

JERSEY / JUDGMENT

Carry -v- Liston [2016] JRC 203B (08 November 2016)

[2016] JRC 203B

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judgment

the master: 1. This judgment concerns an application by the plaintiff that the defendants should pay the plaintiff's costs on an indemnity basis arising out of the withdrawal of the defendants' claim based on possession quadragenaire. During the course of submissions this claim was referred to as the "PQ claim" to distinguish it from the remaining claims advanced by the defendants which were described in general terms as being based on proprietary estoppel and were therefore referred to as the "PE claims". I have adopted these definitions for the purposes of this judgment.

Background

2. The dispute between the parties is a dispute between neighbours. The plaintiff has been an owner of the property known as Les Arbres since 1987. The defendants' property, Les Primavères is generally to the south and west of the plaintiff's property. The dispute in particular concerns a strip of land which is to the east of Les Primavères running along its entire length. 3. The defendants have been in occupation of Les Primarères since 1992 when it was acquired by the first defendant's employer for the benefit of the defendants; they have owned Les Primarères since 1996. 4. The present dispute appears to have started when Mr N P Cabot, a conveyancer employed by Andrew Begg & Co, wrote to the defendants in March 2015 informing them that he had been retained to advise the plaintiff on the location of the boundary line which separated the two properties. The letter stated that the plaintiff wished to incorporate the strip of land into her property and planned to establish a hedge along the line of three boundary stones. 5. This letter was of concern to the defendants and led to a meeting between the plaintiff and the first defendant. It later transpired that this meeting was recorded by the First Defendant. The contents of this recording and what was discussed, if the matter proceeds to trial, may well be explored in cross-examination. 6. This meeting however led to an offer by the defendants to purchase a strip of the plaintiff's property which offer was rejected. 7. On or around 4 th August, 2015, Le Gallais & Luce, who by this time were acting for the defendants, wrote to Mr Cabot enclosing affidavits from the defendants and previous owners of the property in support of an assertion that the defendants had acquired title to the strip of land by virtue of possession quadragenaire

through occupation by the defendants and their predecessors in title. 8. This communication led to a response from Mr Cabot dated 15 th August, 2015, which asserted that the defendants' claim based on adverse possession of 40 years was inconsistent with a contract passed before the Royal Court on 11 th July, 1986, ("the 1986 contract"). The 1986 contract was a contract of sale between a Mr and Mrs D Minikin and Riada Limited ("Riada") pursuant to which Riada acquired Les Arbres . The plaintiff purchased Les Arbres from Raida. Mr and Mrs Donald Le Flem, the previous owners of the defendants' property were parties to the 1986 contract in order to reaffirm the six boundary stones which separated the two properties in particular the strip of land from the defendants' property. Mr Cabot argued that the affidavit evidence that Mr and Mrs Flem had provided to Le Gallais & Luce relied on by the defendants was inconsistent with their being a party to the 1986 contract. 9. The letter of 15 th August, 2015, led to a reply from Le Gallais & Luce dated 1 st September, 2015, which invited the plaintiff, if she wished to assert ownership of the strip of land, to issue proceedings by way of a summons before the Heritag  Division of the Royal Court. 10. It is fair to say, in relation to the letter of th August, 2015, and the letter of 1 st September, 2015, that it was accepted by both counsel, (neither of whom were instructed at the time), that the tone of these letters was somewhat uncompromising. Correspondence of this nature does not generally help in neighbour disputes. 11. On 4 th December, 2015, Advocate Falle, who by that stage had been instructed by the plaintiff, wrote to Messrs. Le Gallais & Luce. Advocate Falle in his letter set out that the defendants' claim was without merit in summary for three reasons:- (i) There was evidence which the plaintiff would adduce which was contrary to a claim for adverse possession; (ii) The claim for adverse possession was inconsistent with the 1986 contract; (iii) There could not have been adverse possession for the period that the property was owned by the first defendant's employer between 1992 and 1996 as any occupation (which was disputed in any event) was by licensees only. 12. The letter gave the defendants 14 days to respond. This period was extended by further 21 days, to 30 th January, 2016, in an exchange of correspondence between Advocate Falle and Le Gallais & Luce. 13. No response was received from the defendants by the end of January 2016 and accordingly proceedings were commenced by summons actioning the defendants to exhibit title. The defendants were summonsed to appear before the Royal Court on Friday, 26 th February, 2016. 14. On 12 th February, 2016, after service of the summons, Advocate Sharp wrote to Advocate Falle informing Advocate Falle that he had been instructed by the defendants in relation to the proceedings that were due before the Royal Court on 26 th February, 2016. The final sentence of Advocate Sharp's letter stated as follows:- "I would welcome an opportunity to discuss the case with you with a view to reaching settlement. As you know, Mr and Mrs Liston have proposed that they acquire the strip of land or at least agree rights over it so as to secure the land as part of their garden. It may be that your client would be keen to ensure that the strip of land is protected against any change of use and that the fenced/tree boundary continues to maintain privacy between the two properties. I cannot imagine that any party wants to incur significant legal costs in respect of such a small strip of land. I am anxious to take the heat out of the situation and it must be possible for an agreement to be reached that is acceptable to all. Often things are said or done in these sorts

of disputes that are not meant or will inadvertently cause offence and one can end up in a hostile situation when neither party had any such intent. This case feels like a dispute that needs a period of calm reflection. Mr and Mrs Liston wish to remain good neighbours with Mrs Carry. I don't know if you have been to see the site but if not, can I respectfully suggest that we could visit the property together and then discuss matters thereafter." 15. Advocate Falle responded by a letter dated 16 th February, 2016, setting out that his letter of 4 th December, 2015, remained unanswered, that the defendants' claims should be withdrawn and his clients' costs should be paid on an indemnity basis. The offer of mediation was not taken up. 16. By an email dated 26 th February, 2016, Advocate Falle also stated he saw no merit meeting on site to discuss settlement because the terms of the 1986 contract were clear. 17. An answer was filed on 15 th March, 2016, and a reply filed on 7 th April, 2016. Paragraphs 8, 10 and 11 of the reply are relevant and state as follows:- "8. It is denied as alleged in Paragraph 11 of the Answer that the Defendants have ever enjoyed exclusive possession of the part of the Plaintiff's land now claimed by them. Any occupation by the Defendants of the Plaintiff's land has occurred with the benefit of her indulgent license and accordingly terminable at will and the Plaintiff has never given up possession alternatively exclusive possession of any part of her garden. 10. Since her purchase of Les Arbres on 29 May 1987 from Riada Ltd the Plaintiff, who is an enthusiastic gardener, has exercised possession of the whole of her extensive garden and although that part of it which is ill dispute has not been the focus of her attention she has throughout the period carried out works on the land which inter alia have included regular visits for inspection and pleasure, the planting and subsequent pruning of a shrub and the Plaintiff's employment of an arboriculturist and contractor to carry out work on an Oak tree on the land in question. 11. The Defendants have frequently, until recently, admitted the Plaintiff's ownership of the land in question and have made no challenge to the Plaintiff's proprietary rights and their exercise. In a conversation between the Plaintiff and Jurat Liston on 9 March 2015 and subsequently in an open letter dated 12 March 2015 addressed to Nicholas Cabot the Plaintiff's legal advisor, Jurat Liston admitted that he did not own the land in question and offered to buy it from the Plaintiff. It is contended that the offer, which was refused, nevertheless represented a significant admission that any possessory act claimed by the Defendants could never have been done *animo domini* and accordingly adverse to the Plaintiff's interest. Finally, by their Affidavit dated 23 July 2015 the Defendants included a statement that Les Primaveraes "....borders.... onto a strip of land forming part of the property called Les Arbres now belonging to Joyelle Ann Carry having right thereto by contract of purchase". It is accordingly contended that the Defendants are estopped from denying the truth of their sworn admission that as of the date of their Affidavit the land now in question remained the property of the Plaintiff and that in consequence It is not now open to the Defendants to allege any right or title to the land by way of possession *quadrangulaire*." 18. In a without prejudice save as to costs letter dated 18 th April, 2016, which I can refer to for the purposes of this costs judgment, Advocate Sharp proposed to Advocate Falle firstly, the defendants acquired the strip of land and secondly, as an alternative, suggested mediation. 19. The proposal for the defendants to acquire the land was rejected by a letter from

Advocate Falle dated 19 th May, 2016, which stated as follows:- "My client is advised that her title is unimpeachable. She set out the root of that title and the weakness of her neighbours' claim in correspondence last autumn. That represented an opportunity for your clients to debate the legal issues and possibly even to settle them without recourse to law. They chose not to take it. It is difficult in the circumstances to see what advantage from my client's perspective could be gained by going to mediation." 20. The basis of the PE claim was first set out in a letter dated 25 th May, 2016, which also invited the plaintiff to consider a possible settlement. This offer was repeated in a letter dated 17 th June, 2016. While both letters were marked without prejudice save as to costs, it is again appropriate to refer to them in this

judgment.

21. On 5 th July, 2016, a directions hearing took place before me. At the hearing, the defendants indicated that they wished to amend their answer to argue an alternative case based on proprietary estoppel. I therefore directed that the defendants should file a rejoinder to the reply in order to plead their case in proprietary estoppel. 22. A rejoinder was filed on 13 th July, 2016, containing the PE claim. In addition, and in the alternative paragraph 9 of the rejoinder pleaded as follows:- "Further and alternatively, whatever the precise circumstances in which Ms Carry permitted Mr and Mrs. Liston to occupy and maintain the strip of land since 1992 until 2015 without complaint, it is now unconscionable for Ms Carry to seek to exercise any legal rights (none being admitted) in order to (a) require Mr and Mrs Liston to vacate the strip of land and/or (b) now use the strip of land, that presently forms an integral part of the garden at Les Primavères, for some other purpose and/or (c) construct a boundary across the strip of land such as a six foot fence or hedge." 23. It is these claims that have been summarised as the PE claim. 24. Following the directions hearing on 5 th July, 2016, in light of an indication from me encouraging the parties to look to resolve their differences though mediation, Advocate Sharp wrote on 6 th July, 2016, to Advocate Falle, again on a without prejudice save as to costs basis, stating "I am therefore writing to confirm that Mr and Mrs Liston would wish to engage in mediation and they will consider a UK based mediator proposed by Ms Carry." 25. On 4 th August, 2016, Advocate Sharp wrote to Advocate Falle informing Advocate Falle that his clients did not wish to pursue their PQ claim but they would continue to pursue the PE claim and would fix dates for trial. 26. In response to this letter Advocate Falle indicated he did not have any objection to the PQ claim being withdrawn but wanted to be heard on the question of costs, as he wanted an order that his client's costs be paid on an indemnity basis. He also rejected the proposal that the question of costs of the PQ claim be deferred until conclusion of the proceedings. 27. On 15 th August, 2016, Advocate Falle also proposed a compromise. It is not necessary for this decision to set out the terms of that proposal because the litigation is on-going. 28. Advocate Sharp replied by a further without prejudice save as to costs letter dated of 25 th August, 2016. The final sentence of his letter stated as follows:- "In my view, your client's offer strongly suggests that a resolution to the case is readily achievable but there appears to be matters of the detail that are difficult if not impossible to resolve by correspondence

exchanged between the parties' lawyers. The parties could sensibly arrange a one day mediation in October which would resolve this case without the further disproportionate cost and expense of continued litigation. We invite you to propose an independent mediator from the United Kingdom given Mr Liston's position." The parties' contentions 29. Advocate Falle for the plaintiff contended as follows. 30. The defendants' PQ claim was bound to fail, firstly, because of the recognition of the boundary between the properties of the parties by the 1986 contract, to which a predecessor in title of the defendants was a party. The 1986 contract and the recognition of the boundary adjoining the strip of land was inconsistent with adverse possession and the PQ claim. 31. The first affidavit of the defendants dated 23rd July, 2015, was also inconsistent with the PQ claim as it recognised the plaintiff's title to the strip of land. Paragraph 3 states as follows:- "3. We understand that the Property borders (amongst others) on its South-Eastern side onto a strip of land forming part of the property called "Les Arbres" now belonging to Joyelle Ann Carry (having right thereto by contract of purchase dated 29th May 1987 from Riada Limited) lying between the South-Eastern edge of the garden forming part of the Property and the foot of the bank forming part of Field 942, Trinity ("the Strip of Land")." 32. The defendants had failed to respond to the points raised by Advocate Falle's letter of 4th December, 2015. 33. The defendants, when they moved into the property, must have known that the strip of land was a jungle and would not have been occupied which knowledge was inconsistent with the claim for adverse possession. The defendants' knowledge was also clear from the second defendant's affidavit sworn on 9th September, 2016, where she is said to have described the strip of land as overgrown. 34. The locations of the boundary stones was always deemed to be known by the defendants because they were known to Maurant Ozannes who acted on the purchase of the property by the first defendant's employer in 1992. Had a review been carried out of the relevant file at Maurant Ozannes (then Maurant du Feu and Jeune) the plan that showed the locations of the boundary stones would have made the question of ownership of the strip of land clear. The defendants acted unreasonably by commencing proceedings without reviewing the files of Maurant Ozannes. 35. All the affidavits sent by Le Gallais & Luce were virtually identical and had clearly been produced by Le Gallais & Luce. The defendants should have realised what the actual position was. 36. At best the defendants occupied the property between 1992 and 1996 as licensees. As licensees they could never establish any adverse possession. 37. Given the defendants' own knowledge of the state of the strip of land they should have seen that the affidavit of Marion Brown formerly Mrs Le Flem was flawed. 38. The plaintiff was forced into the stance she took because of the aggressive correspondence received from Le Gallais & Luce, in particular their letter of 1st September, 2015. 39. There was no overlap between the PQ claim and the PE claim. The plaintiff should therefore receive her costs on an indemnity basis in relation to the PQ claim. 40. The basis for ordering indemnity costs was set out in *Dick v Dick*

[1990] JLR Note N2c where Le Quesne JA stated:- "We appreciate those circumstances but it appears to us that if for reasons of his own, whether good or bad, a party who has instituted proceedings subsequently decides to drop them before they come into Court, it

is fair that he should pay for that conduct the price of compensating the other party by way of indemnity costs." 41. Ultimately Advocate Falle did accept that the Court had a discretion which had to be exercised judicially and fairly. He argued however that costs had been incurred which should have not been incurred which justified an indemnity costs order. 42. Advocate Sharp contended in response that Le Gallais & Luce, before commencing proceedings, in obtaining affidavits and sending those to the plaintiff, had acted reasonably. His clients had not therefore charged into litigation but had taken time to obtain evidence. 43. His clients also acted reasonably through him in reviewing that evidence which led to the defendants no longer being able to rely on the evidence of the previous owner. His clients acted reasonably in recognising the effect of this evidence and in withdrawing the PQ claim. 44. Advocate Sharp was critical of the plaintiff for not responding to the evidence filed by Le Gallais & Luce in particular for not setting out before 15 th September, 2016, the matters set out at paragraph 3 of the plaintiff's affidavit. The implication in paragraph 3 is that the strip of land was unoccupied between 1987 and 1992 when the first defendant's employer acquired the property. Advocate Sharp's contention was that this evidence could have been set out by the plaintiff much earlier and in response to the affidavits filed by Le Gallais & Luce. Had that occurred the position could have been revisited with the owner at the time, Marion Brown and the cost of the PQ claim avoided. 45. Instead, the response received as set out in the letter of 4 th December, 2015, was based on legal argument, rather than factual evidence. 46. He did not accept that the effect of the 1986 contract was conclusive. The concept of adverse possession was about occupation not ownership. Recognition of the boundary stones did not necessarily mean that the defendants could not have established 40 years' worth of adverse occupation in support of the PQ claim. The claim was being withdrawn, not because of the effect of the 1986 contract, but because evidence of adverse possession for 40 years could no longer be adduced. 47. It did not matter that the current defendants had only occupied as licensees. Licences could still occupy part of a property to establish adverse possession. 48. He therefore argued there should be no costs order either at all or at least up to the 6 th May, 2016. Thereafter, if a costs order was to be made, he accepted that any order should be standard costs until the date the proceedings were withdrawn. 49. Paragraph 3 of the affidavit of the defendants dated 23 rd July, 2015, was simply ambiguous. It was not a recognition of the plaintiff's title; rather it was poor drafting. The reference to the plaintiff having the right could equally be read as having the right to Les Arbres as distinct from the strip of land. In any event, the remainder of the affidavit made it clear that it was the defendants' case that they had occupied the strip of land and it formed part of their property. The construction of paragraph 3 argued for by the plaintiff was therefore inconsistent with the remainder of the affidavit and did not stand up to analysis. 50. Insofar as the defendants, through the affidavit of the second defendant sworn on 15 th September, 2016, had described the gardens being "incredibly overgrown", this was a general reference to the entire property and could not be taken as being inconsistent with the claim for adverse possession. 51. The suggestion that the defendants should have reviewed the files of Mourant-Ozannes and recovered the drawing showing the location of

the boundary was in effect requiring the defendants to carry out a full discovery exercise before commencing proceedings. This was not a proportionate response. What was proportionate was the approach taken of obtaining affidavits from the previous owners. 52. Advocate Sharp was critical of the plaintiff for failing to respond to his offer of a meeting set out in his letter of 12th February, 2016, and failing to respond to later proposals of mediation. He therefore contended that a party could be deprived all or part of its costs if it unreasonably refused to engage in mediation, citing *Halsey v Milton Keynes General NHS Trust*

[2004] 4 All ER 920 . I drew to the parties' attention that *Halsey* had been applied in *Bespoke Investments Limited v Lincoln Nominees Limited & Ors*

[2005] JLR Note 29 which states as follows:- "Civil Procedure-costs-refusal of mediation A successful party may be deprived of all or part of its costs if it unreasonably refuses to engage in mediation (*Halsey v. Milton Keynes General NHS Trust*,

[2004] 4 All ER 920 ;

[2004] EWCA Civ 576 , applied; *Hurst v. Leeming*,

[2003] 1 Lloyd's Rep 379 ;

[2001] EWHC 1051 (Ch) , dicta of Lightman, J. considered). When determining the reasonableness of the refusal, the following factors may be relevant: whether mediation has a realistic prospect of success; the character of the litigants; the costs to be incurred in preparing for mediation, which may be disproportionate to the costs of preparing for trial, particularly if an offer to mediate is made late in the proceedings; and whether mediation may result in an unacceptable delay in the final resolution of the dispute. Litigants and counsel must, however, bear in mind that mediation is often a cost-effective and appropriate way to resolve disputes, and counsel should consider routinely whether it may be suitable ." [Emphasis Added] 53. It was not an automatic rule that costs should always be paid on an indemnity basis and it was clear from the decision of Commissioner Page in *Volaw Trust and Corporate Services Limited & Larsen v The Office of the Comptroller of Taxes & Ors*

[2013] JRC 148C , that the Royal Court did not regard *Dick v Dick* as the final word and rather took the approach that it had a broad discretion. 54. Any taxation should in any event be stayed as there was clearly an overlap between the PQ claim and the PE claim at least in respect of evidence from 1992 onwards. Decision 55. I start by reference to the applicable legal principles. I agree with Advocate Sharp that I possess a broad discretion as to what costs order to make. The quotation in *Dick v Dick* referred to above therefore is an indicator as to the approach that might be taken. However it is not a hard and fast rule. As Commissioner Page in the *Volaw* decision stated at paragraph 14:- "14. There are two points here. As regards the Appellants' contention that the discontinuing party must always bear the costs of the other party, this is at variance with the decisions of the Royal

Court in two cases: Jersey Financial Services Commission-v-A. P. JFSC v. Black (Jersey) Limited & Ors.

[2007] JLR 1 and SGI Trust & Anor.-v-Wijsmuller & Ors

[2008] JRC 078 , in each of which defendants were to some extent denied their costs. Now it is true, as the Appellants point out, that in neither case does Dick-v-Dick appear to have been cited. But both cases were decided subsequent to the re-consideration of the Royal Court's approach to costs twelve years later in Watkins-v-Egglishaw and in each case the Court's decision made specific reference to and was evidently informed by Watkins-v-Egglishaw. In any event, in Dick-v-Dick the discontinuing party's submissions as regards costs appear to have turned exclusively on his reasons for withdrawing; and it is plain that in Cotrel the learned Commissioner was influenced by the fact that the reason for the withdrawal of the proceedings was that they had been issued and interim injunctions had been obtained "in haste" and "without proper prior investigation": in neither case were the circumstances of the kind that gave rise to the decisions in JFSC-v-Black and SGI. I do not accept therefore that the latter decisions are of doubtful authority as the Appellants contend they are. Even if Dick-v-Dick had been cited in those cases it is difficult to think that it would have led to any different conclusions. Other matters apart, it is plain from the report in Cotrel that had it been a case of the defendant bringing proceedings on herself, the result might have been different (paragraphs 20 and 28). And the fact that Dick-v-Dick was referred to by Commissioner Clyde-Smith again in his very recent decision in Marange Investments-v-La Generale des Carrieres et des Mines 19th June 2013 (Unreported) is neither here nor there given that the only point in issue in that case was whether costs should awarded on the indemnity or the standard basis. It is also true that the circumstances of the present case are of a different kind again from those that arose in JFSC-v-Black and SGI, but they are, in my view, entirely legitimate considerations on the basis of the modern approach of the courts in this jurisdiction towards costs." 56. The first question I therefore have to decide is whether or not I should make a costs order at all. In my judgment I consider I should. In this case the defendants brought the PQ claim against the plaintiff, which claim has been withdrawn. Costs will have been incurred in addressing this claim. If the PQ claim had not been brought then these costs would not have been incurred. I do not therefore consider it would be a fair exercise of the discretion vested in me not to make any order as to costs, or to defer any order for costs until trial. A claim has been brought and withdrawn which ordinarily justifies a costs order in the other party's favour. I see no reason to depart from that practice in this case. 57. The next question concerns what costs order I should make i.e. standard costs or indemnity costs. In this case the defendants in my view took a reasonable approach by obtaining evidence in advance and sending that to the plaintiff to respond. Regrettably the plaintiff did not do so although she could have done. Instead, the plaintiff's response was mainly based on a number of legal arguments. However what the plaintiff did not do was respond to the factual evidence obtained which suggested a claim of adverse possession. Yet it can be seen from the affidavit the plaintiff ultimately swore in September 2016 at

paragraph 3, that it would have been open to her to challenge the evidence provided to her in August 2015 to say that the evidence was incorrect and that the period of adverse possession claimed had been interrupted because there was no adverse possession at least from 1987 until 1992. I accept that the letter of 4 th December, 2015, contained some factual assertions but these were not a response to the affidavits filed in the way set out in the plaintiff's affidavit sworn in September 2016. 58. Instead, the main thrust of the plaintiff's response was to set out legal arguments as to why the defendants' PQ claim would fail. I am unable to regard these legal arguments as conclusive. I consider that the effect of the 1986 contract in connection with the boundary between the parties, might have been viewed by the Royal Court as being inconsistent with a claim for adverse possession, but it might not. Similarly, the fact that the defendants between 1992 and 1996 may only have occupied the strip of land as licensees on behalf of the owner (the first defendant's employer) does not mean that such occupation could not be adverse. The occupation would be that of the employer acting through the defendants as licensees. Again this was an arguable point. 59. The defendants also acted reasonably, through Advocate Sharp, in reviewing the evidence obtained by Le Gallais & Luce and by withdrawing their claim. It appears to me to be unjust to visit a an indemnity costs order on the defendants when they obtained evidence which the plaintiff had not responded to, whose Advocate reviewed that evidence, and who then withdraw part of their claim when evidence previously relied upon no longer came up to proof. 60. Accordingly generally I consider the just result having regard to all of the above leads to the conclusion that the plaintiff should recover her costs on the standard basis. 61. The observations in the preceding paragraph must however be subject to one qualification. The defendants knew by 6 th May, 2016, that the former owner's evidence supplied by Le Gallais & Luce could no longer be relied upon. Yet, the decision to withdraw the PQ claim was only communicated to the plaintiff on 4 th August, 2016. In the intervening period, there had been correspondence about the PE claim and a directions hearing. From the chronology set out above it is therefore clear that the defendants were considering and analysing their case between the time Advocate Sharp reviewed the evidence with the witnesses obtained by Le Gallais & Luce and the directions hearing on 5 th July, 2016. In my view therefore the defendants should have withdrawn the PQ claim earlier than they did and should have withdrawn that claim at the latest by the end of May 2016. Accordingly, I am of the view that it was inappropriate for the PQ claim to have continued after this time and therefore from 1 st June, 2016, onwards the plaintiff should recover her costs on an indemnity basis. 62. In making the orders I have made, I was not persuaded by the submission that the defendants should have reviewed Maurant Ozannes' file. As set out above the defendant through Le Gallais & Luce took reasonable steps in proofing witnesses. The obtaining of the entirety of Maurant Ozannes file in my judgment was a discovery exercise and did not have to be carried out before the defendants set out the basis for their PQ claim in a letter before action. The defendants in setting out their claim in the way they did supported by affidavits acted reasonably as I have set out above. 63. I was also not persuaded by the argument that the first affidavit of the defendants recognised the plaintiff's title to justify

making no cost order. In my judgment paragraph 3 of this affidavit was ambiguous and arose out of poor drafting. The construction of paragraph 3 argued for by Advocate Falle also does not sit with the contents of the remainder of the affidavit. 64. I was also not persuaded by the argument that the plaintiff should have agreed to mediate the PQ claim. A refusal to mediate a claim that is subsequently withdrawn is not in my judgment a relevant factor to justify depriving a plaintiff of a costs order in its favour and so the principle in *Bespoke* and *Halsey* does not apply. However I address below my observations in relation to mediation of the PE claim because this arose in the course of submissions. 65. I next have to consider whether I should order a taxation of costs or whether assessment of costs should be stayed until determination of the PE claim. The decision I have reached is that the assessment of costs should be stayed. 66. This is firstly because there is an overlap between the PQ claim and the PE claim from 1992 onwards. The evidence relied upon by the defendants in support of their PE claim is essentially the same evidence relied upon in support of their now abandoned PQ claim in relation to their occupation of the property since 1992. This overlap can also be seen from paragraphs 8, 10 and 11 of the reply set out above. For a taxation to occur at this stage would therefore involve making a judgment on whether the costs of obtaining such evidence related to the PQ claim, the PE claim or a combination of the two. This could involve the parties having to make submissions in respect of evidence still to be reviewed by the Royal Court when it tries the PE claim. 67. Moreover, such an exercise may not be necessary. If the plaintiff prevails and defeats the PE claim then she would ordinarily receive a costs order in her favour. If that were to happen then there would be no difficulty on any taxation of any division of costs between the PQ claim and the PE claim. 68. Furthermore, there is no evidence before me, and Advocate Falle did not contend otherwise, that the plaintiff could not afford to meet the costs she had incurred, and therefore she would suffer hardship if costs were not awarded and assessed. Obviously this position does not mean that the plaintiff will not be out of pocket until determination of the PE claim. I accept she will be out of pocket. What was not argued before me, however, was any case of hardship which might have justified a taxation taking place at this stage, notwithstanding the potential difficulties such a taxation might entail. 69. Finally, if the defendants prevail in the PE claim, there may also be a costs order in their favour. This possibility could mean that a negotiated compromise might take place in relation to costs because of the fact that a costs order in the plaintiff's favour would be set off against a costs order in the defendants' favour thus reducing the amount one party might recover on taxation significantly. This is also a reason to justify delaying assessment of the costs order I have made. Mediation 70. Finally, it is appropriate to set out certain observations in relation to mediation given the offers of mediation made by the defendants. While a party not agreeing to take part in a mediation in respect of a claim that is withdrawn is not a factor that justifies depriving that party of costs, the position in respect of the PE claim is different. This is a dispute absent agreement, which can only be determined at trial. It is also a dispute between neighbours. This is a classic territory for mediation to take place. As the head note in *Bespoke* makes it clear counsel should

consider routinely whether mediation may be suitable. I also agree completely with the observations in the final paragraph of Advocate Sharp's letter of 12 th February, 2016, set out at paragraph 14 above. It is well known that mediation allows parties to explore matters that cannot be resolved by Court proceedings. Ultimately, the decision of the Royal Court in this case will be stark. Either the plaintiff or the defendants will be successful. Yet such an outcome, even for the successful party, will not resolve or address the friction that the dispute has caused. Mediation is an opportunity to do so and allows the parties to address their ongoing relationship as neighbours that the Court process can never resolve and in a manner that will not occur at trial. A trial is about determine rights. A settlement by contrast is an agreement as to how the parties wish to regulate their affairs for the future and does not require a determination of rights or a decision as to who is the winner and who is the loser. In addition, while this may be a lesser concern in this case, both parties will also be out of pocket to a greater or lesser degree financially whatever the result. A compromise of a dispute sooner rather than later always saves costs and expense. Finally a review of a number of well-known judgments of the Royal Court and the Appellate Courts makes it clear how boundary disputes between neighbours can incur costs running into many thousands if not tens of thousands of pounds. Exploring an alternative to such an outcome is almost always desirable. 71. The above observations do not mean that a party, if it ultimately chooses to do so, cannot elect to have its day in Court. Ultimately, any party has a right to proceed to trial to have their dispute determined. However, mediation has real potential benefits; this is why a party who unreasonably refuses to mediate can face adverse costs consequences. 72. In this case, there remains sufficient time for the parties to try to resolve their differences through mediation before trial. While I did not therefore order a stay to enable mediation to take place, I did order the plaintiff, if she does not wish to take part in the mediation offered by the defendants, to file with the Judicial Greffier for consideration by the trial judge an affidavit setting out her reasons for such a refusal, which affidavit to may be taken into account by the trial judge when considering the question of costs.

Conclusion

73. For the reasons set out in this judgment I have reached the following conclusions:- (i) The defendants shall pay the costs of the plaintiff in relation to the PQ claim on the standard basis up to 31 st May, 2016m and thereafter, until withdrawal of the PQ claim on an indemnity basis; (ii) Taxation of such costs is stayed until after trial of the PE claim; (iii) The plaintiff, if she does not wish to take part in the mediation offered by the defendants shall file an affidavit with the Judicial Greffier setting out her reasons for the trial judge to consider when dealing with costs following the trial and the Royal Court's

judgment.

Authorities *Dick v Dick*

[1990] JLR Note N2c. Halsey v Milton Keynes General NHS Trust

[2004] 4 All ER 920 . Bespoke Investments Limited v Lincoln Nominees Limited & Ors

[2005] JLR Note 29 . Volaw Trust and Corporate Services Limited & Larsen v The Office of the Comptroller of Taxes & Ors

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CASE PAGE <https://chat.esheria.ai/case-law/jersey/carry-v-liston-2016-jrc-203b-08-november-2016>

Prepared on 23 October 2026 · Esheria