JERSEY / JUDGMENT

# Francis -v- JFSC [2018] JRC 064A (23 March 2018)

[2018] JRC 064A

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## judgment

the COMMISSIONER: 1. This judgment deals with the question of costs following the judgment of the Court dated 4 th December 2017 Francis-v-JFSC

[2017] JRC 203A ("the Judgment") whereby it dismissed the First Appeal and allowed the Second Appeal (to the extent only of declaring that the Commission had failed to comply with the requirements of Article 25A (2) of the Financial Services (Jersey) Law 1998 , but otherwise making no further order in respect of the three public statements where it had so failed). 2. The Commission applies for its costs of the First Appeal on the standard basis and for no order as to costs in respect of the Second Appeal, whereas Advocate Sinel argues that there should be no order as to costs, failing which there should be a substantial deduction from the costs awarded to take account of those aspects upon which the appellant was successful. The Commission also applies for an interim payment. 3. I do not intend to repeat the history of this matter, which is set out fully in the

## Judgment.

Words and expressions defined in the Judgment have the same meaning where used herein. The applicable principles 4. In Flynn v Reid 2012 (2) JLR 226, the Court of Appeal approved the well-known statement of Page, Commissioner in Watkins and Connell v Egglishaw and Others 2002 JLR 1 where at paragraph 7 the Court said this:- "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) [1992] 1 WLR 1207 and A E I Rediffusion Music Limited v Phonographic Performance Limited

[1999] 1 WLR 1507 . (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..... The new Civil Procedure Rules governing civil litigation in the English Courts provide that the Courts '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 is not been wholly successful' another.... 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." 5. The passage in Elgindata ( In re Elgindata (No 2) [1992] 1 WLR 1207 )approved in Watkins (and in Flynn v Reid ) was quoted at paragraph 3 of the judgment in Watkins and reads as follows:- "The principles are these. ( i ) Costs are in the discretion of the Court. (ii) They should follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made. (iii) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or part of his costs. (iv) Where the successful party raises issues or makes allegations improperly or unreasonably, the Court may not only deprive him of his costs but may order him to pay the whole or a part of the unsuccessful party's costs..." Application to the facts 6. Advocate Sinel argued that, although the First Appeal had been dismissed, the Court had made serious criticisms of the conduct of the Commission. Those in connection with procedure were summarised at paragraph 328 of the Judgment. He submitted that, in addition, the Court had been critical of the reasons given by the Commission for its decision as set out at paragraphs 234-251. The fair outcome was therefore no order as to costs. 7. However, in my judgment there is a clear winner in this case. Despite the criticisms referred to, the First Appeal was dismissed and the decision of the Commission upheld. In relation to Ground 1 of the Notice of Appeal (which took up a substantial amount of time), the Court supported the decision of the Commission in resounding terms. In my judgment, the starting point is that costs should follow the event and that accordingly standard costs should be awarded to the Commission in respect of the First Appeal. 8. The question then is whether, in accordance with principle (iii) set out in Elgindata (as quoted at paragraph 5 above), there should be a deduction to reflect the matters where the Court was critical of what the Commission had done and / or found in favour of the appellant. 9. Paragraph 328 of the Judgment was in the following terms:- "As can be seen, there are some areas which we have described where we consider the Commission (whether in the form of the Executive or the Board) should have behaved differently. These relate to the letter dated 25 th May 2014 from the Deputy

Chairman (paras 256 - 262), the unduly short initial timetable for responses to the draft HTJL report (paras 269 - 270), the omission of section 3 from the draft HTJL report (para 271), the one minute decision on 1 st May 2014 (paras 289 - 293), the filing of and subsequently not considering the Debenture (paras 295 - 298), the unsatisfactory wording of the Article 37 warning (paras 311 - 317) and the use of the unsigned board minute (paras 321 - 324). " 10. These were all points raised by the appellant which were opposed by the Commission but on which the appellant was successful. Some of them are of general importance such as the wording of the Article 37 warning, the time allowed for commenting on a draft document such as the HTJL report and the omission of section 3 (the Executive Summary) from the draft HTJL report. These points took a not insignificant amount of time. In my judgment, fairness suggests that, in accordance with (iii) of Elgindata , there should be a deduction to reflect the fact that the appellant was successful on these matters even though they did not lead to the First Appeal as a whole being determined in his favour. 11. Both parties agreed that it would be undesirable (if not impractical) for the taxing officer to try and assess the time spent on these matters and that the better solution was for me to take a broad view based on my knowledge of the papers and the hearing before the Court and make a percentage deduction. I entirely agree. I am not minded, however, to make a deduction on the reasons point referred to by Advocate Sinel . Although the Court was critical of the level of reasons given by the Commission and said that the practice of putting the reasons in a Public Statement was inappropriate, the fact remains that the Court found the reasons to be sufficient not to quash the Commission's decision on that ground. This was not therefore an issue upon which the Commission failed (to use the language of (iii) in Elgindata ). 12. As to the Second Appeal, that appeal was successful albeit that no order was made because there was no ability to direct the withdrawal of the three public statements which had already been issued. Both parties agreed that the time spent on the Second Appeal was minimal and I agree. Advocate Lacey put it at less than 2%. On the basis that prima facie the appellant should be awarded his costs in respect of the Second Appeal, I do not think it would be appropriate to make a separate order as it would require the parties (if indeed it is possible) to separate out from their records time spent on the Second Appeal as opposed to the First Appeal. I think the better course is to make an overall order in respect of both appeals but to make a further deduction (beyond that envisaged in paragraph 10) to reflect the fact that the appellant was successful in the Second Appeal and could be expected to be awarded his costs in relation to that appeal. 13. As to the amount, I must again take a broad view. As mentioned, Advocate Lacey estimated it at less than 2% but this was clearly a guesstimate. Another way of testing it is that the Second Appeal took up 5 pages out of a 143 page judgment, which amounts to 3.5%. I propose to take that figure as a fair reflection of the proportion of time attributable to the Second Appeal. On the basis that the appellant would have been awarded his costs, I therefore propose to make a deduction of 7% from the overall costs to reflect the appellant's success in the Second Appeal. 14. Reverting to the overall position and doing the best I can to reflect the proportion of costs attributable to them, I propose to make a deduction of 25% to cover both the matters

discussed at paragraphs 8

- 10 above and Second Appeal. I therefore order the appellant to pay 75% of the Commission's costs of and in connection with the First Appeal and the Second Appeal on the standard basis. This order will not of course affect any costs orders which have already been made following interlocutory hearings, but will otherwise cover all matters of and incidental to both appeals. Interim payment 15. The Court has made an order for interim payment of costs on a number of occasions. The thinking behind such an order is set out very clearly in the judgment of Jacob J in Mars UK Limited v Teknowledge Limited

[1999] 2 Costs LR 44 as follows:- "I now turn to the second issue, whether or not there should be an order for interim payment. The first thing to do is to consider what the general rule should be, interim payment or not. There is no guidance given in the Rules other than that the Court may order a payment on account. There is no guidance in the Practice Direction. So I approach the matter as a question of principle. Where a party has won and has got an order for costs the only reason that he does not get the money straightaway is because of the need for a detailed assessment [taxation]. Nobody knows how much it should be. If the detailed assessment were carried out instantly he would get the order instantly. So the successful party is entitled to the money. In principle he ought to get it as soon as possible. It does not seem to me to be a good reason for keeping him out of some of his costs that you need time to work out the total amount. A payment of some lesser amount which he will almost certainly collect is a closer approximation to justice. So I hold that where a party is successful the Court should on a rough and ready basis also normally order an amount to be paid on account, the amount being a lesser sum than the likely full amount." 16. In Marange Investments (Proprietary) Limited v La Generale des Carrieres et des Mines SARL

[2013] JRC 119 A , Clyde-Smith, Commissioner, having quoted the above passage, went on to say at paragraph 44:- "The Court should not, therefore, seek to conduct a taxation or detailed view of the successful party's costs, but adopt 'a rough and ready' approach in order to arrive at a figure which the successful party 'will almost certainly collect'". 17. The Commissioner went on to say at paragraph 50:- "Accordingly where costs have been awarded on the indemnity basis, then when considering a payment on account, the Court should work from the fees of the lawyers at the charge out rates claimed, in this case the sum of £158,000 (excluding counsel's fees). The Court should be provided with a summary of the time of the fee earners and the rates claimed to enable any serious issues as to the rates or quantum to be raised. Where costs have been awarded on the standard basis, then it seems to me that in seeking a payment on account it would be helpful to the Court to be provided with a summary of those costs at the taxation rates applying factors A and B." 18. The practice of the Royal Court in ordering interim payments was approved by the Court of Appeal in Crociani and Others v Crociani 2014 (1) JLR 503. Beloff JA indicated at paragraph 16 that the achievement of justice would usually require that a party entitled to his costs should be paid on account a percentage of the amount he is likely to recover on

taxation calculated on a conservative basis to avoid any real risk of overpayment. Beloff JA went on specifically to approve the observations of Commissioner Clyde-Smith in Marange referred to at paragraphs 16 and 17 above. 19. Advocate Sinel submitted that, when seeking a payment for interim costs, a party must place before the Court all the detail required for summary assessment of costs pursuant to Practice Direction 09/03 "Taxation of Costs in Civil Proceedings by Summary Assessment in Interlocutory Proceedings". However, he did not refer me to the decision of the Royal Court in Crociani v Crociani

[2013] JRC 250 which is completely against him on this very point. This case was only supplied to me after the hearing following my request to be provided with the judgments in the various cases where the Court had made an interim order. 20. In Crociani , Commissioner Clyde-Smith said this at paragraphs 25-26:- "25. At the hearing when this judgment was handed down, Advocate Robinson had produced, as invited, a one page summary of the time of the fee earners in Bedell Cristin applying the Factor A and Factor B rates. In the interests of proportionality and to assist the Court, he had applied a 50% Factor B uplift, whilst reserving the right to apply a different uplift as part of the detailed Bill of Costs. The summary also listed the disbursements, the major part of which related to the fees of English and Mauritius counsel. 26. Advocate MacRae submitted that this summary was simply inadequate for any meaningful response to be made by the defendants as the paying party. He argued that the plaintiff should comply with Practice Direction 09/03 "Taxation of Costs in Civil Proceedings by Summary Assessment in Interlocutory Proceedings" and the formalities laid down therein. I rejected that approach in that as made clear in Marange at paragraph 44, the Court should avoid a detailed review of the costs of the receiving party, adopting a 'rough and ready' approach to the costs in order to arrive at a figure that the receiving party 'will almost certainly collect'. The information provided by the Court in Marange (see paragraph 48) was consistent with the information provided by Advocate Robinson." It is therefore not necessary to produce the level of detailed information suggested by Advocate Sinel . 21. Unfortunately, no information complying with the requirements set out in Marange and Crociani has been supplied on behalf of the Commission in this case. In her skeleton argument, Advocate Lacey stated that the fees incurred by the Commission in connection with the appeals totalled £1.4m. No information was given as to the basis upon which these fees were calculated. She noted that three separate bills of costs had been taxed in relation to costs orders concerning unsuccessful interlocutory applications brought by the appellant and that, on these occasions, taxation had resulted in recovery of 70%, 65% and 87% respectively of the amounts claimed by the Commission. However, she did not explain the basis upon which the amounts claimed had been calculated. It can perhaps be assumed that such bills had been prepared on the standard cost basis i.e. Factor A plus Factor B, but this was not specifically stated. Furthermore, it was not clear to me whether the amounts claimed for these three taxations were calculated on the same basis as the £1.4m or some different basis. 22. Advocate Lacey further noted that the appellant had paid £67,208.33 in respect of the three orders for taxed costs, which should, she said, obviously be deducted from the

overall sum. She further noted that a costs order had been made against the Commission in respect of a directions hearing which took place in December 2016 and that that was currently in taxation. On a rough and ready basis, she proposed to exclude the invoices for December, January and part of February in order to allow for this. This came to £120,000. She suggested deducting a rounded up figure of £220,000 which would leave £1.18m as the total amount which should be used as the starting point in any calculation of an interim payment. 23. She said that the Royal Court had not always been entirely consistent as to the starting figure which it took when ordering interim payments. She pointed out that in Representation of Centre Trust

[2009] JRC 133 , the Court had taken the fees actually charged at the firm's standard rates to the successful party and then applied a deduction of more than 50% to take account of various uncertainties. However, that was a case where costs had been awarded on an indemnity basis and therefore, in accordance with Marange , the starting point was correctly taken as the full fee basis. 24. In this case the award of costs is on the standard basis and accordingly, in accordance with Marange , the starting point should be the amount claimed by the Commission prepared on a Factor A and Factor B basis. Unfortunately, that has not been made available. Advocate Lacey suggests that the three taxations which have taken place have resulted in an average recovery of 74% of the amount claimed and that that should be used for the purposes of an interim payment. Applying that percentage to the figure of £1.18m and then taking 50% results in a figure, she says, of £418,500. She asked for an interim payment of between £400,000 and £500,000. (This was of course on the basis of a 100% costs order and would need to be reduced to reflect the 75% order actually made). 25. Advocate Sinel submitted that a figure of £1.4m was wholly disproportionate. This was an appeal against an administrative decision. If potential appellants were to be faced with possible cost orders of this magnitude, no one would appeal against a decision of the Commission, which would be able to proceed unchallenged. He said that his own firm's fees as billed to the client were in the region of £500,000 although, as I understood it, this was exclusive of the fees paid to English counsel. He said that proportionality was a factor to be taken into account on taxation and that I should reflect that when deciding on any sum to be awarded as an interim order. 26. Since the hearing, I have been sent further material. I have read this but I do not think that it advances the position. In particular, some of the English cases sent to me are simply examples of the exercise of discretion in particular circumstances. Decision 27. I respectfully agree with observation of the Court of Appeal at paragraph 16 in Crociani (see paragraph 18 above) that the achievement of justice will usually require that a party entitled to his costs should be paid on account a percentage of the amount he is likely to recover on taxation, calculated on a conservative basis to avoid any real risk of overpayment. I further agree that, in respect of an order for standard costs, the starting point will be to order an interim payment of 50% of the costs claimed by the successful party on the standard basis i.e. Factor A and Factor B applied to the number of hours worked. This does not require a full bill of taxation. As was made clear by the Royal Court

in Crociani and Marange , what is required is a simple (often one page) summary of the time of the fee earners and the rates claimed. The Court then adopts a 'rough and ready' approach to fix upon an amount which the successful party 'will almost certainly collect'. 28. The difficulty is that I have not received such information in this case. In the absence of the required information, it seems to me that I could proceed in any of three ways:- (i) I could, as Advocate Sinel submits, simply refuse to make an interim order because the advocates for the Commission have failed to supply the necessary material; (ii) I could direct Advocate Lacey to produce the necessary summary and then hold a further hearing to consider any submissions which Advocate Sinel might wish to make in relation to that summary; or (iii) I could make a very conservative order which would be in a sum which would probably be much lower than that which might have been ordered if the course at (ii) were followed but which I was comfortable would be less than any sum eventually recovered on taxation. 29. I have decided to follow the course at (iii) above. I think that course ( i ) would penalise the Commission unduly for the failure to produce the necessary information. Subject only to any successful appeal by the appellant, the Commission is entitled to recover a substantial sum by way of costs in respect of proceedings which have been running for many years. It will now incur further fees on appeal and I think that justice requires that it should receive some payment on account at this stage. 30. As to (ii), I am anxious not to incur further costs in what has already been very extended and expensive litigation. Furthermore, subject only to any costs orders I might make against the Commission in relation to the extra hearing, it would result in the Commission suffering no disadvantage for the failure of its advocates to comply with the guidance set out in Marange and Crociani . It is important that such guidance should be complied with. 31. It seems to me that course (iii) should achieve a fair balance. It will mean that the Commission recovers less than it would have if the correct procedure had been followed but nevertheless it enables it to make some recovery against what will (subject to appeal) undoubtedly be due to it. 32. As to proportionality, I agree that this

- in the sense used by the Court of Appeal at paragraph 49 of its judgment in Weston-v-Leeds United

[2015] JCA 159A , namely that costs are disproportionate if they are unnecessary if the litigation had been conducted in a manner proportionate in the context of a particular case having regard to the amount and issues at stake - is a matter which is properly to be taken into account at the time of taxation and that I should also therefore have regard to it when fixing upon a figure that I am comfortable will be exceeded upon taxation. 33. However, I am not surprised that the fees in this case are very substantial. The appeal involved a root and branch attack by the appellant on the procedures and indeed, in certain respects, the integrity of the Commission. Furthermore, there were a large number of interlocutory hearings and appeals therefrom. According to Advocate Lacey there were twenty. 34. Nor am I surprised that the time spent by Advocate Lacey's firm exceeded that spent by Advocate Sinel's firm. As mentioned in the judgment, although the Notice of Appeal was very focused and specific, Advocate Sinel's skeleton and oral submissions were of a more

discursive nature, particularly in relation to Ground 1 of the grounds of appeal. It was left to Advocate Lacey's firm to refer the Court to the relevant documents which underlay the Commission's findings in relation to Ground 1. Advocate Sinel was critical of the length of the skeleton argument (and the accompanying schedules) filed for the appeal by Advocate Lacey and compared the length of them unfavourably to his own. I do not share that criticism. In my judgment, the material put forward by Advocate Lacey's firm was helpful and necessary. It dealt very properly with all the factual and legal issues which arose. 35. I emphasise that is not to say that every hour claimed should be allowed on taxation. As made clear earlier, assessment of interim costs requires a 'rough and ready' approach and I am simply not in a position to judge the reasonableness of the amount claimed; that will be a matter for taxation. It is simply to record that, contrary to Advocate Sinel's submission, the general nature of the material put forward on behalf of the Commission in connection with the appeal was not excessive or unreasonable. 36. Turning to consider the appropriate sum, in the absence of the required material on behalf of the Commission, I start by taking the figure of approximately £500,000, which Advocate Sinel referred to as his costs. Given that they did not include counsel's fees and that I have already noted that it was reasonable for the Commission's advocates to spend more time, I propose to take a figure of £750,000 for the Commission's fees on a full fee basis. I consider that it would be reasonable to assume that, on a standard cost basis, a party will recover something in the region of two-thirds of the amount incurred on a full fee basis. That would take the sum down to £500,000. 37. The costs award is only for 75% and accordingly this would lead to a recovery of £375,000. 50% of that (being the amount conventionally awarded by way of interim order) comes to £187,500. In the absence of proper information, I proceed on a conservative basis to round this sum down to £150,000. 38. I repeat that the figures I have taken will provide no guidance whatsoever on taxation. In the absence of proper information, I have had to proceed on an extremely conservative basis. However, I am confident that, given the length and complexity of these proceedings, the Commission is bound to recover at least this sum and I therefore consider it to be fair and just to make an interim order for payment of costs in the sum of £150,000. 39. In summary, I order that:- (i) the appellant pay 75% of the costs of and incidental to the appeal on the standard basis; and (ii) the appellant make an interim payment on account of costs in the sum of £150,000. 40. When sending out this judgment in draft in the usual way, I invited written submissions by midday today as to the period I should allow for payment of the sum of £150,000. In his letter of 22 nd March, Advocate Sinel said merely that he was instructed "to seek an extended period over which stage payments may be made" . No further information was provided. In the circumstances I have not been provided with any arguments for not making a conventional order and I therefore order the sum to be paid within 28 days of today's date. 41. As to the costs of the hearing on costs, I indicated when releasing the judgment in draft that my provisional view was that costs should follow the main order i.e. 75% against the appellant on the standard basis. I further indicated that if either party wished to submit otherwise, such submission should be filed by midday today. No such submission having been filed, I therefore order that the

appellant pay 75% of the costs incurred in connection with the costs hearing on the standard basis. Authorities Francis-v-JFSC

[2017] JRC 203A. Financial Services (Jersey) Law 1998. Flynn v Reid 2012 (2) JLR 226. Watkins and Connell v Egglishaw and Others 2002 JLR 1 . In re Elgindata (No 2) [1992] 1 WLR 1207. Mars UK Limited v Teknowledge Limited

[1999] 2 Costs LR 44 . Marange Investments (Proprietary) Limited v La Generale des Carrieres et des Mines SARL

[2013] JRC 119A . Crociani and Others v Crociani 2014 (1) JLR 503. Practice Direction 09/03. Crociani v Crociani

[2013] JRC 250 . Representation of Centre Trust

[2009] JRC 133 . Weston-v-Leeds United

[2015] JCA 159A . Page Last Updated: 30 May 2018 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII


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