KCOTSOB LIMITED

Defendants

16 Coram: Mr. Justice Angus Foster

17 Hearing Date: 4th November 2014

18 Appearances: For the Plaintiff: Mr. Peter McMaster, QC and Mr. Rupert Coe
19 of Appleby

20 For the 1st Defendant: Mr. Tom Lowe, QC instructed by Mr.
21 George Giglioli of Giglioli and Company

22 For the 2nd, 3rd and 4th Defendants: Ms. Clare Stanley instructed
23 by Mr. Robert Jones of Tayler Jones

24 For the 5th and 6th Defendants: Mr. Kenneth Farrow, QC of
25 HSM Chambers

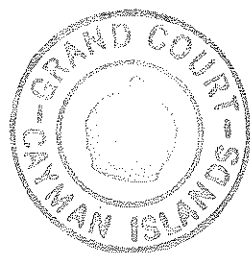
1 **RULING ON FORM OF ORDER TO BE MADE ON**
2 **JUDGMENT DATED 9TH JULY 2014 AND ON COSTS OF THE**
3 **PROCEEDINGS**
4

5
6 1. Introduction

7
8 1.1 This Ruling concerns the appropriate form of order to be made on
9 the judgment dated 9th July 2014 (“the Judgment”) following the
10 trial of this matter and also the appropriate award(s) to be made
11 in respect of the costs of the proceedings. I shall use the same
12 designations, abbreviations and references as in the Judgment
13

14 2. Form of Order

15
16 2.1 Although the Judgment refused all the relief which Phillip sought
17 as plaintiff and dismissed all his claims, it was nonetheless
18 submitted on his behalf that the declarations which he sought in
19 his originating summons dated 17th June 2011 (as amended on
20 17th December 2012) insofar as relating to 4 of the 7 parcels in
21 issue (namely parcels 15B/81, 15C/172, 15C/175 and 15E/222),
22 should be granted in the order to be made on the Judgment. This
23 was contended on the basis that in the Judgment I reached the
24 view that these parcels of land, which had been transferred by Sir
25 Vassel from Bradley’s estate to Esther, were assets of John
26 Samuel and were transferred to Esther in her capacity as
27 Administratrix of his estate and not transferred to her beneficially
28 (Judgment para. 6.28).
29



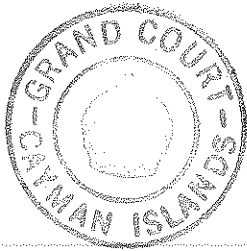
30 2.2 However, that argument was only one of the issues in the case
31 and Phillip’s contention in this respect seemed to me to ignore
32 the fact that the Judgment concluded not only that Phillip’s
33 claims were both misconceived (Judgment paras. 8.5, 8.10 and
34 8.12) and barred by limitation (Judgment para. 12.21) but
35 perhaps more significantly, this submission also ignored the fact
36 that the Judgment concluded, after a lengthy analysis of Phillip’s
37 knowledge, that he had acquiesced in the matters of which he
38 complained and that it would be unjust and inequitable in the
39 circumstances to permit him to assert the rights which he sought
40 to enforce by his claims (Judgment para 15.24). Furthermore, it

1 failed to appreciate that the Judgment concluded too that it would
2 be unconscionable to permit Phillip to assert the relief which he
3 claimed due to laches (Judgment para. 19.3). The relief being
4 referred to clearly included all the relief claimed by Phillip in his
5 originating summons (as amended), including the declarations
6 concerned. In my opinion the Judgment makes it quite clear that
7 the court had concluded that the claims which Phillip brought
8 should be refused in their entirety and that the court had declined
9 to grant any of the relief which he sought (Judgment para. 20).

10
11 2.3 When I pointed out these conclusions in the Judgment to leading
12 counsel for Phillip during the course of the hearing he did not
13 persist in this submission regarding the form of order.
14 Accordingly, I now direct that the order to be made on the
15 Judgment should provide that the court, having tried the
16 plaintiff's claims made in his originating summons (as amended
17 on 17th December 2012), declines to grant any of those claims
18 and they are accordingly dismissed in their entirety.

19
20
21 3. Costs

22
23 3.1 It is uncontroversial that the award of costs is in the discretion of
24 the court. However, the overriding objective is that the successful
25 party in proceedings should recover his reasonable costs from the
26 losing party unless the court orders otherwise (see GCR O.62, r.4
27 (2)). It is furthermore expressly provided that if the court sees fit
28 to make an order for costs it should order the costs to follow the
29 event unless it considers that in the particular circumstances
30 some other order should be made in relation to the whole or any
31 part of the costs (see sub-para. (5) of the same rule). In the latter
32 connection it is also specifically provided that the court may
33 make an order that a party must pay a proportion or a stated
34 amount of another party's costs or the costs relating only to a
35 distinct part of the proceedings (see r. 4 (7)).



36
37
38 3.2 Notwithstanding the overriding objective and the express
39 provision that costs should follow the event, leading counsel for
40 Philip rather valiantly attempted to argue that Phillip had

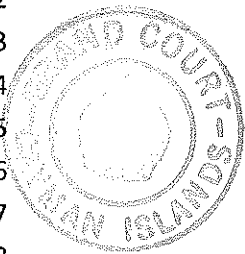
1 succeeded in relation to four of the parcels of land and “on major
2 issues” concerning the devolution of assets from his father to his
3 mother as administratrix, and should therefore have all of his
4 costs against all of the defending parties (except Sharon and the
5 Company, against whom he conceded he had lost). I found this a
6 surprising and misconceived submission in light of the clear
7 conclusions in the Judgment. Phillip did not succeed in his claims
8 to any of the parcels concerned; his claims were dismissed
9 entirely and there is, in my opinion, no basis for his contention
10 otherwise.

11
12 3.3 It was also submitted on behalf of Phillip as an alternative that he
13 should not anyway be ordered to pay the entire costs of the
14 proceedings because, it was said, Clive as administrator and the
15 defendants had made arguments which were either subsequently
16 abandoned or which were unsuccessful and which, it was
17 contended, took up “a very large proportion” of Phillip’s and of
18 the court’s time. As pointed out above, GCR O.62, r. 4 (7)
19 provides that the court may make an order for a party to pay a
20 proportion of the costs or the costs relating only to a distinct part
21 of the proceedings. I was referred in this connection to the
22 judgment in *Elgindata Ltd (No.2)* [1993] 1 All ER 232 in the
23 English Court of Appeal in which in setting out the principles on
24 which costs were to be awarded it is summarized in the headnote
25 inter alia that:

26 *“(iii) that the general rule did not cease to apply simply*
27 *because the successful party raised issues or made allegations*
28 *that failed, but that he could be deprived of his costs in whole or*
29 *in part where he had caused a significant increase in the length*
30 *of the proceedings, and*

31 *(iv) that where the successful party raised issues or made*
32 *allegations improperly improperly or unreasonably the court*
33 *could not only deprive him of his costs but could also order him*
34 *to pay the whole or part of the unsuccessful party’s costs*

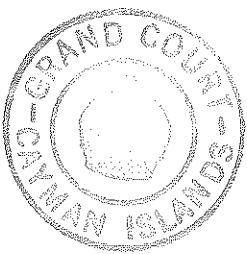
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36 *The fourth principle implied, moreover, that a successful*
37 *party who neither improperly nor unreasonably raised issues or*
38 *made allegations which failed ought not to be ordered to pay any*
39 *part of the unsuccessful party’s costs.....”*



1 That summary of those principles was cited with approval by
2 Chief Justice Smellie in *A.B. Jnr. and Another v. M.B. and*
3 *Others [2013] 14 June, unreported*
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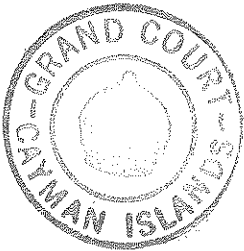
5 3.4 It was argued on behalf of Phillip that since he had succeeded in
6 his submission that the parcels deriving from Bradley's estate
7 were assets of John Samuel and transferred to Esther as
8 administratrix of his estate and, it was said, the arguments of
9 leading counsel for Clive as administrator and of counsel for the
10 defendants to the contrary were unjustified and unreasonable. It
11 was contended that this issue had taken up a significant part of
12 and had added significantly to the length and cost of the
13 proceedings. It was argued that the costs incurred in connection
14 with this issue should therefore be awarded to Phillip.
15

16 3.5 While it is correct that that particular issue was a significant one, I
17 did not find Phillip's contention in relation to it persuasive. In
18 the overall context of the proceedings that issue was only one of
19 several significant issues, some of which, particularly the issues
20 of acquiescence and laches which involved lengthy cross-
21 examination and submissions, took up considerably more time
22 and were in my view more significant in the end of the day. I do
23 not consider that the issue on which Phillip relies took up an
24 undue or disproportionate amount of time having regard to the
25 proceedings as a whole. Furthermore, in my view, the position
26 taken and the submissions made on behalf of Clive as
27 administrator and the defendants in relation to this issue were not
28 at all unjustified or unreasonable in the circumstances nor was
29 the outcome of the debate on this issue a forgone conclusion. It
30 was made clear in the Judgment that the final conclusion thereon
31 was only reached with considerable hesitation and only on
32 balance considering the known circumstances (Judgment para.
33 6.28). It was also made clear that determination of this issue had
34 been made considerably more difficult and unsatisfactory in the
35 absence of the evidence of the two principal witnesses, Sir Vassel
36 and Esther, which was directly due to Phillip's own inappropriate
37 and unjustified delay in commencing these proceedings
38 (Judgment for example paras 6.2 et seq and para 17.10). In the
39 circumstances I do not consider it appropriate in the
40 circumstances of this case and do not propose to segregate out



1 the costs of this particular issue or this part of the proceedings
2 from the overall costs.

3
4 3.6 Leading counsel for Phillip also pointed out that the defendants
5 had amended their points of defence in September 2013 to plead
6 that parcel 15B/81 had been purchased by John Samuel and
7 Esther using money belonging to the defendants and that during
8 the trial John III had admitted this allegation was a speculation
9 and this claim was not pursued thereafter. He argued that the
10 defendants should be penalized in costs in respect of the time
11 wasted in respect of this amendment, which he contended was
12 unjustified and inappropriate. However, I accept the submission
13 of counsel for the defendants that the amendment was based on
14 reasonable inference in the circumstances. There was evidence
15 that John Samuel and Esther had access to money held on behalf
16 of the defendants and that they had used some of such money to
17 meet some of the cost of building the Cayman House (parcel
18 7C/1). It was not unreasonable, in my view, to infer that they had
19 also used some of such money to purchase the shares of parcel
20 15B/81 which they acquired. This is also another example of the
21 difficulty in establishing all of the facts as a result of the
22 unavailability of Esther's evidence due to Phillip having waited
23 until after his mother's death to commence these proceedings.
24 Furthermore, in my opinion, this amendment and its
25 consequences had minimal impact on the length of the
26 proceedings.



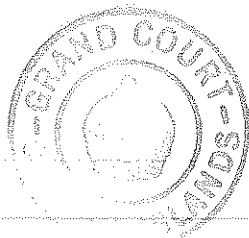
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28 3.7 Leading counsel for Phillip also argued that similar considerations
29 applied to the late amendment of their re-amended defence by the
30 defendants during the trial, which I had allowed notwithstanding
31 his opposition (Judgment para. 2.6). He contended that the
32 defendants' application to so amend had taken time in respect of
33 which they should be penalized in costs. However, Phillip's
34 opposition to the defendants' application was unsuccessful and,
35 in my opinion, the proposed amendment was not unforeseeable,
36 nor was the time spent during the trial dealing with the
37 application significant in relation to the length of the proceedings
38 overall.

1 3.8 In all the circumstances I do not consider this to be a case where
2 it is appropriate to segregate out any particular issues in or any
3 part of the proceedings as far as costs are concerned. It is not, in
4 my view, a case to which the exceptions referred to in the
5 *Elgindata* case to the usual rule that costs should follow the event
6 should be applied and I decline, in the exercise of my discretion,
7 to award any proportion of the costs of the proceedings to Phillip
8 as the unsuccessful party on that basis.
9

10 4. The costs of Clive as administrator
11

12 4.1 It was also argued on behalf of Phillip that Clive as administrator
13 as a trustee, should have adopted a neutral role in the proceedings
14 and simply agreed to abide by the directions and decisions of the
15 court. It was submitted that it was inappropriate for him as such
16 trustee to take an adverse position in relation to Phillip's claims
17 and that it was in breach of his duties to play the significant role
18 in the litigation which he did. He should have left Phillip's claims
19 to be defended by the defendants, as they were. It was contended
20 that in such circumstances Clive as administrator should not be
21 awarded his costs of the proceedings against Phillip, such costs
22 having been incurred in breach of his duty as administrator.
23

24
25 4.2 In support of this proposition I was referred to the passage at
26 page 1225 of the report of the well-known case, *Alsop Wilkinson*
27 *v Neary* [1996] 1 WLR 1220:
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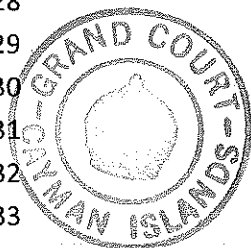


'In a case where the dispute is between rival claimants to a beneficial interest in the subject matter of the trust, rather the duty of the trustee is to remain neutral and (in the absence of any court direction to the contrary and substantially as happened in Merry's case [1898] 1 C. 306) offer to submit to the court's directions, leaving it to the rivals to fight their battles. If this stance is adopted, in respect of the costs necessarily and properly incurred, e.g. in serving a defence agreeing to submit to the court's direction and in making discovery, the trustees will be entitled to an indemnity and lien'.

1 However, I consider it important, in the circumstances of the
2 present case, to note that that was said in the context of an
3 argument as to whether the trustee was entitled to an indemnity
4 for its costs of litigation out of the trust estate. In that context the
5 judge continued:

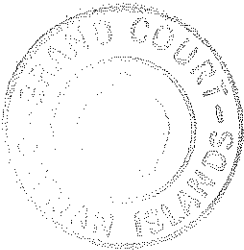
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7 *“If the trustees do actively defend the trust and succeed in*
8 *challenging a claim by the settlor to set aside for undue influence,*
9 *they may be entitled to their costs out of the trust, for they have*
10 *preserved the interests of the beneficiaries under the trust.... But if*
11 *they fail, then in particular in the case of hostile litigation,*
12 *although in an exceptional case the court may consider that the*
13 *trustees should have their costs [see Bullock v Lloyds Bank Ltd.*
14 *[1955] 1 Ch. 317) ordinarily the trustee will not be entitled to any*
15 *indemnity, for they have incurred expenditure and liabilities in an*
16 *unsuccessful effort to prefer one class of beneficiaries e.g. the*
17 *express beneficiaries specified in the trust instrument, over another*
18 *e.g. the trustees in bankruptcy or creditors, and so have acted*
19 *unreasonably and otherwise than for the benefit of the trust*
20 *estate.”*

21
22 4.3 It seems to me that these comments are not themselves
23 supportive of the submission of leading counsel for Phillip in the
24 circumstances of the present case. In the first place this was not
25 an application by Clive as administrator for an indemnity for his
26 costs out of the estate of which he is the trustee. His leading
27 counsel made that clear. Clive’s present application as
28 administrator was simply for his costs, as a successful litigant,
29 against the losing party, Phillip. In these proceedings the trustee
30 has actively defended the trust against claims by a third party and
31 has succeeded. It is not a case where a trustee who has
32 participated in litigation unsuccessfully is seeking an indemnity
33 for his costs nonetheless from the trust estate. I am not satisfied
34 that it is an appropriate analysis in the present circumstances that
35 Clive as administrator has incurred his costs in breach of his duty
36 as a trustee. This was hostile litigation by a person who was a
37 third party. Phillip’s claim was made, not in his capacity as a
38 beneficiary of Esther’s estate but as a beneficiary of John
39 Samuel’s estate. It was a proprietary claim to the assets in
40 Esther’s estate, which he claimed were absolutely his. The fact
41 that he is a 25% beneficiary of Esther’s estate is, for this purpose,
42 in my view, coincidental and irrelevant. If Phillip had succeeded



1 in his claims then he would have taken the assets concerned out
2 of Esther's estate. Clive as administrator was not preferring any
3 beneficiary or beneficiaries of the estate of which he was trustee
4 against any other beneficiary or beneficiaries of that estate; he
5 was not acting in breach of his duty. In my view in the rather
6 unusual circumstances of this case, Clive as administrator was
7 obliged to seek to protect the assets of the trust (Esther's estate)
8 which, in the event, he did successfully at no cost to the trust
9 estate. In the circumstances here I do not see why, as a successful
10 party in the litigation, he should not have his costs paid by the
11 unsuccessful party in the litigation, Phillip.
12

13 4.4 It was pointed out by leading counsel for Clive as administrator
14 that at the pre-trial review on 14th January 2014 Phillip's leading
15 counsel expressly submitted that it was for Clive as administrator
16 to take an active role in relation to Phillip's claims. Consistent
17 with this there was no objection on behalf of Phillip at the trial or
18 any other stage of the proceedings to the part which Clive as
19 administrator was playing in the proceedings nor, until Clive as
20 administrator sought an order for his costs against Phillip, was
21 there any suggestion that it was inappropriate for him to do so.
22 In fact it was clear from an early stage that there was
23 considerable co-operation between Clive as administrator on the
24 one hand and the defendants on the other hand with a view to
25 minimizing any duplication of costs.
26



27 4.5 In the particular and unusual circumstances of this case I consider
28 that Clive as administrator should have his costs of successfully
29 defending Esther's estate from Phillip's claims paid by Phillip
30 and I so order.
31

32 4.6 I have therefore concluded that the overriding objective should be
33 complied with in this case and the usual rule followed; the costs
34 of the proceedings shall follow the event. That event, is in my
35 view, clearly established by the Judgment, namely the refusal of
36 all of the relief which Phillip sought and the dismissal of the
37 entirety of his claims. Accordingly I order that all of the
38 defending parties, namely Clive as administrator, the defendants
39 and Sharon and the Company shall have their costs of the action
40 paid by the unsuccessful party, Phillip.

1 5 Indemnity Costs

2
3 5.1 Clive as administrator, the defendants and Sharon and the
4 Company all sought an order that their costs of the action should
5 be taxed on the indemnity basis. GCR O. 62, r. 4 (11) provides
6 that the court may make an order for costs to taxed on the
7 indemnity basis only if it is satisfied that the paying party has
8 conducted the proceedings or the part of the proceedings to
9 which the costs order relates “*improperly, unreasonably or*
10 *negligently*”.

11
12 5.2 Chief Justice Smellie recently considered the meaning and
13 application of this rule in *Ahmad Hamad Algozaibi and Brothers*
14 *Company v. Saad Investments Company Limited & Others*
15 [2013] 2 CILR 344 [“the Algozaibi v. Saad case”]. With due
16 respect, I do not think it is necessary for present purposes to
17 quote verbatim everything the Chief Justice said but in summary,
18 by reference to various earlier cases, he made it clear that the
19 provisions of rule 4 (11) constitute an exception to the normal
20 rule and that there must be something in the conduct of the action
21 or the circumstances of the case which takes it out of the norm in
22 a way which justifies an order for indemnity costs. He said that:

23
24 “*such an order should be made only in exceptional*
25 *circumstances where it is shown that the losing party has*
26 *behaved improperly, unreasonably or negligently, for*
27 *instance by pursuing a spurious claim - one that may be*
28 *described as plainly ‘speculative, weak, opportunistic or*
29 *thin’*” [see para 5].

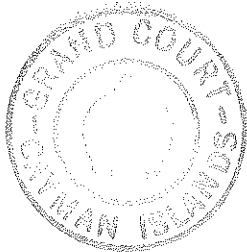
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31 He also confirmed that it follows from the terms of the rule that
32 the fact that a claim has been unsuccessful will not by itself
33 necessarily be persuasive and he made it clear that the courts
34 have declined to lay down general guidance on the principles
35 which should lead to an award of costs on the indemnity basis.
36 However, the Chief Justice also relied on the comments in the
37 English case *Simms v Law Society* [2006] 2 Costs L.R. 245 that
38 the cases do show that costs will normally be awarded on the
39 standard basis unless there is something in a party’s conduct of
40 the case which deserves a mark of disapproval but it is not just to



1 penalize a party for litigating a case which he has lost; that is not
2 itself a sufficient reason for awarding costs on the indemnity
3 basis. He also approved the comments of Simon Brown L.J. in
4 *Kiam v.MGN (No.2) [2002] 2 All E.R. 242* where he said that
5 conduct which, although falling short of deserving moral
6 condemnation, may still justify an order for indemnity costs if it
7 was unreasonable to a high degree.

8
9 5.3 The Chief Justice also referred to several other English cases
10 (including *Excelsior Comm. & Indus. Holdings Ltd v. Salisbury*
11 *Hammer etc [2002] C.P. Rep. 67; Reid Minty v. Taylor [2002] 1*
12 *W.L.R. 2800* and *Three Rivers D.C. v. Bank of England [2006] 5*
13 *Costs L.R. 714*) and expressed the view that there is a
14 commonality of approach to the question of an award of
15 indemnity costs between this jurisdiction and England. These
16 English cases were also referred to me and I have reviewed them
17 but in light of the comments of the Chief Justice made on
18 consideration of them, which I have summarized above, I have
19 not quoted from them directly myself.

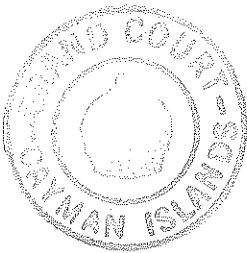
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21 5.4 I was also referred in particular to the judgment in *Sagicor*
22 *General Insurance etc and Another v. Crawford Adjusters etc*
23 *and Others [2008] CILR 482*. In that case Henderson J concluded
24 that the plaintiffs' abandonment of their claims of fraud and
25 conspiracy on the eve of the trial indicated that they had had no
26 evidence capable of establishing those claims from the start and
27 he awarded the defendants their costs against the plaintiffs on the
28 indemnity basis. It was also accepted by the court that on a
29 taxation of costs on the indemnity basis there was no limitation,
30 as there is on a taxation on the standard basis, on recovery of the
31 costs of a foreign lawyer prior to his admission as a Cayman
32 Islands attorney, subject of course to the test of reasonableness,
33 the onus being on the paying party to establish unreasonableness



34
35 5.5 I was also referred to the judgment of Gloster J. (as she then was)
36 in *Euroption Strategic Fund Limited v. Skandinaviska Enskilda*
37 *Banken AB [2012] EWHC 749 (Comm)* in the English
38 Commercial Court, which I found to be a particularly helpful
39 summary of the principles to be applied when choosing between
40 the two bases for taxation of costs, standard or indemnity. I

1 should say that there seemed to me anyway to be no significant
2 disagreement about these principles between counsel for the
3 parties in the present case; the difference really being one of
4 emphasis having regard to the particular circumstances of the
5 case. As Gloster J said (para 11) "*The principles are well known
6 and have been exhaustively rehearsed in the relevant authorities*"
7 She then continued with what she described as a headline
8 summary as follows:
9

10 *12. First, on either basis, the receiving party is only entitled to*
11 *recover costs which it has actually incurred, and, further, is*
12 *only entitled to receive costs which were reasonably incurred*
13 *and were reasonable in amount. Second, the standard basis is*
14 *the normal basis of assessment: see Reed Minty v Taylor*
15 *[2002] 1 WLR 2800 at [28]; Excelsior Commercial &*
16 *Industrial Holdings Ltd v Salisbury Hammer Aspden &*
17 *Johnson [2002] EWCA (Civ) 879 at [19]. This means that*
18 *there has to be something in the conduct of the action, or about*
19 *the circumstances of the case in question, which takes it out of*
20 *the norm in a way which justifies an order for indemnity costs:*
21 *see Excelsior (supra) and Noorani v Calver [2009] EWHC 592*
22 *(QB) at [9], per Coulson J. Third, cases vary very*
23 *considerably, and the Court of Appeal has declined to lay*
24 *down guidelines on the subject: see Excelsior (supra) at [32].*
25 *It is obvious from a reading of the authorities that each case is*
26 *highly fact-dependent.*
27

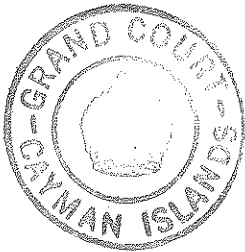


28 *13. Fourth, to demonstrate that a case has gone outside the*
29 *norm of behaviour, it is not necessary to show that the paying*
30 *party's conduct lacked moral probity or deserved moral*
31 *condemnation in order to attract recovery of costs on an*
32 *indemnity basis: see Balmoral Group Ltd v Borealis (UK) Ltd*
33 *[2006] EWHC 2531 (Comm) at [1], where Christopher Clarke J*
34 *said:*
35

36 *"... The basic rule is that a successful party is*
37 *entitled to his costs on the standard basis. The*
38 *factors to be taken into account in deciding whether*
39 *to order costs on the latter basis have been helpfully*
40 *summarised by Tomlinson, J., in Three Rivers District*
41 *Council The Governor and Company of the Bank of*
42 *England [2006] EWGC 816 (Comm). The discretion is*
43 *a wide one to be determined in the light of all*
44 *the circumstances of the case. To award costs*

1 against an unsuccessful party on an indemnity scale is
2 a departure from the norm. There must, therefore, be
3 something - whether it be the conduct of the claimant
4 or the circumstances of the case - which takes the case
5 outside the norm. It is not necessary that the claimant
6 should be guilty of dishonesty or moral blame.
7 Unreasonableness in the conduct of the proceedings
8 and the raising of particular allegations, or in the
9 manner of raising them may suffice. So may the pursuit
10 of a speculative claim involving a high risk of failure or
11 the making of allegations of dishonesty that turn out to
12 be misconceived, or the conduct of an extensive
13 publicity campaign designed to drive the other party
14 to settlement. The making of a grossly exaggerated claim
15 may also be a ground for indemnity costs."
16

17 14. However, as Mr. Shivji emphasised, by reference to
18 paragraph 8 of the decision in *Noorani* (*supra*), conduct must
19 be unreasonable "to a high degree" to attract indemnity costs.
20 "Unreasonable" in this context does not mean merely wrong
21 or misguided in hindsight: see per Simon Brown LJ (as he then
22 was) in *Kiam v MGN Limited (No 2)* [2002] 1 WLR 2810. In
23 each case, it is a fact dependent question as to whether or not
24 the paying party's conduct has been unreasonable to a high
25 degree.
26



27 The judge also added at paragraph 17:

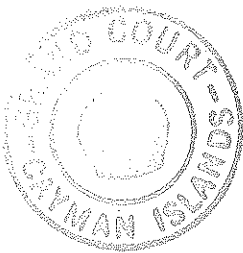
28
29 17 In my judgment, for the purposes of the exercise of my discretion, it is
30 necessary to stand back and look at the nature of Euroption's claim as a
31 whole, rather than conduct a micro-analysis of particular aspects of
32 particular claims.
33

34 35 6 The Present Case

36
37 6.1 In my opinion, having regard to all the circumstances, this is
38 indeed an exceptional case which warrants exceptional
39 treatment and a departure from the usual rule. There has been
40 extraordinary misconduct by the plaintiff, Phillip, in various
41 respects which the court, after lengthy consideration and
42 analysis, has concluded rendered it unfair, inequitable and

1 unconscionable to permit him to seek to make the claims
2 which he has.

3
4 6.2 In the first place the court has concluded following trial that
5 the claims which Phillip made were anyway wrong in principle
6 and misconceived (see e.g Judgment paras. 8.5, 8.10 and 8.12).
7 The court has also concluded that the claims are barred by
8 limitation (see Judgment para. 12.21). While in the abstract it
9 is perhaps arguable whether these conclusions in themselves
10 amount to negligent conduct of the action on the part of
11 Phillip, in the overall circumstances of an untruthful,
12 unreasonable and unjustified persistent pursuit of the
13 proceedings, such as is the case here, I am inclined to the view
14 that they do. Although the words of GCR O.62, r.(11) are to
15 be read disjunctively, they must be considered in the context of
16 the whole circumstances of the particular case. It is clear that
17 Phillip, through his attorneys, was forewarned more than once
18 in correspondence, by the pleadings and in particulars that it
19 was contended that his claims were wrong in principle and
20 misconceived and also barred by limitation. Furthermore, it is
21 also clear that despite encouragement by the court itself,
22 Phillip declined to agree to compromise the proceedings on
23 any reasonable or realistic basis. Rather than agree to share the
24 parcels of land in issue equally with his three half-brothers, as
25 he must now do, or to accept a reasonable compromise offer
26 which would have given him rather more than that, he
27 persisted on the basis of his claims with minimal concession
28 and notwithstanding the difficulties with his claims which had
29 been pointed out.



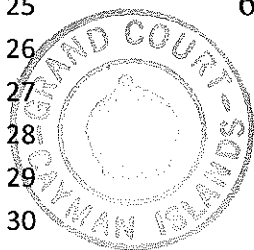
30
31 6.3 More significant, however, in the context of improper and
32 unreasonable conduct in particular, is the fact that Phillip was
33 not truthful, full or frank (see e.g. Judgment para. 9.1). The
34 central issue in the case was the extent, nature and timing of
35 Phillip's knowledge of the facts on which his claims were
36 founded. He was compelled in cross-examination to make
37 significant and relevant admissions about this. If he had
38 disclosed this knowledge in his witness statements, or even
39 before, which he could and should have done, it would have
40 had a significant impact on the case and, it is possible that it

1 would not have been pursued at all (see generally Judgment
2 para. 14). Those admissions, once made in cross-examination
3 during the trial, in my view, called into question whether
4 Phillip should properly and reasonably have persisted in
5 continuing with his claims as he did.
6

7 6.4 Quite apart from that, such admissions and the overall
8 surrounding circumstances as found by the court made it quite
9 clear, that notwithstanding his knowledge, Phillip deliberately
10 stood by for many years until after his mother's death before
11 commencing these proceedings (see e.g. Judgment paras. 14.6,
12 14.17, 14.18 and 14.19). He acquiesced in what was
13 happening in relation to the entitlement which he claimed in
14 these proceedings (see e.g. Judgment paras. 15.2 and 15.4).
15

16 6.5 The effect of Phillip's delay was to create significant
17 difficulties for the court at trial and resulted in prejudice and
18 unfairness to the defending parties. The court was significantly
19 hampered by the fact that Phillip waited until after the death of
20 Esther to commence these proceedings. Her evidence would
21 have been crucial in respect of many, if not most, of the issues
22 in the case. This resulted in prejudice, unfairness and possibly
23 a denial of justice (see Judgment para. 17.11).
24

25 6.6 This is also an exceptional case in light of the length of the
26 delay in commencing the proceedings. Laches is not a usual or
27 common finding but in the circumstances of this particular
28 case the court has found that there was extraordinary delay
29 which was inexcusable (see Judgment paras. 19.1 and 19.2).
30 That cannot constitute conduct which is either proper or
31 reasonable.
32



33 7 Conclusions

34
35 7.1 I have applied the principles explained in the authorities to the
36 particular circumstances of this case and have concluded that
37 this is an exceptional case in which the court should mark its
38 disapproval of the losing party's conduct by an award of
39 indemnity costs. The authorities make it clear that it is not
40 necessary in this context to establish conduct by the losing

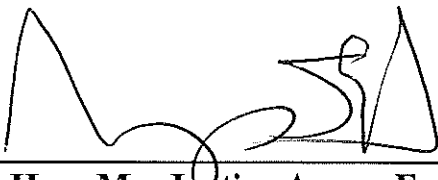
1 party deserving of moral condemnation. However, in the
2 present case it seems to me that moral condemnation is
3 appropriate. The court has concluded in its judgment that in all
4 the circumstances not only would it have been unreasonable,
5 unfair and unjust to the defending parties to allow Phillip to
6 assert the relief which he claimed but that it would also have
7 been unconscionable to permit him to do so. I have also taken
8 into account that Phillip's persistent and unreasonable actions
9 have clearly damaged and probably destroyed the previously
10 happy family relationship between him and his half-brothers.

11
12 7.2 I take into account also the fact that in the circumstances it
13 would also be unreasonable, unfair, unjust and, indeed,
14 unconscionable that the defending parties should be
15 significantly out of pocket as a result of having to defend this
16 case, no doubt at very considerable expense.

17
18 7.3 In all the circumstances as fully set out in the Judgment I am
19 satisfied that this is an appropriate case for the losing party,
20 Phillip, to pay the defending parties their costs of the action on
21 an indemnity basis and I so order. For the avoidance of any
22 doubt such costs shall include the costs of and incidental to this
23 application and hearing.

24
25 Dated 5th day of December 2014

26
27
28
29
30
31



The Hon. Mr. Justice Angus Foster
JUDGE OF THE GRAND COURT

