

JERSEY / JUDGMENT

Carr v Liston [2019] JRC 085 (10 May 2019)

[2019] JRC 085

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[2019] JRC 085,

[2019] JRC 85 [New search] [Help] Costs - plaintiff's application for costs [2019]JRC085 Royal Court (Héritage) 10 May 2019 Before : R. J. McMahon, Esq., Commissioner, sitting alone Between Joyelle Anne Carry Plaintiff And Michael Joseph Liston and Lesley Marie Liston (née Jebbett) Defendants Advocate S. J. Young for the Plaintiff. Advocate H. Sharp for the Defendants. judgment on costs the COMMISSIONER:

Introduction

1. This judgment is supplementary to the judgment of the Court handed down as long ago as 8th September, 2017, (Carry v Liston

[2017] JRC 144) and deals with the issue of the remaining costs of the action. The final sentence of that substantive judgment finding in favour of the Plaintiff states: " in the absence of agreement between the parties as to an appropriate order, the Court will also entertain submissions on the question of costs ". Earlier in paragraph 156, the Court indicated that ancillary matters would need to be addressed in relation to any access to the strip of land in question, in particular to remove any of the planting undertaken by the Defendants. When nothing further was heard from the parties, I rather assumed that they had been able to agree all these matters, including the way to deal with the costs. However, the Plaintiff applied on 8th February, 2019, to issue a Summons for Costs proposing certain procedural steps, which were then broadly agreed on behalf of the Defendants. I have, therefore, received written submissions on behalf of both sides and have reached the conclusion that, in the absence of any request for a hearing, which has not been forthcoming, I can determine the costs position that follows without needing to convene the parties to an oral hearing. 2. The Plaintiff seeks her further costs on the indemnity basis because she argues that the tenor of the Court's judgment shows that this was a case which was out of the norm, so justifying such an award of costs. The Plaintiff also invites the Court to make a summary assessment of the costs to be awarded to her. The

Defendants' response is to highlight first that the Court has no power to award any costs in favour of the Plaintiff because it is *functus officio* or alternatively that the Court should exercise its discretion not to award any costs in her favour because of the inordinate delay in making this application for which there is no adequate explanation. Further, if any costs are to be awarded against the Defendants, there should be some reduction as a result of the Plaintiff's stance in relation to the Defendants' suggestion to mediate the parties' dispute and, in any event, this is not a case in which an award of indemnity costs is appropriate. Finally, the Defendants disagree that this is an appropriate case for a summary assessment.

Background

3. The Plaintiff already has orders for some of the costs in this action in her favour. These orders were made by the Master on 12 th October, 2016, when he permitted the Defendants to withdraw their claim based on possession quadragenaire ("the PQ Claim") and proceed on the basis of the doctrine of proprietary estoppel ("the PE Claim"), which was the subject of the substantive judgment to which the current application for costs relates. The Master's orders were: "2. the Defendants shall pay the costs of the Plaintiff in relation to the PQ Claim on the standard basis up to 31st May 2016 and thereafter until withdrawal of the PQ Claim on the indemnity basis; 3. the taxation of the costs ordered pursuant to paragraph 2 of this order is stayed until after trial of the PE Claim pending further order of the Royal Court; 4. the Defendants shall further pay 50% of the Plaintiff's costs on the standard basis in relation to the hearing dated 12th October 2016 dealing with the Plaintiff's application for costs following withdrawal of the PQ Claim; 5. taxation of the costs of the hearing granted pursuant to paragraph 4 of this order is stayed until after the delivery of the Royal Court's judgment, pending further order of the Royal Court". 4. Comparatively little appears to have happened in relation to ancillary orders, including costs, following the handing down of the substantive judgment on 8 th September, 2017. Advocate Sharp points out that a letter sent to him by Advocate Falle dated 19 th October, 2017, refers to the recent removal of plants from the strip of land by the Defendants, albeit without the benefit of any order of the Court or agreement between the parties, yet makes no reference at all to seeking to agree what the appropriate order as to costs ought to be. The question of costs was first raised by way of a letter dated 5 th June, 2018, headed " Without Prejudice save as to costs ", that Advocate Falle sent to Advocate Sharp. 5. That letter refers to the final sentence of the substantive judgment and hopes that " it is agreed that we must first look to settle the matter of costs without recourse to the Court ". It indicates that it must " follow that in the face of an adverse judgment, the Defendants are liable to pay [the Plaintiff's] costs ", so the only issue to negotiate would be the basis on which costs were to be paid. The letter proceeds to set out the reasons why the Plaintiff seeks her costs on the indemnity basis, reflecting what has subsequently been incorporated into Advocate Young's Skeleton Argument. Advocate Falle enclosed details of the Plaintiff's costs and disbursements, including those of Advocate Begg, who had instructed Advocate Falle, and invited the Defendants to settle the costs set out or at

least to agree that the bills of costs be submitted to taxation on the basis that the Defendants agreed that indemnity costs were payable. 6. Advocate Sharp responded by way of a letter dated 2 nd July, 2018. Because of the delay involved, he referred to the need, as he understood it, for the Plaintiff to seek leave from the Greffier to proceed to a taxation of the costs ordered by the Master. He sought an explanation so that he could consider the issue further. He pointed out that there was no costs order arising from the PE Claim because no application had been made by the Plaintiff for her costs. 7. On 23 rd August, 2018, Advocate Falle sent three letters to Advocate Sharp. There was a reply to Advocate Sharp's letter dated 2 nd July 2018, in which Advocate Falle took issue with Advocate Sharp's interpretation of the Master's costs orders. Advocate Falle considered that the stay operated until there was a decision on costs following the conclusion of the Plaintiff's PE Claim. He further indicated that his letter of th June, 2018, sought to reach an agreement on the costs that would follow the Plaintiff's success and invited Advocate Sharp to respond to the issues raised in that letter. One of the other letters related to an incident that took place on 8 th July, 2018, and which the Plaintiff had reported to Advocate Falle, which involved the First Defendant and which the Plaintiff considered to amount to an intrusion on her right to enjoy privacy in her own garden. An apology was sought and proceedings for an injunction and damages were intimated. The third of the letters raised a new matter relating to the boundary hedge between the parties' properties, with a proposal for how to defray the expenses of work required, as well as requesting the Defendants to deal with overhanging branches and reducing the height of evergreens on their property. 8. The Defendants wrote directly to Advocate Falle by letter dated 4 th September, 2018. In doing so, they indicated that the letter regarding litigation costs was being dealt with by their Advocate. In relation to the other two letters, they agreed to the proposal for joint action to reduce the height of the boundary hedge and agreed to cut back overhanging branches and to comply with the terms of the legislation relating to high hedges. The Defendants further proposed " a non-confrontational discussion between [them] and if necessary [their] lawyers, to identify and seek remedies for the grievances which risk blighting for both parties what should be unimpaired enjoyment of [their] properties for the remainder of [their] days in them" , offering some suggestions about what might be considered. 9. The Plaintiff responded by way of a further letter from Advocate Falle dated 16 th October, 2018 addressed to the First Defendant only. It includes the following passages: "(ix) Your open letter pretends to stand separate and apart from current correspondence between Advocate Sharp and me concerning your liability to pay the costs incurred by my client in her successful defence against your baseless claim. The Court, as you know, in its Judgment left settlement of the costs of the parties at first instance, leaving application to be made only in the event of a failure to agree them. That three letters instead of one, all dated 23 August 2018 were sent to Advocate Sharp, was a reflection only of their particular subject matter. It would however, be disingenuous to pretend that the two lines of correspondence are unconnected and the outstanding inter-related issues including costs can be resolved piecemeal: hence my instruction to respond on behalf of my client to your letter. (x) My client's position was vindicated by the Judgment of the Royal Court and she sees no reason to change it. She has, from the beginning, and

with the greatest clarity, repeatedly stated her determination not to dispose of one inch of the property which she purchased to settle in on her retirement and the peaceful enjoyment of which she was entitled to expect. In the circumstances, my client would find it extraordinary if as it seems, you should now consider it appropriate to invite her to review her position seemingly only as parcel of arrangements concerning non-contentious matters concerning light and shade near the boundary but in reality motivated by a continuing determination to acquire my client's property. (xi) If, of course, my client has entirely misconstrued your letter, you will doubtless speedily disavow harbouring any such intent. In that case, assuming you to have written in good-faith that would necessarily imply acceptance of an obligation on your part to put things right between you. Thus, taking your letter at face value, supposing you to be genuinely looking to an improved relationship, it must follow that you will do whatever may be necessary to repair the damage you have done to your neighbour without at the same time looking to your principal object to gain some advantage for yourself as yet undisclosed. In that light, failure to discharge your obligation to settle the costs without the need for further litigation will surely reflect badly on your good name." 10. The Defendants responded by return (although the letter is incorrectly dated 17 th September, 2018) stating that Advocate Falle had misconstrued their earlier letter, expressly rejecting the assertion that they covet the strip of land, and explaining that they had "sought only to pre-empt through dialogue the foreseeable tensions which could be caused by either party's provocative use of the small strip of land which we each own in the other's garden." That letter ends: "It is a matter of concern to us that more than one year after the Royal Court's Judgment we still do not know what costs your client is claiming and whether they have been properly and reasonably incurred - not least given her unreasonable rejection of all our many offers to avoid by settlement or mediation, the great expense of litigation over a relatively worthless strip of land. As you are aware Advocate Howard Sharpe [sic] is continuing to act for us in this matter." 11. Advocate Falle replied on behalf of the Plaintiff in a letter dated 27 th November, 2018, addressed to the First Defendant. He took issue with the terminology used by which reference had been made to strips of land in each other's garden, noting the sequence of events by which ownership by the parties of those strips of land occurred, indicating that, if the Defendants could show any encroachment of the fence of the Plaintiff on the area of land they had acquired from Mr and Mrs Cook, the Plaintiff would, of course, take steps to rectify the position of her fence. That letter ends: "This last is of course a trivial issue while the question of liability for the costs in the action remains outstanding. You have for some months past, been in possession of details of the Plaintiffs [sic] costs and to settlement of which she is plainly entitled. You are also aware of an earlier costs order made by the Master in relation to the first part of the procedure. Further you will have seen my analysis of comments in the Judgment relevant to costs arising in relation to your claim for equitable relief. You will recall that the Royal Court in its closing remarks looked to the parties to agree the costs and only to make representations with a view to obtaining an order in the event of there being no agreement. It is in the circumstances clear that you have the means and the advice to enable you to quantify and settle your liability and thereby avoid a further painful rehearsal of the terms of the

Judgment." 12. Finally, in a letter dated 4 th February, 2019, Advocate Young wrote to Advocate Sharp rehearsing some of this history, acknowledging that there had clearly been some delay between the handing down of the substantive judgment and Advocate Falle's latter dated 5 th June, 2018, but pointing out that " there is no prejudice to [the Defendants] in relation to this delay who have thus far not had to pay any of the costs." Advocate Young indicated that the Plaintiff was pursuing a Summons for Costs, and had copied to Advocate Sharp a letter of the same date sent to the Bailiff's Judicial Secretary, inviting any comments on how to proceed by 8 th February, 2019. *Functus officio* 13. The primary basis on which the Defendants contend that no order for costs should be made is that this Court is *functus officio* . Advocate Sharp refers to the explanation of this doctrine given at paragraph 9 of the Royal Court's judgment in *Jersey Evening Post Limited v Al Thani* 2002 JLR 542 : "A court is *functus* when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even where a decision has been communicated to the parties. Proceedings are only fully concluded, and the court *functus* , when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its rulings on adjudication must be taken to a higher court if that right is available." 14. When read in conjunction with paragraph 3 of Royal Court Practice Direction 10/01 ("The primary purpose of supplying the judgment in draft is to enable the advocates to consider the judgment and decide what consequential orders they should seek. Efforts should be made to agree these if possible."), Advocate Sharp submits that an application for costs should have been made in a timely manner. He points out that there is no obligation on a party to seek a costs order; it is an option. He further suggests that the Court in this case had performed all its duties when it handed down the final decision on 8 th September, 2017. 15. On behalf of the Plaintiff, Advocate Young has pointed out that the question of what costs order to make, if any, was left in the first instance for the parties to agree and, only in the absence of agreement, to seek an order from the Court. That is what the Plaintiff has now done. The Court, therefore, has not yet performed all its functions and so is clearly not *functus officio* . 16. I am quite clear that this Court has the ability to entertain the Plaintiff's costs application and that it is not *functus officio* . The Plaintiff's original summons dated 2 nd February, 2016 included seeking an order against the Defendants that they " be condemned to pay the costs, recoverable and irrecoverable, of this action" . When handing down the substantive judgment without convening the parties, the best the Court could do was invite the parties to agree the costs question between them or, if agreement could not be achieved, entertain any application to be made subsequently. As such, the possibility of there being further submissions made in respect of costs was expressly left open. In those circumstances, the Court had not performed all of its functions in the case because it had explicitly directed that it would consider submissions on the question of costs if that were necessary. The mere passage of time does not render the Court *functus* . Delay could be an issue if there were any period of prescription engaged, but that has not been raised on behalf of the Defendants. Accordingly, the Plaintiff's application for a costs award in her favour does not fall at this

first hurdle. General principles relating to costs 17. The starting point in respect of costs is what is set out in Article 2(1) of the Civil Proceedings (Jersey) Law 1956 : "Subject to the provisions of this Part and to rules of court made under the Royal Court (Jersey) Law, the costs of and incidental to all proceedings in the Royal Court shall be in the discretion of the Court, and the Court shall have full power to determine by whom and to what extent the costs are to be paid." 18. I consider the summary of the general principles given at paragraph 7 of *Watkins v Egglshaw* 2002 JLR 1 , to which Advocate Young has referred, to be helpful: "The principles that should guide the court in the exercise of its discretion in this area appear to me, therefore, to be as follows, stating them as shortly and simply as possible: (a) The court's overriding objective in considering costs is, as in everything else, to do justice between the parties. (b) In many cases, that objective will be fulfilled by making an award of costs in favour of the "winning party", where a "winner" is readily apparent. In any event, the "follow the event" rule can be a useful starting point. (c) It is a mistake, however, to strain overmuch to try to label one party as the "winner" and one as the "loser" when the complexity or other circumstances of the litigation do not readily lend themselves to analysis in these terms. (d) The discretion laid down in art. 2 of the Civil Proceedings (Jersey) Law 1956 is a wide one and ought not to be treated as fettered by any particular supposed rule or practice, other than that the discretion should be exercised judicially and broadly in accordance with the guiding principles referred to in *In re Elgindata* (N. 2) and *A. E. I. v. Phonographic Performance*. (e) It is, accordingly, open to the court to have regard to any and all considerations that may have any bearing on the overriding objective of doing justice. Its task is to take an overview of the case as a whole (*Bank of Credit & Commerce Intl. v. Ali* (No. 4), per Lightman, J.). The new Civil Procedure Rules governing civil litigation in the English courts provide that the court "must have regard to all the circumstances" and then go on to spell out certain matters that such circumstances include, the "conduct of all the parties" being one and "whether a party has succeeded on part of his case, even if he has not been wholly successful" another (Civil Procedure Rules, para. 44.3(4)). To a large extent, however, the particular matters mentioned do no more than state the obvious and it is unnecessary to import them verbatim, in any formal way, into the practice of the Royal Court. (f) It is implicit in this that, even though a party would otherwise be regarded as having been "successful," justice may require that costs should not automatically follow the event." 19. The distinction between costs on the standard basis and costs on the indemnity basis is apparent from rules 12/4 and 12/5 of the Royal Court Rules 2004 . Costs on the standard basis are those reasonably incurred in a reasonable amount and any doubts the Greffier has on a taxation are resolved in favour of the paying party. Costs on the indemnity basis are all the costs of the receiving party save those that have been incurred unreasonably or in an unreasonable amount and any doubts the Greffier has on a taxation are resolved in favour of the receiving party. 20. It is a well-established principle that the approach to be taken when considering whether to award costs on the indemnity basis is what was set out by Beloff JA in *C v P-S* 2010 JLR 645 (at paragraph 11), as confirmed and applied by this Court in the example offered by Advocate Young, *Hong Kong Foods Limited v Robin Hood Curry Limited*

[2017] JRC 116 : "... we do not accept that it is appropriate to impose such a restrictive approach on the discretion of the court to make an award of costs on the indemnity basis. The question will always be - is there something in the conduct of the action by one of the parties or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs, recognising there will usually be some degree of unreasonableness? We do not consider that there is a need for the claiming party to show a lack of moral probity or conduct deserving of moral condemnation, or malicious or vexatious conduct." Delay 21. Advocate Sharp is critical that the Plaintiff has not explained the reasons for the lengthy delay in seeking an order for costs by way of affidavit evidence. As Advocate Young points out in reply, the Court did not order the explanation to be provided in this form. I am satisfied that providing the explanation in Advocate Young's Skeleton Argument suffices and that there was no requirement for it to feature in sworn evidence. I accept that what is proffered by an officer of this Court can be taken at face value. 22. Advocate Young explains that the first pause occurred whilst the time for any appeal against the Court's decision to be instituted was running and thereafter that " it was considered appropriate to allow some time for the dust to settle following the Judgment in the run up to the festive period". When nothing had been heard from the Defendants by May 2018, Advocate Falle took steps to have a draft bill of costs prepared and duly wrote to Advocate Sharp on 5 th June, 2018. Thereafter, the correspondence between the Advocates and, on occasion involving the Defendants directly, was as set out above. Advocate Young further refers to Advocate Falle's absence from the office for some time in the summer of 2018 and then due to him undergoing a significant medical procedure. Further, given the " continuing animosity between the neighbours ", it was considered appropriate to allow the Defendants further time to respond to the issue of costs. 23. As a result of these delays, Advocate Sharp invites the Court to decline to award the Plaintiff any of her costs now. He suggests that the excuses set out in the Skeleton Argument are hard to take seriously and that a more accurate interpretation of the events is that the Plaintiff chose not to seek any order for costs until, many months later, she wished to use the threat of costs as leverage to resolve other issues that had arisen between the parties. By the summer of 2018, it was already too late for the Plaintiff to raise the issue of costs when application should have been made in the wake of the handing down of the substantive judgment many months earlier. The Defendants were, by then, entitled to move on with their lives. 24. In my judgment, the leisurely manner in which the Plaintiff has approached seeking to pursue her remaining costs of this action is unsatisfactory and so deserves some sanction, to which I will return in due course. However, I also take the view that it would result in an unjust outcome if the Plaintiff were to be deprived of all of her costs in this matter. I have no hesitation in regarding the Plaintiff as the successful party. The Defendants' contention that they had a better title to the strip of land than the Plaintiff by virtue of invoking an equitable principle was rejected. As a result, the starting point is that the Plaintiff's costs should follow the event, although departure from that general principle is, of course, permissible. It would, therefore, be an extreme conclusion, and in my view an unwarranted one, to deprive the Plaintiff now of the opportunity to seek her costs on some

appropriate basis. Accordingly, I decline to adopt Advocate Sharp's alternative to his primary argument that the Court is functus of simply making no order as to costs at this stage. 25. It should have been apparent to the parties and their Advocates that the Court had chosen the pragmatic approach of handing down the substantive judgment without convening them to a hearing for that purpose as a means of saving costs and giving both sides a period of time to reflect on the terms of the substantive judgment. That is why the onus was placed squarely on the parties through directing them to attempt to agree any consequential costs order rather than forcing any such application to be made upon handing down the judgment as envisaged by Practice Direction 10/01. I do not consider that leaving it until June 2018 to raise the question of costs is acceptable. Indeed, I doubt that any delay predicated on not wanting to detract from the festive period had any merit, because the issue of costs should properly have been raised as soon as practicable. The months of silence at the beginning of 2018 only compound the position. Equally, though, when the issue of costs was eventually raised in Advocate Falle's letter of 5 th June, 2018, I consider the response from Advocate Sharp to have been less helpful than arguably it ought to have been. In particular, having been able to review the whole chain of correspondence following the issue of costs being raised, I have noted that the Defendants indicated that Advocate Sharp was dealing with the costs aspect, yet Advocate Sharp did not re-engage on the Defendants' behalf throughout the whole period. 26. Reference has also been made to the overriding objective, which was inserted into the 2004 Rules by the Royal Court (Amendment No. 20) Rules 2017 with effect from 1 st June, 2017. Although this post-dates the hearing, it was operative by the time the substantive judgment was handed down. In the absence of any transitional provision, the obligation, for example, in rule 1/6(4) imposed on the parties to help the Court further the overriding objective of dealing with cases justly should, in my view, have been at the forefront of the minds of the parties and their Advocates. The reality of the situation after the substantive judgment had been given was that, unless the Defendants could raise any issues, as they have now done, as to why the usual order of costs following the event should not be made, the Plaintiff was likely to be awarded her costs. At the time, of course, the Court had no idea whether there had been any discussions between the parties that may have touched on the costs position between them in the event of any particular outcomes following. I accept what Advocate Sharp points out about the Plaintiff having to apply for her costs if a suitable order could not be agreed, and that no order for costs had yet been made because no application had been progressed, but I do not consider that this means that the Defendants, who must be viewed as having lost this action, can simply sit on their hands and not engage appropriately when the issue is finally raised. In my opinion, neither side has acted consistently with the overriding objective, but I always have to bear in mind the need to do justice between the parties when balancing how that is reflected in any costs order. 27. Had the Defendants raised some procedural bar to the Plaintiff's application for her costs, I would necessarily have considered whether it had merit. Aside from contending that the Court is functus, which I have rejected, Advocate Sharp's alternative submission is for the Court to exercise its discretion and refuse to make any order for costs at this stage. He has

not, by way of example only, suggested that the element of the Plaintiff's summons claiming costs should be struck out on any particular basis that might be advanced. For the reasons I have just explained, I think it would result in an unjust windfall to the Defendants if the Plaintiff were now to be deprived of all of her costs simply because the issue was not raised by her Advocate as quickly as it really should have been. The balancing exercise I have conducted before deciding how to exercise the Court's acknowledged wide discretion cannot, in my view, properly tip as far as that. 28. In support of this submission, Advocate Sharp has referred to *Mitchell v News Group Newspapers Limited*

[2014] 1 WLR 795 . In that case, the English Court of Appeal dismissed an appeal against a decision of the master refusing to grant relief from the sanction that the claimant be treated as having filed a costs budget comprising only the applicable court fees in respect of a libel action. This arose because the claimant's costs budget had not been filed sufficiently far in advance of the case management conference, as required by the Civil Procedure Rules as they operate in that jurisdiction. The headnote summarises the principles discussed in the judgment: "The purpose of costs management, including costs budgets, which is to enable the court to manage the litigation and the costs to be incurred so as to further the overriding objective, cannot be achieved unless budgets are filed in good time before the first case management conference. No less important is the requirement that parties should discuss with each other the assumptions and timetable on which their respective costs budgets are based so as to enable the hearing for which the budgets are required to be conducted efficiently and in accordance with the overriding objective. The mischief at which CPR rr 3.13 and 3.14 are directed is the last-minute filing of costs budgets. Rule 3.14, which represents the considered view of the Civil Procedure Rule Committee as to what constitutes a proportionate sanction for failure to file a costs budget in time unless the court otherwise orders, sets out a stark and simple default sanction which will usually apply unless the breach is trivial, or there is good reason for it. The considerations when a court decides whether it should "otherwise order" are likely to be the same as those which are relevant to a decision whether to grant relief from sanction under CPR r 3.9, namely, the need for litigation to be conducted efficiently and at proportionate cost, and the need to enforce compliance with rules, practice directions and court orders. Those two considerations, specifically mentioned in rule 3.9, are now to be regarded as of paramount importance and to be given great weight and, although regard should be had to all the circumstances of the case, other circumstances should be given less weight. Although there is power to grant partial relief from the default sanction under rule 3.14 it will not be appropriate to do so since, if partial relief were to be encouraged, that would give rise to uncertainty and complexity and stimulate satellite litigation." 29. I am not persuaded by Advocate Sharp that the Court should apply these principles by way of analogy. For certain actions, the 2017 Amendment Rules have introduced into the 2004 Rules (as rule 6/26A) the obligation to file and exchange cost budgets before the first directions hearing. The type of default sanction found on the face of the Civil Procedure

Rules does not operate in the same way. In any event, these obligations were only introduced after the action in this case had been heard. In the absence of anything quite so prescriptive, I consider it inappropriate to seek now to incorporate into what was a wide discretion as to how to deal with costs issues such a prescriptive regime to deprive the Plaintiff of her entitlement to any costs or, at best, just the fees associated with the action pour exhiber titre she brought. In short, it is not comparing like with like. The costs to which the current application relates were incurred at a time when the 2004 Rules were more flexible. I am satisfied that the wide discretion available to the Court should not be exercised so that the outcome is that there be no order as to costs. 30. The conclusion I have reached, therefore, is that the conduct of the Plaintiff in delaying raising the issue of costs and thereafter progressing it to the current application is not such that this Court should simply decline to award her any of her costs of the action, or only those associated with fee disbursements because that would not do justice as between the parties. Basis of costs 31. Having indicated that the Plaintiff can be regarded as the successful party, meaning that I take a starting point of awarding her the remaining costs of the action, the next question to determine is the basis on which those costs should be awarded. On this issue, I agree with the submissions of Advocate Sharp and reject those of Advocate Young. In my judgment, this is not a case in which awarding costs on the indemnity basis is justified. 32. Advocate Young has referred to a number of paragraphs in the substantive judgment (paragraphs 134, 137, 138, 139, 140, 142, 144 and 147) in which the Court highlighted matters that would have led it to decline to award the Defendants the equitable relief on which their PE Claim was based. As a result, he submits that there is ample support for the premise that the Defendants' conduct in this action takes the case outside of the norm and was more unreasonable than might have been expected even in hard fought civil proceedings. In response, Advocate Sharp draws attention to the finding recorded at paragraph 38 of the substantive judgment that "the Court has formed the impression that each of the witnesses giving oral evidence is an intelligent person doing his or her best to recall events accurately so as to assist" and that this was a case in which the evidence of certain witnesses was preferred over that of others. 33. Before awarding costs on the indemnity basis, there must be "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 relation to how the action was conducted, I take the view that the claim to a better title than that of the Plaintiff based on the doctrine of proprietary estoppel cannot be said to have taken this case outside the norm. There was a divergence of prior judicial comment on the way the doctrine operates in Jersey and it was on the basis of that legal issue, as opposed to the facts, that the action was decided. Accordingly, the way the parties, and particularly the Defendants, gave their evidence was of secondary importance to the outcome. 34. I have further taken into account that the Defendants had already been permitted to withdraw their PQ Claim and proceed instead on their PE Claim and be condemned in costs as a result by the Master's judgment. As a result, I treat the reference to "the circumstances of the case" as being confined to the circumstances of the PE Claim. As I have just indicated, I am satisfied that this was a course of action open to the

Defendants, albeit that they lost on the law and would have lost on the facts had they won on the law. The findings made are, I think, more consistent with this case having been hard-fought litigation and so not indicative of the Defendants having conducted their case unreasonably in a manner that took it out of the norm. The nature of this action was perhaps fairly typical of what happens all too often when neighbour disputes arise. Parties can lose sight of what to an objective outside observer appears most obvious, but that does not, in itself, mean that the case is out of the norm. Balancing how the case developed prior to and at the hearing of the PE Claim, I am satisfied that the Plaintiff should not be awarded costs on the indemnity basis with the consequences that flow from such an order and that the ongoing starting point remains costs on the standard basis because the Plaintiff was the winner and the Defendants fought the case but lost. Any reductions? 35. Having decided that in principle the Plaintiff should be awarded her costs, the next issue to consider is whether there is any justification for reducing the award for any reason. The principal reason advanced on behalf of the Defendants is that the Plaintiff was reluctant to engage in mediation, although I have also considered this issue more broadly. 36. Mediation was something about which the Master had concerns. The final order he made on 12 th October, 2016 was that " the Plaintiff, if she does not wish to take part in any mediation with the Defendants, shall file an affidavit with the Judicial Greffier setting out her reasons for the Judge to consider when dealing with costs following any trial and delivery of any Royal Court judgment ". The Master set out his reasons for encouraging serious consideration of the benefits of mediation at paragraphs 70 to 72 of his judgment (Carry v Liston

[2016] JRC 203B) on the costs following the permitted withdrawal of the PQ Claim. 37. I have now seen the correspondence following that decision, and have noted what the Master had already said about the Defendants' offers to mediate before that time. By letter dated 22 nd November, 2016, Advocate Falle wrote to Advocate Sharp proposing a Jersey Advocate as mediator. That letter, though, questioned what might be achieved, given the stance of the Plaintiff that she was determined not to part with any of her land to the Defendants. Advocate Sharp replied the following day seeking an assurance that the Plaintiff would enter into mediation with an open mind, pointing out that the purpose of mediation would not be the same as obtaining from the Court a ruling about the applicability in domestic law of the doctrine of proprietary estoppel. Advocate Sharp subsequently forwarded by e-mail details of a UK-based mediator on 28 th November, 2016. Advocate Falle responded the following day doubting that a UK-based mediator was qualified to conduct any mediation in this case and referred to a number of Advocates who might be best placed to assist. On 30 th November, 2016, Advocate Sharp rejected Advocate Falle's apparent suggestion that the mediator had to be qualified in Jersey law to be able to understand the issues and further drew attention to how the First Defendant, as a Jurat, would struggle with a Jersey Advocate acting as mediator because of the potential consequences in their ongoing relationship thereafter. In the event, no attempt at mediation was progressed. 38. It is clear that an unreasonable refusal to engage in mediation can justify awarding costs

on an indemnity basis (see, eg, *Café de Lecq Limited v R A Rossborough (Insurance Brokers) Limited* 2012 (2) JLR 155, as referred to in the Hong Kong Foods case) and so, by extension, can form the basis of for making a reduction to what would otherwise be the costs order in favour of the receiving party. There has been no affidavit from the Plaintiff setting out her reasons for there not being a mediation for me to consider now but I take the view that the Plaintiff was not obliged by the terms of the Master's order to put her reasons into an affidavit because it seems it was not a wish on her part not to take part in a mediation but rather the inability of the parties to reach agreement in the time available on how any mediation should be conducted that resulted in their being no mediation held. What seems clear, though, is that the Plaintiff was reluctant to acknowledge there would be any benefits from the encouragement to mediate being offered by the Master. 39. When considering whether a party's stance in relation to possible mediation is reasonable or not, I take the view that it is relevant to consider the eventual outcome of the case. The rationale for considering indemnity costs is that the same outcome could have been achieved without the need for the Court's decision because it could have been achieved through agreement following mediation. If that rationale is adopted in the present case, the outcome achieved by the Plaintiff would not, in my view, have been possible through agreement. Having seen the way in which the Defendants conducted their case, I am clear that they had no intention of conceding that the Plaintiff retain ownership of the strip of land. Having seen the way the Plaintiff conducted her case, I am clear that she would not have parted with any of the strip of land whatever price had been offered to her by the Defendants, as was touched upon in Advocate Falle's letter of 22 nd November, 2016. A mediator could have attempted to find a compromise that was mutually acceptable, possibly being confined to how the costs by then incurred by both parties might be apportioned, but the clear impression the Court formed of the parties was that their positions relating to the issue of ownership, or even use, of the strip of land were deeply entrenched and so never likely to get closer, however skilled the mediator may have been, so that agreement on such matters could be reached. I understand the reasons why the Defendants were keen to press the benefits of mediation but I fear it was always a forlorn hope that it would be effective. In those circumstances, I am not persuaded that it would be just to penalise the Plaintiff for pursuing the matter to what amounts to complete victory on the parties' respective cases. As was noted in the correspondence, the substantive judgment effectively vindicates the position she adopted throughout. 40. I have considered most carefully whether an award of costs on the standard basis to the Plaintiff amounts to doing justice between the parties in the light of everything that has happened. I wish to emphasise that I am unimpressed at the way in which the costs issues have been left to drift when the whole tenor of the substantive judgment was that a costs order in favour of the Plaintiff would most likely follow. For the reasons I have given, it is unfortunate that the Plaintiff pursued indemnity costs when that was, in my view, over-ambitious. It is possible that it was a tactic designed to deflect the criticism that has been forthcoming about her stance on mediation. The most pragmatic outcome would have been for both parties to have recognised in late 2017 that there be a costs order on the

standard basis in favour of the Plaintiff, in which fashion both sides would have benefited from finality. However, on balance, I have decided that the costs order in favour of the Plaintiff that I consider should follow her success on her action should not be reduced to reflect this displeasure at how matters have been progressed post-judgment, because that can be dealt with in another way. Accordingly, because the parties were unable to reach agreement about the costs of the action up to the handing down of the substantive judgment, the order I make is that the Defendants shall jointly and severally pay the Plaintiff her costs on the standard basis. Costs of this application 41. Turning to the costs of making this application, Advocate Young seeks an order on the indemnity basis because the Defendants' conduct has been unreasonable. He submits that the Defendants, through Advocate Sharp, failed to engage and so disregarded the terms of the Court's order to attempt to reach agreement. Advocate Sharp makes no specific submissions in relation to the costs of this application, but I am prepared to treat his overall submissions as being equally relevant to this aspect of the application. 42. As I have already indicated, I find what has occurred since September 2017 as somewhat troubling because neither side has introduced any urgency into the process. Given that Advocate Falle wrote on 19 th October, 2017 about the Plaintiff's concerns about the Defendants removing planting without her agreement or an order from the Court, I am bemused as to why the question of the incidence of costs was not raised in that letter. Although the party most likely to initiate a post-judgment discussion of costs would inevitably be more likely to be the Plaintiff, the terms of the order made was that both sides should engage on the question of costs. The Defendants' position is not, in my view, consistent with the modern way of litigating as now formalised through rule 1/6 of the 2004 Rules. If nothing else, an enquiry to Advocate Falle about when they might hear further on his proposals relating to costs should have been forthcoming. Further, I regard the absence of any meaningful response from Advocate Sharp on the proposal that costs be paid on the indemnity basis, especially when the Defendants' letters had indicated that he remained instructed on the issue of costs, as unsatisfactory. 43. What I am left with strikes me as being a series of instances of unreasonable conduct by both parties. Whilst I am minded to agree with Advocate Young that there has, until recently, been a lack of engagement on behalf of the Defendants, I consider that the first unreasonable conduct has to be attributed to the Plaintiff. Waiting close on nine months before even inviting the Defendants to agree anything relating to the costs of the action was not in keeping with the Court's order that the parties attempt to agree the issue of costs. I have come close to reducing the costs that should be awarded to the Plaintiff as a result of her conduct but decided, on balance, that the conduct should not affect the main order for costs to be made but that it will instead impact on the costs relating to this application. 44. Looking at the position in the round, I take the view that the Plaintiff should have been realistic from the outset and proposed her costs be paid on the standard basis, as I have now ordered. Had she done so in a timely fashion, then she might well have succeeded in obtaining indemnity costs thereafter had the Defendants chosen not to agree to pay the Plaintiff's costs on the standard basis. She has not obtained the order she sought, but she has obtained more than the Defendants have conceded they

should pay. On balance, I consider that the Plaintiff has just got the better of the arguments relating to costs and so I have started from the premise that costs on the standard basis in respect of this application could follow. However, I do feel strongly that the Plaintiff's laissez-faire attitude initially should result in some sanction against her. I am further persuaded that the Defendants' stance, through Advocate Sharp, would not have been as stark as it has been if the issue of costs had been raised in 2017 or even at the start of 2018. Had the Plaintiff been more proactive, the parties might have managed to reach agreement, as the Court hoped would be the case, or she would at worst have realised she needed to make her application much earlier than has been the case, which in turn would have avoided the types of issue now raised by Advocate Sharp needing to be rehearsed at all. Accordingly, whilst I consider that the Defendants have conducted the exchanges on costs in a poor manner, the root cause was, in my view, the unnecessarily long delay before the Plaintiff even sought to engage on the costs that followed from the substantive judgment. 45. There are a number of different routes I could take in order to do justice between the parties but, on the basis that a request for costs on the standard basis should reasonably been met by the Defendants by agreement, I am satisfied that the costs both parties have incurred in pursuing the different courses they have once the question was raised should be met by each side bearing their own costs of that exercise. This may appear to be harsh on the Plaintiff, but I have reached this decision as a means of expressing the Court's displeasure at the manner in which she delayed for longer than she should have even seeking to engage with the Defendants on this issue. I incline to the view that the Plaintiff has linked her pursuit of her costs with other aspects of the relationship that continue to bubble between her and the Defendants and, in doing so, had effectively lulled the Defendants into the belief that there might be no further costs consequences for them, as suggested by Advocate Sharp. In my opinion, the Plaintiff would have been wiser to have endeavoured to resolve all aspects remaining post-judgment in respect of her action pour exhiber titre, especially any outstanding costs she was seeking, as a discrete issue. In short, my overall impression is that the outcome now ordered was readily capable of being agreed without more ado in the aftermath of the substantive judgment being handed down and both sides have to share the burden of the increased costs that have arisen because of the way they failed to seek to agree an appropriate order, hence there being no order as to costs in respect of this application and the steps leading to it. Summary assessment 46. The final issue relates to whether the Court should order a summary assessment of the costs in the amounts claimed by the Plaintiff or, as Advocate Sharp points out, order a payment on account of costs along the lines indicated by, for example, *Crociani v Crociani* 2014 (1) JLR 503, which he suggests would be inappropriate in this case. 47. The differences in the amounts claimed in respect of the costs order I am making in favour of the Plaintiff, whether on the indemnity basis or the standard basis, are just a few hundred pounds. However, Advocate Young's Skeleton Argument indicates that the bills of costs on the standard basis included significant uplifts. In response, Advocate Sharp points out that the small difference however the costs are awarded cannot be right and demonstrates a fundamental problem with the Plaintiff's approach to costs. Advocate

Sharp has also taken issue with the terms of the Master's order and whether the time for the Plaintiff to seek to have her costs in relation to those orders taxed without leave has now passed. 48. I do not consider that I can summarily assess the entirety of the Plaintiff's costs but I do consider that, having now been awarded her costs by virtue of this judgment, she should be paid an interim amount on account of what she will ultimately receive. I am satisfied that I have sufficient information before me to enable me to do so. 49. I decline to make a summary assessment of the costs awarded to the Plaintiff first so as to enable the Defendants, if so advised, to raise the question of whether any leave is required from the Greffier before the taxation of the pre-existing costs orders in her favour can be progressed. My own view on that issue is that, despite the wording of the orders referring to taxation being stayed until after trial or until after delivery of the Royal Court's judgment, as the case may be, the Master's judgment indicates that taxation was to be stayed until after the costs decision following the trial was given. He was concerned about possible overlap and the possibility of there being costs awarded in favour of the Defendants or through a negotiated compromise that could then be set off. Viewing those comments in the spirit in which I consider they were intended, I incline to the view that time will only start to run for proceeding to a taxation of any of the costs relating to this action once this judgment on costs has been given and the relief sought by the Plaintiff has finally been fully determined. That outcome appears to me to be consistent with the Master's approach and further makes sense because any request for taxation would more sensibly be deferred until the entire costs position between the parties has become clear, and further assuming that no agreement as to what falls to be paid to settle all the relevant orders can be reached between the parties. 50. I am also not minded to assess the Plaintiff's costs without there being a taxation because it seems to me that there are some elements in the draft bill of costs that probably should not be allowed, especially on the standard basis. Advocate Sharp has spotted the issue that most readily springs to mind in the portion of the bill of costs from Advocate Begg where a claim is made for three hours of Mr Cabot's time in attending at Court to give evidence. I could add that there is also an entry for his attendance with the Court at the site visit to the land in question at the start of the trial, where the claim is for 2½ hours. I would take some persuading that either of these amounts is properly allowable on behalf of the Plaintiff, which reinforces my view that leaving the bills of costs to be taxed if the amounts payable cannot be agreed is the most appropriate outcome. 51. I do not, though, agree with Advocate Sharp that this is not an appropriate case in which to order a payment on account of costs, recognising that it must be heavily discounted to reflect the uncertainties surrounding what figure might be reached following taxation. In my view, although it can be said that the Plaintiff has been the author of some of her own misfortune by not addressing the question of costs earlier than she did, she has been kept out of monies that, in my judgment, are properly payable to her for a significant period of time and so some form of payment should be made if there is going to be a taxation pending the crystallisation of the full amount payable. If the parties manage to agree a global figure and so avoid the added expense of taxation, then the payment on account would not need to be made. 52. Advocate Sharp refers to the

percentage ordered to be paid ranging from 30% to 50% of the amount set out in the bill of costs. I will consider only the bill of costs that will follow from the costs award made by me in this judgment, leaving the bills of costs reflecting the Master's orders to one side for the reason I have already given. The amount claimed on behalf of the Plaintiff in total is a little under £47,000. I have just expressed my reservations about some of the claim in respect of Advocate Begg's bill of costs. Accordingly, using what I consider to be a conservative percentage of approximately 40%, I am satisfied that it is just to order the Defendants to pay £18,000 on account of the costs awarded to the Plaintiff and direct that such payment is to be made within 28 days of this

judgment.

Conclusion

53. For the reasons given, the Plaintiff's application for her costs of this action is partially successful. It has been difficult to strike a balance between the parties' positions when closer dialogue could easily have avoided those problems that have now surfaced. However, I find that justice dictates that the costs should in principle follow the event and so the costs of the action up to the handing down of the substantive judgment, ie, to September 2017, will be payable jointly and severally by the Defendants to the Plaintiff on the standard basis. I further order that the Defendants make a payment on account of these costs in the sum of £18,000 within 28 days. The costs for the period after September 2017, including the costs of this application, will be borne by the parties and so there will be no order as to costs from that time. *Authorities Carry v Liston*

[2017] JRC 144 . *Jersey Evening Post Limited v Al Thani* 2002 JLR 542 . Royal Court Practice Direction 10/01. Civil Proceedings (Jersey) Law 1956. *Watkins v Egglisshaw* 2002 JLR 1 . Royal Court Rules 2004. *C v P-S* 2010 JLR 645 . *Hong Kong Foods Limited v Robin Hood Curry Limited*

[2017] JRC 116 . Royal Court (Amendment No. 20) Rules 2017. *Mitchell v News Group Newspapers Limited*

[2014] 1 WLR 795 . *Carry v Liston*

[2016] JRC 203B . *Café de Lecq Limited v R A Rosborough (Insurance Brokers) Limited* 2012 (2) JLR 155. *Crociani v Crociani* 2014 (1) JLR 503. Page Last Updated: 24 May 2019 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: https://www.bailii.org/je/cases/UR/2019/2019_085.html

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