

JERSEY / JUDGMENT

Flynn v Reid [2012] JCA 169 (26 September 2012)

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Court of Appeal 26 September 2012 Before : Sir Michael Birt, Bailiff, President; The Hon. Michael Beloff, Q. C., and; R. J. Collas , Esq. , Bailiff of Guernsey. Between Rosemary Flynn Plaintiff And George Reid Defendant Appeal against the costs order made by the Deputy Bailiff on 14 th May, 2012. Leave to appeal was granted by the Deputy Bailiff on 24 th June, 2012. Advocate C. Hall for the Appellant Advocate J. N. Heywood for the Respondent The Bâtonnier, Advocate Redgrave and Advocate Corbett for the President of the Law Society, The Solicitor-General for the Attorney-General (Convened parties)

JUDGMENT

beloff ja: Beloff JA delivered the first judgment of the Court at the request of the President. 1. This is an appeal against an order for costs made by the Deputy Bailiff on 14th May, 2012 when he:- "(1) ordered that the Defendant shall pay 60% of the Plaintiff's costs, such costs not to exceed £16,000; and (2) ordered that the Plaintiff shall pay 40% of the Defendant's costs, such costs not to exceed £8,000." ("the Costs Order") Leave to appeal was given on 24th July, 2012 by the Deputy Bailiff on the basis that the third proposed ground of appeal, namely that the Court erred in taking into account the fact that the parties were on legal aid, "raises access to justice considerations which is (sic) a matter of public importance and public interest." 2. The dispute, the background to the Costs Order, involved two former co-habitants; the Appellant (represented by Viberts) and the Respondent (represented by Applebys), and their interests in a property known as 6 Le Petit Pre, Rue des Pres ("the property") or the proceeds of sale thereof. The Appellant sought orders:- " i . that the Defendant be ordered to sell the Property and the Plaintiff receive general damages to compensate her for breach of contract together with interest on such sum and/or be paid 50% of the total equity of the Property or such other proportion as the Court deems just in all the circumstances of the case; ii. that the Plaintiff be granted Special Damages in the sum of £3,725.00. Such payment is to compensate the Plaintiff for her loss of her share of the contents of the house which were jointly owned by the parties; iii. interest on the sum of £3,725 referred to in paragraph ii above; iv. such other relief as the Court may deem just; and v. that the Defendant pay the Plaintiff's costs of and incidental to this action." After a three day hearing on 9th, 10th and 11th January 2012, the Royal Court held that the Appellant was entitled to 40% of the net equity in the property, being the sum of £92,237.90 in respect of the sale proceeds of the property. She had advanced in support of her case four grounds; breach of contract; proprietary estoppel;

constructive trust; and unjust enrichment, of which the Court accepted only the fourth. 3. The Appellant argued that she should be awarded her costs on the standard basis. The essence of her submissions was that:- (i) she had 'won' overall in that she had been awarded £92,237.92 in satisfaction of her interest in the Property; (ii) she had beaten any Calderbank Offer made by the Respondent; and (iii) she had herself offered to settle these proceedings for a sum lower than that ultimately awarded. 4. The Respondent argued that there should be no order as to costs. The essence of his submissions was that:- (i) the Appellant was unsuccessful on the majority of her arguments and those in which she was unsuccessful had entailed the greatest amount of work/expense; (ii) the matter was quasi-matrimonial in nature and the normal order in matrimonial proceedings is that each party bears its own costs; and (iii) the position of the parties, including the fact that both are legally aided and that the case raised novel issues of law, pointed to no order as to costs being in all the circumstances the most appropriate order. 5. On 14th May 2012 in an ex tempore judgment ("the ex tempore judgment") the Deputy Bailiff articulated the reasons for his split order as follows:- "As will be apparent from the time spent considering this matter, this is a question, which we find very difficult. It is quite clear that some novel points of law were being argued in this case. It is also clear that the Plaintiff has succeeded in the sense that she now has, according to the calculations given to us, £92,237.92, which she did not have before she commenced her action and the action was therefore justified. The fact that without prejudice offers were put in at £60,000, on her part, has little relevance but what the without prejudice discussions do show is that there is nothing that the defendant can put forward as to saying why the plaintiff has acted unreasonably. She clearly has not acted unreasonably in the sense that she brought her action and that has been justified. Nonetheless, she has run arguments, three quarters of which, on the main issues failed and I have to take that into account. I also note that although it is not a matrimonial case the parties treated themselves as a couple and there is at least some attraction in the Court treating them the way they wanted to treat themselves. If it were possible to make an order that suggested that the Defendant should meet 60% of all the costs on both sides and the Plaintiff should meet 40% of all the costs on both sides that would be an order which frankly would meet the justice of the position as the Court sees it. I take into account that Appleby have capped their costs at £20,000 and Mr Heywood, as I say, I take that into account that it is on your assurance that that is the maximum sum that Appleby will be charging in any event in this particular case. And while I cannot interfere in the arrangements between Viberts and their client I have an expectation that that firm will want to cap their fees at no higher than the same level as Appleby. That is one of the reasons for the decision of costs which is about to be made. The second reason is that fairness to the Defendant is such that his success on three of the four main issues needs to be recognised as well as fairness to the Plaintiff in recognising that she has a proportion of funds which she did not have before she started her action and as I say, I take into account that this was an argument in a novel area of law. In the circumstances, the order is going to be that the Defendant should pay 60% of the Plaintiff's costs with a cap of £16,000 and there is an order that the Plaintiff should pay 40% of the Defendant's costs with a cap of £8,000. If the Plaintiff's costs are the same as those of the Defendant's that will result in 60% overall being paid by the Defendant and 40% overall being paid by the Plaintiff which would meet, what we consider, to be the justice of the position in

relation to costs and Mr Baxter I hope that the partner colleagues in your firm will take those comments very much on board." 6. On 18th June 2012, in a full judgment ("the full costs judgment") delivered at the request of the Appellant so she could consider an application for leave to appeal the costs order, the Deputy Bailiff articulated his reasons more fully as follows:- "As the full judgment on the merits shows, the Plaintiff brought her claims to a proportion of the sale proceeds of the Property on four different grounds. She was unsuccessful on three of them. In relation to the grounds upon which she was unsuccessful, there were subordinate arguments such as the claim for waiver and contractual variation, which made the unsuccessful grounds more expensive to deal with. The Plaintiff has succeeded in the sense that she has a judgment for a sum of money which previously she did not have, but on the other hand she has lost at least three quarters of the main issues which she litigated in the case. By indicating without prejudice that she was prepared to settle for the sum of £60,000 when in fact the award granted to her was in excess of that sum, the Plaintiff has put herself in the position of rightly being able to say that the costs were incurred unnecessarily from the moment of that offer. Nonetheless, the fact that costs might have been incurred unnecessarily does not justify incurring costs on the unsuccessful parts of the claim, because those costs were unnecessarily incurred on two counts, one on the Plaintiff's side, the other against her - both because the Plaintiff's offer should have been accepted, and secondly because the Plaintiff in fact failed on those arguments. So those are the first litigation factors which I took into account. In accordance with the principles set out in Pell Frischmann Engineering Limited -v- Bow Valley Iran Limited and others

[2007] JLR 479 , it is permissible to take into account that a successful party has raised issues on which it was unsuccessful thereby causing a significant increase in the length or costs of the proceedings. Here, the increase in costs was not attributable to the time taken in relation to the evidence, because that was much the same on all grounds, but it is attributable to the research, preparation and argument upon those grounds. Secondly, I took into account that these were quasi matrimonial proceedings. I put it that way because, as the judgment itself makes plain, the parties treated themselves as a married couple and there is at least some attraction therefore in the Court treating them the way they wanted to treat themselves. Now of course the Court does not necessarily order costs to be split equally in all matrimonial cases. There is a discretion to be exercised - sometimes it may be right to make no order as to costs, and on other occasions it may be right to order one or other party to pay all or some of the costs. In R -v- G

[2006] JRC 112 , Birt DB accepted the submission of the petitioner that the Court adopts a more flexible approach in matrimonial causes than in others. He referred to the English case of Gojkovic -v- Gojkovic (No. 2)

[1992] 1 ALL ER 267 the headnote of which reads: "Although the award of costs in the family division prima facia followed the event, as in other divisions of the High Court, that presumption was displaced more easily than in other divisions and might be affected by the behaviour of a party in failing to disclose material documents or assets, the incidence of legal aid and the inadequacy of available assets, especially if children were involved."

The Deputy Bailiff went on to refer to the comments of Butler- Sloss LJ at page 271 where she said:- "In many cases, the incidence of costs has a marked impact upon the availability of sufficient funds for the needs of the family. It may substantially diminish the cake which has to be cut. In some cases, those costs are specifically allowed for in these substantive orders made. The ambit and extent of the discretion of the Court is consequently, and rightly, far wider than in other civil proceedings." In R-v-G

[2006] JRC 112 , the Court also referred back to the case of J-v-M 2002/127, where Bailhache Bailiff said at paragraph 2:- "While the ordinary rule that costs should follow the event is an important consideration it must be subordinated, in my judgment, in this type of case to the need to justice between the parties." The present case is one where an unmarried couple have parted and disagreement has arisen as to the extent to which the Plaintiff could claim a share of an asset - perhaps I can refer to it as a quasi matrimonial asset - which was registered in the name of the Defendant alone. Given the absence of precedent directly applicable, it is in a sense unsurprising that such argument arose. The fact that there was argument is not of itself a matter to be held against either party. Neither party's conduct was the subject of substantial enquiry before the Court. Neither party has misconducted the litigation itself. The Court was faced with claims in novel areas of law in the sense that there is no indication that similar claims had previously been brought before the Courts of this jurisdiction . (my emphasis) In the event the Court decided that the justice of the matter lay in finding that the Defendant had been unjustly enriched, and in ordering him to account to the Plaintiff for 40% of the net equity in the property. In order to reach that figure, the Defendant was entitled to repayment of his own capital contribution with interest calculated thereon. If one had regard to the sale proceeds of the Property less the costs of sale and the amount due to the Royal Bank of Scotland International by way of repayment of loans, the Defendant had approximately 70% of the net; but regarding his capital contribution as a debt due by the two of them, then he had 60% of the equity as I have said. Taking all these matters in the round, the justice of the case required in my view an order that the Plaintiff pay 60% of the costs incurred on both sides, and the Defendant pay 40% of the costs incurred on both sides. At that point however, the uncertainties of the legal aid scheme became relevant. Advocate Heywood had informed me that although the Defendant was on legal aid, the fees which would be charged to the Defendant had been capped at £20,000. On the basis that a party can only recover in costs an amount equal to that which he has expended, there was no basis for suggesting that the Plaintiff should ever have to pay more than 40% of £20,000, even if the amount that might be due on an advocate and own client basis might be nearer £60,000. On the other hand, Advocate Baxter said he was not in a position to let me know what the Plaintiff's exposure to fees might be. It followed that an order that the Plaintiff pay 40% of the Defendant's costs and the Defendant pay 60% of the Plaintiff's costs might end up with the Defendant bearing a very much greater overall percentage of costs than the Plaintiff. This did not seem to me to be fair, given that on the substance of the argument, the Defendant had been successful in three quarters at least of the major issues. (my

emphasis) The way I resolved to handle that possible inequity was to insert a cap in the costs exposure of each party. As far as the exposure of the Plaintiff was concerned, that was easy in the sense that Advocate Heywood had confirmed that the Defendant's exposure to costs was limited to £20,000. Accordingly, 40% of that figure meant that a cap on the costs which the Plaintiff should pay towards the Defendant would be £8,000. I had no such information in relation to the costs incurred by the Plaintiff with her lawyers. They might well be higher than £20,000, and as I indicated in the *ex tempore* reasons which were given, while I recognised that it was not possible for me to interfere in the arrangements between Messrs. Viberts and their client, I expressed an expectation that Messrs. Viberts would cap their fees at the same level as Messrs. Appleby. However, recognising that that might not be the result, and recognising also that the Defendant had received 70% overall of the sale proceeds of the Property, the cap which I put on the Defendant's contribution towards the Plaintiff's costs was not limited to £12,000 (60% of £20,000) but £16,000. This was a rough and ready calculation. If the Plaintiff's legal fees amount to something around £26,000, then the Defendant will be paying approximately 60% of them. If they are lower, because they are set at the same level as the Defendant's lawyers, the Defendant is paying a higher percentage. If they are higher than £26,000, there is a matter for negotiation between the Plaintiff and her lawyers, but ultimately I took into account that this sum represents a significant percentage of the amount in dispute, is not by any standards an insignificant sum for a three day hearing in any event and furthermore that there is no overall justice in meting any additional costs upon the Defendant given the way in which the arguments were advanced. For these reasons I placed a cap on the Defendant's liability for the Plaintiff's costs at £16,000 and a cap on the Plaintiff's liability for the Defendant's costs at £8,000. The result of that approach was that the Defendant has legal fees overall of some £28,000, in all probability, and the Plaintiff will have to make overall a contribution of at least £16,000 and possibly a higher figure depending upon the outcome of any discussions with her lawyers. I was advised that the Plaintiff was in receipt of legal aid and I therefore make the assumption that the Plaintiff's lawyers will be prepared to make some reduction in the charges which would otherwise have been made, were the Plaintiff legally aided. As Birt DB said in *R-v-G* at paragraph 18: "I see nothing wrong in [the Deputy Registrar] taking into account the fact that he was legally aided when having regard to the quantum of such an award." 7. It therefore appears that the Deputy Bailiff made the costs order in the form which it took for three main reasons, first that the Appellant had succeeded on only one out of four issues, thereby unnecessarily elongating the hearing and the time taken to prepare those points ("the partial success point"); secondly that the proceedings were in fact, if not in form, quasi-matrimonial proceedings ("the quasi-matrimonial point") - these two reasons explaining the split order and the percentages associated with it; and thirdly that both parties were legally aided ("the legal aid point") - the third reason exclusively explaining the capping (which reason was only clearly exposed in the full costs judgment). He considered the settlement offers made by the Appellant - in the phrase used in the *ex tempore* judgement "of little relevance" ("the settlement offer point"). 8. The Appellant

sought to appeal the costs order on grounds, which are reflected in the judgment granting leave ("the leave judgment") in which on 24th July 2012 the Deputy Bailiff articulated the reasons for that grant of leave as follows:- "I have had an application from the Plaintiff for leave to appeal based on 3 broad propositions: The first involves what is said to be a mistake of law as to whether there was a discretion to apply the costs rules differently in what is said to be a quasi family case and also if that discretion existed whether it was properly applied; As to the second, it is said that I wrongly had regard to the fact that the Plaintiff was unsuccessful on three out of the four grounds on which the claim was originally advanced. I am not persuaded that either of those two grounds would justify the giving of leave to appeal, because I am satisfied that the justice of the costs order was correct and therefore on those grounds leave to appeal would not be given; However, the third ground is that the judgment which I gave in this case wrongly takes into account that the parties were on legal aid. Mr Heywood argues that a cap on costs is not the same thing as a cap on fees and I have to say that speaking for myself I accept that submission. But it may have the effect that taking legal aid into account involves saying that the Court will inquire into private arrangements between the lawyer and the client because otherwise the question can be put rhetorically: how does the Court fully assess the justice of the costs order? I am dismayed by the operation of the legal scheme if it means what seems to me to be implied by what the Plaintiff says, namely that full fees, that is to say the Factor A fees and uplift can be recovered from the opposing party, even on legal aid, even though the lawyer could only recover Factor A fees from his or her own client. I am similarly dismayed if the operation of the legal aid scheme means, which seems to be implied, that a legal aid client can be represented for nothing if she loses, but charged Factor A rates if she wins, perhaps taking all the proceeds of her victory. But these are matters which can be enquired into by the Court of Appeal, and adjudicated upon if that is necessary . (My emphasis) It may sound harsh, and it is certainly crudely put, that many members of the public would say that lawyers might have to decide whether their job as professionals is to serve the clients they represent or whether it is as businessmen to exploit them. The Court will have to consider how best to accommodate the delivery of justice between these extremes, and that is not pointing a finger of accusation at any member present in this Court, how to accommodate the delivery of justice within these extremes with fairness to all. That is going to be a very, very difficult task, but I do consider that this issue raises access to justice considerations which is matter of public importance and public interest and that it is right that leave to appeal be given on this limited ground. It may well be that once the Court of Appeal is seized of the matter because leave to appeal has been given, the argument will be at large, but I express the hope that the exercise of discretion should stand in respect of the other matters, because that seemed to me to meet the justice of the case. The legal aid issue is, as I say, quite different, raising points of principle which ought to be ventilated in the Court of Appeal. So leave to appeal is given on that limited ground." 9. The Appellant's subsequent Notice of Appeal focussed exclusively on the legal aid context i.e. the third of the propositions referred to in those reasons, (the legal aid point), although the skeleton and oral argument resurrected the

other two (the partial success point and the quasi-matrimonial causes point), as well as broader themes of overall justice which embraced, inter alia, the settlement offer point. The extent of the appeal 10. There is a threshold issue as to the ambit of this appeal. The Court of Appeal (Jersey) Law 1961, Art. 13(1)(c)(ii) states that no appeal shall lie to the Court of Appeal on any issue as to costs without the leave of the court making the order. The Respondent submits that leave was refused by the Deputy Bailiff in respect of all matters save the legal aid point and therefore no other issues raised are before the Court of Appeal. 11. I reject this submission and accept, as the Deputy Bailiff did, that once leave to appeal has been given, the argument is at large so that all viable points are in play before us. I do so for the following reasons:- (i) No authority has been shown to us which suggests that the Deputy Bailiff is entitled to limit the leave on an appeal of a costs order. (ii) I do not construe Article 13(1)(c) of the Court of Appeal (Jersey) Law 1961 to do more than say that it is for the court of first instance to open the door to a costs appeal. Once it has done so, the Court of Appeal must be able within the limits identified below to consider all available arguments. (iii) Where leave to appeal to a Court can be restricted to particular issues, the rules expressly so provide: Royal Court Rules 2004, 16/2(8) dealing with judicial review. (iv) Rule 12(1) to (3) of the Court of Appeal (Civil) Rules 1964 provides:- "12 General powers of the Court (1) The Court shall have full discretionary power to receive further evidence on questions of fact, either by oral examination in court, by affidavit, or by deposition taken before the Viscount or on commission: Provided that in the case of an appeal from a judgment after hearing of any cause or matter on the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds. (2) The Court shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made, and to make such further or other order as the case may require. (3) The powers of the Court under the foregoing provisions of this Rule may be exercised notwithstanding that no notice of appeal or respondent's notice has been given in respect of any particular part of the decision of the court below or by any particular party to the proceedings in that court, or that any ground for allowing the appeal or for affirming or varying the decision of that court is not specified in such a notice; and the Court may make any order, on such terms as the Court thinks just, to ensure the determination on the merits of the real question in controversy between the parties." On its face this gives the Court the widest power to deal with matters which come before it, even (notably) where not raised in a Notice of Appeal. (v) Although it is correct that the legal aid point bears only on the capping, it would be contrary to the interests of justice if the Court of Appeal, perceiving a manifest error in the exercise of discretion in relation to the other points, was impotent to rectify the costs order. Were there errors of principle in the costs order? 12. By way of preface I note, as is common ground, that the award of costs indeed involves the exercise of a discretion pursuant to Civil Proceedings (Jersey) Law 1956 Article 2 which provides:- "(1) Subject to the provisions of this Part and to rules of Court made under the Royal Court (Jersey) Law 1948, 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." 13. In *Watkins and another v Egglshaw and four others*

[2002] JLR 1 ("Watkins") Commissioner Page set out the principles which, in his view, ought to guide the Court in the exercise of its discretion when considering the issue of costs:- "7 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 still 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 as 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 (No.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. 8 Among the factors to which a court may have regard, two in particular should be mentioned at this point. The first is conveniently expressed in the passage of the judgment of Judge, L. J. in *Ford v. G. K. R. Construction Ltd.* (with which Lord Woolf, M. R. and Pill, L. J. agreed), in which he said ([2000] 1 W. L. R. 1400): "Civil litigation is now developing into a system designed to enable the parties involved to know where they stand in reality at the earliest possible stage, and at the lowest practicable cost, so that they may make informed decisions about their prospects and the sensible conduct of their cases. Among other factors the judge

exercising his discretion about costs should consider is whether one side or the other has, or has not, conducted litigation with those principles in mind." After referring to the trial judge's reasons for making the order, he continued (*ibid.*, at 1402): "Indeed his judgment has served to underline the importance, rightly and increasingly, to be attached to civil litigation being conducted openly between the parties with the real issues between them efficiently and quickly identified and investigated ..." The case in question was one in which the trial judge had, quite properly in the opinion of the English Court of Appeal, awarded a successful plaintiff the entirety of her costs notwithstanding that she had failed to beat the payment in, but the principle was plainly intended to be of more general application. Secondly, it may also be appropriate for a court to have regard to the fact (if such be the case) that a defendant has to a greater or lesser extent brought the action on his own head. Authority for the proposition that this can be a legitimate factor to take into account is to be found in a clutch of decisions of the English Court of Appeal in the late nineteenth and early twentieth centuries which include, among others: *Angus v. Clifford*, *Bostock v. Ramsey* *Urban Council* and *Ritter v. Godfrey* (8). In each of these cases the court recognized that, in exercising a discretion in relation to costs, a court was not confined to looking at the conduct of the parties during the course of the litigation itself but was entitled to have regard also to the earlier circumstances. Although it is now necessary to treat older authorities on costs with caution, the general point made in those cases is, in my view, still a perfectly valid one. A relatively recent application of the point can, for example, be found in the decision of the English Court of Appeal in *Walker v. Daniels* (11), in which the successful appellants were refused their costs because, in the words of Lord Woolf, M. R., they had "brought the appeal on themselves as a result of the way the matter was conducted in the court below." Such an approach in civil cases would also be broadly consistent with that of the Royal Court in criminal proceedings: *Romeril*

- v. Att. Gen." He referred again to these principles in *Pell Frischmann Engineering Limited v Bow Valley Iran Limited*

[2007] JLR 479 ("Pell Frischmann "). I take this opportunity in the Court of Appeal to endorse these observations. 14. As stated at paragraph 7 of *Watkins* , the principles are broadly in accordance with *Re Elgindata* (No.2)

[1992] 1 WLR 1207; [1993] 1 All ER 232, a decision of the English Court of Appeal which predated the Civil Procedure Rules, although with additional flexibility now that the overriding objective is engaged. *Elgindata* is itself summarised at paragraph 3 of the judgment in *Watkins* and draws a distinction between two different situations (that a party may be deprived of his costs where he raises issues on which he fails even though he has succeeded overall) and (that he may be ordered to pay the unsuccessful party's costs if he raises issues or makes allegations improperly or unreasonably). The Royal Court has indeed in practice tended to draw a distinction between these two forms of costs orders. See for example *Café de Lecq v Rossborough*

- [2011] JRC 071 . It is not (and never was) necessary to show unreasonable conduct to trigger the former and less severe of the two: and the dictum of Lord Woolf MR in *AEI Rediffusion Music Limited v Phonographic Performance Ltd*
- [1999] 1 WLR 1507 at 1522 insofar as it suggests otherwise should be treated with caution. 15. The exercise of a discretion such as that in awarding costs is immune from review by the Court of Appeal unless vitiated by matters almost too well known to repeat (*United Capital Corporation v Bender*
- [2006] JLR 269) i.e. that the Court of Appeal should only interfere if it is satisfied that one or more of the following has occurred:- (i) the judge misdirected himself with regard to the principles in accordance with which his discretion should be exercised; (ii) the judge, in exercising his discretion, has taken into account matters of which he ought not to have taken account or not taken into account matters he should; (iii) the decision is plainly wrong, in the sense that no reasonable judge properly directed could reasonably have reached the same decision; (iv) there has been a change of circumstances since the lower court's decision, which would have justified a different decision. I recognise that self-restraint is particularly appropriate in any appeal on costs, see *Fleming v Chief Constable of Sussex Police Force*
- [2004] EWCA Civ "the Court of Appeal must exercise self-restraint in substituting its views for the view of the judge who has the feel of the case he has tried, as well as knowledge of its progress and nuances of detail which are not suitable for investigation on an appeal concerning costs" (para 32) 16. I draw attention to Lord Diplock's conclusion in *Hadmor Production Ltd v Hamilton*
- [1983] AC 1 at p.220 (which was approved in *United Capital Corporation v Bender* (para 26)):- "It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own." That reinforces the point I made as to the width of our powers in paragraph 11 above. 17. We have for the purposes of this appeal had the benefit of impressive argument, written and oral, not only from advocates for the parties, but also from the Solicitor-General; (vice the Attorney-General who was convened by the Deputy Bailiff) and from the Bâtonnier and The President of the Law Society (for whom Advocate Redgrave and Advocate Corbett appeared at the hearing). The latter trio were concerned only with the legal aid point. However I agree with the general approach of the Deputy Bailiff that a Court should first decide on the appropriate costs order without reference to legal aid and then see whether it should be adjusted to reflect the fact that one or both parties are on legal aid. 18. In my view there is a clear 'winner' in this case, namely the Appellant. The Appellant's claim was for, broadly, 50% of the net equity in the property and she was in fact awarded 40% i.e. £92,237.90. Conversely the Respondent's final position was that she was entitled to nothing. Therefore, as a starting point on the Elgindata basis the Appellant should be entitled to her standard costs. The question which then arises is whether the Deputy Bailiff's decision betrayed any error of principle. In my

view it did. 19. First and most significantly, there were various Calderbank offers. It is a clear policy of the Court to encourage the parties to settle. Where parties reject Calderbank offers which the Court's decision shows they should have accepted, the costs order should reflect this. I therefore cannot agree with what the Deputy Bailiff said in his ex tempore costs judgment to the effect that this was "of little relevance". On the contrary in my view it was highly relevant. The correspondence reveals that, so far as the Appellant was concerned, she said back in July 2008 that she would accept £45,000 plus standard costs. In July or August 2009 she indicated a willingness to accept £20,000 with no contribution to costs provided it was paid immediately. On 10th February 2011 she indicated that she would accept £80,000 plus standard costs and on 10th March 2011, this was reduced to £60,000 plus taxed costs. That remained her position. The best offer from the Respondent on 17th February 2011 was £35,000 plus standard costs and he made it clear that, should the Appellant fail to beat the offer, he would seek to recover his costs by wage arrest if necessary. The offer of £35,000 was restated on 20th December 2011, shortly before trial. Both parties were therefore clear that their offers were Calderbank offers and would be relevant to any eventual costs order. 20. Accordingly, I conclude that from 2008 onwards the costs were incurred because the Respondent refused to pay the Appellant a sum which was both one she said she would accept and one which was much less than she eventually achieved. Justice suggests that prima facie he must bear the responsibility for the costs from that time. If such offers are only to be treated as having 'little relevance' this will act as a great disincentive to parties to make Calderbank offers and try to settle matters sensibly. The importance of offers of settlement as a means of avoiding costs liability was stressed in *Goodwin v Bennetts UK Limited*

[2008] EWCA Civ 1658 at paragraphs 13, 14 and 15. 21. Secondly, the Deputy Bailiff does not explain why, even if the Appellant because of her partial success should have had a deduction from her own costs, she ought also to make a contribution to the Respondent's costs and I can identify no reason why she should. This kind of case is easily distinguishable from a case such as *Pell Frischmann* para 18 where the Commissioner said "the order that the successful party pay the unsuccessful party a proportion of its costs was because of the disproportion between the nature and extent of the Plaintiff's main claim and the nature and extent of the judgment obtained at the end of the trial". The Deputy Bailiff expressly acquitted the parties of any misconduct in the litigation itself and there was no equivalent disproportion. As set out in *Elgindata* (in the passage cited at paragraph 3 of *Watkins*) a successful party should only be ordered to pay the costs of an unsuccessful party where the successful party has raised issues or made allegations improperly or unreasonably. 22. Thirdly, the Deputy Bailiff described the proceedings, as "quasi-matrimonial", diverted it may be, by the vocabulary from time to time deployed at the Bar, and adjusted his costs order accordingly. In my view, however, the description was inaccurate and the adjustments therefore flawed. 23. In matrimonial proceedings the Court is concerned with need: in the present proceedings - a property dispute

- with right. The issue was not how to achieve a fair balance between the parties for the future, but to inquire into the past to determine who was entitled to what share in the proceeds of sale of the property. The Solicitor General who sought to justify this part of the Deputy Bailiff's judgment, conceded that the Deputy Bailiff, in his various rôles in the proceedings, adopted different approaches to the substantive i.e. property issue and to the subsidiary costs issue before the Court: but suggested that this was a permissible approach. I cannot agree. It is well established that a court addresses costs in matrimonial proceedings in a different way from in other civil proceedings *Gojkovic v Gojkovic* (C. A.) [1992] Fam 40 and the distinction should not be eroded by the introduction of ingenious but inappropriate concepts such as a "quasi-matrimonial". 24. Moreover the wider question as to whether married or unmarried parties should be treated in the same way by the law is a matter for consideration by the legislature, and not for a single decision in a single case on an ancillary matter. 25. For all those reasons I consider that the Deputy Bailiff, in his obvious and proper desire to do justice to the parties, nonetheless made significant errors of principle - although I should observe that, for reasons which it is not necessary to detail, he may not have received all the assistance to which he was entitled from the Bar, and that his attention was not drawn to all the same material information as has been identified to us. 26. We are therefore free to exercise our own discretion. Having carefully considered the case in the round, I conclude that this is not a case in which there should be any departure from the default principle i.e., that the successful party is entitled to its costs. 27. A party's lack of success on some issues entitles a court to make a deduction but does not oblige it to do so. The Deputy Bailiff recognised that the evidence relied on was common to all issues - "much the same on all grounds" - but while he stated there was a significant increase in the length or cost of the proceedings "...attributable to the research, preparation and argument upon those grounds" , in his later observations he also noted that the Court was "faced with novel claims of law" and that the arguments advanced by the Appellant, both those that succeeded and those that did not, were not separate, but rather different ways of addressing the same central question - what claim in respect of the property did the Appellant have? Contrast *Olcott v Mark Amy Ltd*

[1998] JLR 62 where 10 out of 11 days were spent on issues which the party failed, from whose award of costs no discount was made, and which this Court identified as discrete from that on which alone that party succeeded, observing that it was correct in such circumstances to make no discount from the award. In my view therefore no deduction is warranted. 28. Accordingly, subject to the legal aid point I now address, I would award the Appellant 100% of her costs, which will, of course, be subject to taxation. The Legal Aid Point 29. I must start by sketching out the salient features of the legal aid scheme in Jersey of which there is a useful, if general, summary in *Attorney-General v Michel and Gallichan*

[2007] JLR 553 paras 13-20. 30. The provision of legal aid in Jersey, designed to ensure access to justice, is not, as it is in England or (prospectively) in Guernsey, sourced in statute, but is based on the obligation of advocates to give legal assistance to certain classes of persons. Phillipe Le Geyt in his *Manuscrits sur la Constitution, les Lois et les Usages*, Tome IV states

"Un Avocat doit plaider pour les pauvres et pour les personnes indéfendues , et s'il ne le fait pas, le Juge doit d'office le contraindre de le faire". Le Geyt added "On plaide toujours gratis pour ceux qui sont véritablement pauvres . C'est le riche qui dédommage quand son tour vient ." This is currently reflected in the advocate's oath set out in the Code of Laws for the Island of Jersey approved by Order in Council in 1771 " Vous vous contenterez de gages et salaires raisonnables et assisterez aux Veuves , Pauvres , Orphelins et Personnes indéfendues ." It is not a legal aid scheme in the sense used in England and Wales i.e. a scheme in which costs of certain litigants without adequate means are met out of public funds. It is really a pro bono scheme with a contingent fee element. 31. The current Guidelines for the legal aid scheme administered by the Bâtonnier were approved on 30 September 2005 and amended on 7 June 2010. 32. The Bâtonnier submitted that in allocating legal aid certificates the Bâtonnier is exercising an authority delegated by the Royal Court as part of its inherent power to control proceedings before it. I agree. 33. Under the Guidelines the financial criteria relating to an application for legal aid are based, broadly, on two elements: household disposable capital (currently less than £15,000) and gross household income (currently less than £45,000 per annum). The Bâtonnier has an over-riding discretion to grant legal aid where it is in the interests of justice to do so, regardless of the nature of the case or the personal or financial position of the applicant. The Bâtonnier may also grant legal aid to an applicant who for some reason has been unable to secure the services of a Jersey advocate; in the latter case, the advocate may charge on a private client basis. 34. An advocate is entitled to be remunerated by the client for legal services provided, as long as the quantum of any account does not cause financial hardship to the client. The hourly charge out rate of all staff engaged on legal aid may not exceed the hourly rates allowed for the purpose of the taxation of legal costs in the Royal Court from time to time. Such rates are calculated to be an approximate assessment of the costs of providing services, without allowing for any profit (known as the "Factor A" rates). 35. If the client's case is successful so that an order for costs or an agreed settlement for the payment of legal fees is obtained from the opposing party, the advocate may charge his full reasonable fees applying his usual private client rates, provided always that should the fees prove to be irrecoverable and become the responsibility of the client, the client would only be responsible for the payment of fees as set out in the Guidelines. 36. Taxation of recoverable costs is conducted by the Judicial Greffier. The fees recoverable are based on Factor A rates plus a factor depending on the nature of the case (Factor B). Conversely any disputes between the advocate and client in relation to fees charged by the advocate are referred to the Bâtonnier for resolution. 37. An advocate who refuses to discharge his duties under a legal aid certificate may also face disciplinary action under the legal regime governing the Law Society and its members. 38. Where a legally aided client is unable to pay all or any of the costs of the legal services provided to him, the financial burden falls on the advocate concerned or his firm, but it is to be noted that the Judicial Greffier administers a fund known as the "Legal Aid Vote" which may be used, at his discretion, to fund the cost of experts, English counsel, other out-of-pocket expenses and in particularly onerous cases to make some financial

contribution to the assigned advocate. 39. The issue at this juncture and against this background can be stated as follows. Was the Deputy Bailiff entitled to cap his costs order by reference to the fact that the parties were both recipients of legal aid? I make the following observations. First it was uncontested that the Court has power to cap costs (although the President of the Law Society suggested that cost capping ought not be introduced in practice without consideration by the legislature or rules committee). The breadth of its jurisdiction under Article 2(1) of the Civil Proceedings (Jersey) Law 1956 I have already alluded to. In matrimonial cases when an allocation of costs can affect the balance that the Court seeks to achieve between the parties, such capping may be appropriate, in particular in cases when parties are legally aided and, accordingly, usually of limited means; see *Gojkovic v Gojkovic* (No2)

[1992] 1 All ER 267, per Butler- Sloss LJ at p.271 applied in *R v G*

[2006] JRC 12. Second the Court in making an award of costs is concerned with the interests of the parties only and not with those of their legal representatives. The fact that, because of the operation of the legal aid scheme, a particular award of costs to one party may benefit only that party's advocate (but without, I should add, disadvantaging that party) is no reason for not making an order which is otherwise justified. Certain obiter dicta in cases in the Royal Court to apparent contrary effect (*R v G*

[2006] JRC 12 at para 17, especially when extended to non-matrimonial cases, see *Benest v Syvret*

[2012] JRC 079A , para 3) can in my view be disregarded, insofar as they were said to represent an independent relevant factor. Thirdly, there is no precedent in Jersey jurisprudence drawn to our attention that inhibits us from approaching the issue as one of principle - as indeed the Deputy Bailiff anticipated we would. 40. In my view costs awards should be based on two major considerations: the merits of the case (as adjudicated upon by the Court) and the conduct of the parties in the litigation (as appraised by the Court). These are not the only considerations. A Court may, for example, properly decline to make a costs order which might aggravate the relationship between the parties and for that reason be undesirable in the public interest or one which would be futile because the party against whom it would otherwise be made is impecunious. But, save it may be in exceptional cases (whose existence or extent we do not need to consider in these proceedings) the means of the parties are, in our view, outwith the matrimonial field, not relevant. No-one after all is compelled to bring a claim or to defend one. The potential exposure to costs, if unsuccessful, is itself a salutary discipline against maintaining from either perspective an untenable position. A person not in receipt of legal aid would not expect the Court to absolve him from liability to pay costs or to cap them if he unsuccessfully pursued (or resisted) a claim simply because of the financial burden in consequence imposed upon him. We cannot see any reasonable basis for treating a legally aided party differently, see too *M v Mayor and Burgesses of Croydon BC*

- [2012] EWCA Civ 595 at paras 44-6. 41. The Solicitor General suggested that not to endorse costs capping for a legally aided party might deny him access to justice. I respectfully disagree. Access to justice is accorded to such litigant by provision of courts to resolve his dispute, coupled with legal advice and assistance to enable him to make use of them. Such advice would (or should) include a warning about his liability to costs if he were to lose. A legally aided party, like any other litigant, has the choice of settling a case, or, where money is in issue, making an appropriate offer or payment in to protect himself. I have to remind myself that it was because he neither accepted the Appellant's offer nor made a sufficient counter offer that the Respondent became exposed to a liability to costs. He was the author of his own misfortune. (I note that the English Court of Appeal in *Blatcher v Heaysman*
- [1960] 2 All ER 721 held that it was wrong to make no order as to costs just because the parties were both legally aided - although such a result was there compelled by statute under a wholly different regime.) 42. In truth, receipt of legal aid has frequently been used in this case as proxy for lack of means. In my view for a court (other than in a matrimonial case) to embark upon the exercise of cost capping by reference to a party's means might involve an unjustifiable protracted inquiry, which might include (if the picture was to be complete) an investigation into the arrangement between each party and his own lawyer. Had it not been for the adventitious revelation that the Respondent's firm was capping its own fees, it may be the Deputy Bailiff would not have made reference in his costs award to legal aid at all. 43. In my view considerations both of practicality but, particularly, of certainty militate against opening the doors to costs capping on grounds that a party who is otherwise liable for costs is legally aided or - more generally - enjoys less than abundant resources. There are all kind of familiar devices which prevent what may be seen subjectively, or even objectively, as harsh treatment of a party with slender means when the insult of costs is added to the injury of an adverse holding. The successful party (especially for example a large corporation) may regard seeking a costs order against an individual of limited means as unnecessary, futile, or even in terms of its own reputation, damaging. The Court may itself encourage clemency. Awards made may not be enforced. Indeed the Court has the power to attach to an award of costs a proviso that it is not to be enforced without leave of the Court, something done on at least one occasion by this Court, see *Costs of or against Legally Aided Parties* 2005 Jersey Law Review 2-6 (In England this is sometimes called a "football pools order" which recognised the possibility that the indigent litigant may by some future stroke of good fortune acquire sufficient means to discharge his cost obligation). I do not, however as I have explained, consider cost capping as an appropriate solution. I have noted that under the Legal Aid Act 1949 Section 2(2) a legally aided litigant's liability to pay the opposing party's costs "shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including the means of the parties and their conduct in connection with the dispute." See also the Access to Justice Act 1999 Section 11(1) but this was again a legislative decision in an entirely different context. 44. The Solicitor General drew our

attention to a passage in the transcript when the parties were debating costs which suggested that the Deputy Bailiff's real concern, implicit if not explicit in his trilogy of costs judgments, was that if his costs orders were uncapped the parties' exposure was out of proportion to the value of the property in dispute. I have sympathy with those concerns, but observe only that it was not suggested that the time and resources devoted by the Appellant to her claim was itself disproportionate. This is not a case where there was an excess of advocates, authorities or applications - the usual hallmarks for a proportionality discount. On uncharted seas the Appellant's lawyers navigated as best they could. Lack of proportionality would have had relevance (if at all) at the initial stage of deciding what proportion of the costs the Appellant could recover, not at the later stage of deciding whether costs should be capped. The consequences of capping in this case would indeed make the Appellant's success something of a pyrrhic victory, as appears from this summary:- "The effect of the Deputy Bailiff's Order on the Appellant if not disturbed

1. Costs Appellant's liability to pay her Advocate assuming a 10% reduction on taxation and £3,000 for the taxed costs in preparing and attending the application for leave to appeal: £68,984.70 + payment to Respondent of 40% of his costs capped at £20,000: £8,000.00 £76,984.70 Less recovery from the Respondent 60% of her costs not to exceed £16,000: (£16,000.00) Appellant's Net liability for costs: £60,984.70
2. The Appellant's outcome from the litigation 40% of the net equity in the property: £92,237.90 Less net liability for costs: £60,984.70 £31,253.20" 45. The Deputy Bailiff also indicated in somewhat trenchant terms his dismay at the operation of the legal aid scheme (as he perceived it) and disquiet (at any rate as perceived by some members of the public) about the exploitation of clients by lawyers who allowed commercial considerations to impair their professional responsibilities. In my view the profession in Jersey, in providing their services under the scheme (often to their own or their firm's financial disadvantage) deserve praise. Whether or not Jersey should move to a system by which legal aid is provided from public funds rather than by the legal profession (a theme developed by the President of the Law Society in his written submissions) is of course not a matter for this Court. But I do not find it easy to understand how those who provide their services under the scheme can presently be said to exploit their clients. The amount of any fees they receive from their clients is limited by the provisions of the guidelines themselves; their fees are always subject to taxation which will be conducted on the same basis for a legally aided as for any other party, *Boyd v Pickersgill & Le Cornu*

[2000] JLR 310 and those who, for whatever reason, fail to honour their obligations under the scheme are subject to professional discipline. There is certainly no basis for applying the Deputy Bailiff's general reflections to the advocates involved in this litigation, and I do not consider that it was fair for him to base his award upon an expectation that the Appellant's lawyers would cap their fees in the same way as had the Respondent's. 46. For these reasons I would allow this appeal and substitute for the Deputy Bailiff's order of 14th May, 2012, an order that the Respondent pay the Appellant's costs of and incidental to the

proceedings before the Royal Court on the standard basis. I should only add that I have had the privilege of reading the judgment that the Bailiff is about to deliver, in draft, and respectfully agree with it. THE PRESIDENT: 47. I agree that this appeal should be allowed for the reasons given by Beloff JA. I wish only to add a few remarks. 48. It is clear that, in making the order he did, the Deputy Bailiff was motivated by a desire to see that the proceeds of sale were not consumed to an unacceptable degree by legal fees. This was an entirely proper and laudable objective. However, for the reasons given by Beloff JA, I do not think that the solution he adopted of capping the level of costs payable by a party against whom a costs order is made is the appropriate way of achieving that objective. It would require the Court in every case to delve into considerable detail as to the arrangements between legal aided clients and their lawyers. Furthermore, the effect of making such an order would be unpredictable in its effect because it would depend upon the approach of the receiving party's lawyer in relation to his fees and that is of course not governed by any costs order. 49. Indeed the unpredictable effect of relying upon a limited costs order to achieve fairness is manifest in this case. The net effect of the Deputy Bailiff's order was that the Respondent would pay £8,000 towards the costs of the Appellant. From the information we have been given - which is more detailed than that which was before the Deputy Bailiff - the costs order will operate very unfairly as between the Appellant and the Respondent and will leave the Appellant far worse off by comparison, despite the fact that she was successful in the litigation and that the Respondent was responsible for the continuation of the litigation because he refused the Appellant's offers to settle for less than she eventually achieved. 50. It seems to me that the protection for legally aided clients lies in the provisions of the legal aid guidelines, which state that any fees levied by an advocate against his legally aided client must not be such as to cause financial hardship to the client. Matters such as the amount which has been recovered or ordered to be paid in the litigation and the effect of any costs order made by the Court are clearly matters which need to be taken into account by the legally aided client's lawyer in assessing whether there is financial hardship. If a legally aided client disagrees with the fees to be charged by his or her advocate, there is an appeal to the Bâtonnier who exercises an independent

judgment.

The Court looks to the profession and to the Bâtonnier to ensure that the guidelines are applied in an appropriate manner to achieve the objective encapsulated in the Advocate's oath. 51. As Beloff JA has noted, the legal aid scheme in this jurisdiction operates by way of a largely pro-bono contribution by members of the legal profession and the Court has regularly paid tribute to the profession's efforts in this respect. I would hope and expect that the members of the profession can in general be relied upon to apply the spirit of the oath when they assess fees for their legally aided clients and the Bâtonnier can similarly be relied upon to exercise her role so as to ensure that fees are reduced where financial hardship would result. 52. It remains the case, as the Bâtonnier submitted, that the Bâtonnier exercises her role as a delegate of the Royal Court and

ultimately, jurisdiction over the provision of legal aid rests with the Court. Were it ever to be the case that the legal aid guidelines were thought to be unsatisfactory or out of date, then should the Bâtonnier of the day not amend them appropriately, it would be open to the Royal Court (sitting as a full Court after suitable consultation and discussion with the Bâtonnier and the profession rather than by way of individual decision in a particular case) to issue new or amended guidelines which would then bind the profession. That has not been necessary during the last century and I have every confidence that future Bâtonniers and the profession will continue to offer legal aid in a manner which does not require such intervention in the future. Nevertheless that remedy is available should it become necessary. 53. Finally, I would like on behalf of the Court to thank counsel for their assistance. We are particularly grateful for the assistance offered by the Bâtonnier, the President of the Law Society and the Solicitor General, which assisted us in considering the wider implications of this case. COLLAS JA: 54. I also agree that this appeal should be allowed for the reasons given by Beloff JA and by the President. *Authorities Flynn v Reid*

[2012] JRC 100 . *R v G*

[2006] JRC 112 . *J v M* 2002/127. Court of Appeal (Jersey) Law 1961. Royal Court Rules 2004. Court of Appeal (Civil) Rules 1964. Civil Proceedings (Jersey) Law 1956. *Watkins and another v Egglisshaw and four others*

[2002] JLR 1 . *Pell Frischmann Engineering Limited v Bow Valley Iran Limited*

[2007] JLR 479 . *Re Elgindata (No.2)* [1992] 1 WLR 1207. *Re Elgindata (No.2)* [1993] 1 All ER 232. *Café de Lecq v Rossborough*

[2011] JRC 071 . *AEI Rediffusion Music Limited v Phonographic Performance Ltd*

[1999] 1 WLR 1507 . *United Capital Corporation v Bender*

[2006] JLR 269 . *Fleming v Chief Constable of Sussex Police Force*

[2004] EWCA Civ 643. *Hadmor Production Ltd v Hamilton*

[1983] AC 1 . *Goodwin v Bennetts UK Limited*

[2008] EWCA Civ 1658. *Gojkovic v Gojkovic (C. A.)* [1992] Fam 40. *Olcott v Mark Amy Ltd*

[1998] JLR 62 . *Attorney-General v Michel and Gallichan*

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[2012] JRC 079A . *M v Mayor and Burgesses of Croydon BC*

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Prepared on 26 October 2026 · Esheria