David Banks v Sanne Holdings Ltd

Jurisdiction:	Jersey
Judge:	Greffier
Judgment Date:	10 December 2019
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Text

[2019] JRC 222A

ROYAL COURT

(Samedi)

Before:

Advocate Adam Justin Clarke, **Judicial** Greffier

Between
David Banks
Plaintiff
and
Sanne Holdings Limited
First Defendant
Sanne Fiduciary Services Limited
Second Defendant

Advocate H. Sharp **the Plaintiff**.

Advocate J. D. Kelleher **for the Defendants**.

Authorities

Companies (Jersey) Law 1991.

Trant v A.G. and others [2007] JCA 073.

Caversham Trustees Limited v Patel and others [2008] JRC 020.

Prest v Petrodel Resouses Limited and Others [2013] UKSC 34.

Fitzpatrick Contractors Limited v Tyco Fire and Integrated Solutions (UK) Limited [2008] EWHC 1391.

Roach v Home Office [2010] 2 WLR 746.

Companies — reasons for granting summary judgment and decision in respect to ancillary costs.

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Greffier

THE JUDICIAL

Introduction

1 This judgment contains the written reasons for my decision to grant summary judgment in

the application brought by the plaintiff and in respect to the ancillary costs awards.

Background

2 The plaintiff is an Advocate of the Royal Court and a previous partner of the law firm of Crill Canavan. The first defendant is a Jersey limited liability company (of which the plaintiff was a director until his resignation in September 2006) which existed as a holding company for a group of operating companies whose primary business was the provision of fiduciary services in Jersey and abroad ("the Sanne Group"). The second defendant is also a Jersey limited liability company which was and is the main operating company within the Sanne Group.

3 The plaintiff asserts that the parties entered into a contract in 2006 ("the 2006 Agreement") whereby the defendants would provide Mr Banks with full financial and management information in respect of the defendant companies after his resignation as a Director in lieu of him appointing an alternative director to represent his interests on the boards of both defendants. It is submitted that in addition to the express terms to provide the plaintiff with the necessary information, the defendants also owed the plaintiff fiduciary duties including a duty to act in the plaintiff's best interests regarding his interests in the defendant companies.

4 The plaintiff contends that two relevant transactions took places in 2010 and 2011. The first related to an agreement reached with Ivegill Holdings Limited owned by a family trust ("the Ivegill Transaction"). It involved the acquisition of the Ivegill shareholding and voting rights in first defendant ("SHL") in exchange for the issuance of 4,000,000 10% preference shares of £1 each fully paid in SHL.

5 The second related to an agreement between SHL and the majority of the directors in a separate shareholding company called Hunters Investment Limited whereby those shareholders agreed to transfer the majority of their shares and voting rights in SHL in exchange for receiving 9,600,000 12% preference shares in SHL paid up to £0.0939275 each.

6 The plaintiff contends in his Order of Justice dated 12 th June, 2019 that the defendants breached the terms of the 2006 Agreement and were in breach of their duty of care to him for numerous reasons; those pertinent to this summons being:

(i) The Ivegill Transaction breached the requirements of the Companies (Jersey) Law 1991 (the "1991 Law"), in that the Defendants had to transfer £4,000,000 from the SHL profit and loss account into the nominal share capital account in recognition of the preference shares issued in 2010;

(ii) The 2010 financial statements and audited accounts of SHL were materially

misstated because they did not appropriately account for the Ivegill Transaction; and

(iii) In light of (i) and (ii) above, SHL had failed to comply with the provisions of Articles 103 and 105 of the 1991 Law and were consequently in breach of Article 109 of the 1991 Law.

7 By the time the plaintiff's summons for summary judgment dated 22 nd July 2019 was heard on 8 th November 2019 no answer had been filed by the defendants (by agreement between the parties). The summons sought the following relief:

"1. Summary Judgment be entered in favour of the plaintiff in respect of the following matters:-

(i) Sanne Holdings Limited ["SHL"] produced consolidated financial statements for the year ended 31 December 2010 [the "SHL 2010 Accounts"]. The SHL 2010 Accounts do not, either properly or at all, account for the 4 million, fully-paid, redeemable, cumulative 10% preference shares of £1 each that SHL agreed and issue to Ivegill Holdings Limited in March 2010 [the "Ivegill Preference Shares"]. The SHL Accounts were materially mis-stated.

(ii) The consolidated balance sheet at page six of the SHL 2010 Accounts is materially wrong and misstated. It records positive net assets of £3,011,321, whereas the consolidated balance sheet should have recorded a deficit of net assets, having regard to the liabilities created in respect of the Ivegill Preference Shares.

(iii) In the circumstances:-

a. SHL acted contrary to Articles 103 and 109 of the Companies (Jersey) Law 1991, which required:-

1) A company must keep accounting records that are sufficient to show and explain its transactions.

2) The records must be such as to –

a. disclose with reasonable accuracy, at any time, the financial position of the company at that time; and b. enable the directors to ensure that any accounts prepared by the company under this Part comply with the requirements of this Law.

b. SHL acted contrary to Article 105(4) and 109 of the Companies (Jersey) Law 1991, which requires:-

4) the accounts of the company that is required by Article 113(1) to appoint an auditor must give a true and fair view of, or be presented fairly in all material respects so as to show –

a. the company's profit or loss for the period covered by the accounts; and b. the state of its affairs at the end of the period,

and must otherwise comply with any other requirements of this Law.

2. the defendant shall pay the plaintiff's costs of and related to the application and the issue in the case."

8 In response to the summons, the defendants' lawyers has issued two letters containing certain concessions. The first was dated 17 th October, 2019 and states in response to the respective paragraphs of the summons:-

"[S1(i)] the SHL 2010 accounts do not properly or at all account for the Ivegill Preference Shares and (presumably, given the last sentence in this paragraph) were therefore materially misstated.

4. We note this paragraph poses two alternative base findings leading to a conclusion of a misstatement. The evidence filed on behalf of your client suggests that the argument that will be pursued is that the SHL 2010 accounts do not properly account for the Ivegill Preference Shares, rather than that they do not at all account for those shares. Assuming our interpretation to be correct, on that basis our clients will not contest the summary judgment application in relation to this paragraph.

5. Our clients will not contest the summary judgment application in relation to this paragraph.

[§1(iii) a.] SHL acted contrary to Articles 103 and 109 of the Companies (Jersey) Law 1991

6. Our clients will contest the summary judgment application in relation to this paragraph. Firstly, while "accounts" is defined at Article 102(1) by reference to financial statements, in relation to Article 103, the term "accounting records" is not defined in the Companies (Jersey) Law 1991. However, the necessary implication from Article 103(2)(b) is that "accounting records" refers to the source documentation necessary for the preparation of the accounts. The source documents are not in evidence. We remind ourselves that this is a summary judgment application. The Court cannot properly make a finding on 'accounting records' without having the relevant documents before it.

7. Secondly, Article 109 states that a company which fails to comply with inter alia Articles 103 and 105 commits an offence. This requires a finding of criminal culpability. The judicial powers of the Judicial Greffier are restricted to civil matters. The Judicial Greffier cannot therefore make a finding under Article 109.

[§1(iii) b.] SHL acted contrary to Articles 105(4) and 109 of the Companies (Jersey) Law 1991

8. Article 105(4) sets out that the accounts of company whose accounts are required to be audited must give a "true and fair view" (or "be presented fairly in all material respects") "so as to show (a) the company profits or loss for the period covered by the accounts; and (b) the state of its affairs at the end of the period." We interpret your client's case to be that sub-paragraph (b) is the limb asserted to have not been met. On that basis, our client is prepared to concede the point.

9. As to Article 109 under this sub-heading, please see our comments above."

9 The second was a letter dated 7 th November, 2019 (the day before the summons was heard). It repeated the defendants' view in regard to the appropriateness of orders relating to Article 109 of the 1991 Law but made the further concession in respect of Article 103:-

"In relation to Article 103 of the CJL our clients have taken time to reflect and consider their position. Our clients will now not contest the summary judgment application on this discrete point. However, they will only do so on the terms of the amended draft consent order enclosed herewith. Our clients will not agree to the suggested wording of the consent order you have put forward as it goes far beyond what your client originally sought in his summons dated 22 July 2019 (as endorsed on 30 August 2019). Our client is entitled to rely on the exact terms of the order sought."

10 The attached draft consent order from the defendants stated:-

"The parties agree by consent that:-

1. Summary judgment shall be granted in favour of the Plaintiff on the following basis (utilising the defined terms in the Plaintiff's summons dated 22 July 2019):

The SHL 2010 accounts do not properly account for the Ivegill Preference Shares and were therefore materially misstated.

The consolidated balance sheet at page 6 of the SHL 2010 Accounts is materially wrong and misstated in that it records positive net assets of £3,011,321 whereas it should have recorded a deficit of net assets, having regard to the liabilities created in respect of the Ivegill Preference Shares.

Contrary to Article 103 of the Companies (Jersey Law 1991, the accounting records of SHL are insufficient as they do not show and explain the Ivegill Preference Share transaction.

*As a result of the orders at paragraph 1.1 and 1.2 hereof, the SHL 2010 Accounts did not give a "true and fair view ….*so as to show… (b) the state of [SHL's] affairs at the end of the period. "contrary to Article 105(4) of the Companies (Jersey) Law 1991."

Contentions on summary judgment

11 The submissions by Advocate Sharp on behalf of the plaintiff can be summarised as follows:-

(i) Notwithstanding the concessions that had belatedly been made by the defendants in the letters of the 17 th October and 7 th November, 2019, the plaintiff invited the court to make orders that made it expressly clear exactly what had been agreed and what those concessions actually meant.

(ii) The plaintiff had adduced evidence in the form of an affidavit from Advocate Banks and an expert report from Mr Ballamy (a forensic accountant). The latter spoke to the failings of the 2010 SHL accounts and why those accounts failed to comply with both Article 103 and 105 of the 2019 Law. The plaintiff drew the court's attention to the comments of The Hon. Michael Belloff QC, President of the Court of Appeal in the case of *Trant v A.G. and others* [2007] JCA 073 at paragraph 35:

"Where evidence (even in affidavit form) is admissible, it should be considered in its totality…If only one side has adduced evidence, unless it is manifestly implausible, a Court will have little, if any, choice but to accept it. If a party chooses not to adduce evidence when able to do so (especially when faced with a case to meet), his decision not to do so permits adverse inferences to be drawn…"

(iii) Applying the principle enunciated in *Trant*, and in light of the defendants not having filed evidence to rebut it, Advocate Sharp requested that the Court utilise the opinions and conclusions of Mr Ballamy's report to form the basis of a summary judgment which would avoid ambiguity and uncertainty as to the extent and reach of the concessions made by the defendants.

(iv) Advocate Sharp asserted that where the accounts of SHL are misstated (as had been conceded by the defendants in their letter of the 17 th October, 2019), one should be comfortable in inferring that the underlying accounting records are also incorrect. He highlighted the statement made by the accountants who had audited the 2010 SHL accounts. They had declared that they had nothing to report on matters which the 1991 Law required them to do so, such as "proper accounting records not having been kept…". Advocate Sharp argued that if the auditors could not find a discrepancy between the accounts (which were misstated) and the underlying accounting records, it was appropriate to assume that the underlying accounting records were materially incorrect as well.

(v) A review of the annual return filed by SHL on 28 th February 2011 shows that SHL had declared the existence of 4,000,000 10% preference shares paid up to £1 each to the Jersey Financial Service Commission contrary to the contents of the final accounts for that year. This was a clear discrepancy and further evidence of the failure of SHL to comply with Article 103 and 105 of the 1991 Law.

(vi) As to Article 109 of the 1991 Law, the wording of the article is clear – should a company fail to comply with the Articles 103 or 105 it was guilty of an offence. Advocate Sharp submitted that, as the defendants had already conceded that they had acted contrary to both Articles 103 and 105 of the 1991 Law, it followed that they had also contravened Article 109 and a summary judgment to that effect should be given by this court. To support his argument and defeat concerns regarding the appropriateness of this Court making an order adjudicating on the criminal guilt of a party, Advocate Sharp sought to draw analogy with other cases where, in reaching a conclusion of civil liability, the court may be required to express a conclusion on whether a defendant have committed a criminal act, e.g. an assault leading to a personal injury claim.

12 In response Advocate Kelleher for the defendants argued that the plaintiff was seeking to overstep the bounds of the summons that he had issued and asking for too broad an order from the court. In particular he argued:-

(i) The plaintiff was arguing that because he had filed evidence and the defendants had chosen not to do so, that evidence was now without challenge and should be accepted by the court without question. In addition, the fact that the plaintiff had not accepted the wording of the consent orders proffered by the defendants meant that the issues were entirely at large. This stance was unreasonable. It was not appropriate for the plaintiff to ask for orders that were outside of the wording of the prayer within the summons being heard by the court. The plaintiff had failed to provide any authority to support the position that the court was entitled to go beyond the wording of the summons.

(ii) Moreover, the defendants had made their concessions in the letters of the 17 th October, 2019 and 7 th November, 2019 strictly on the basis of the orders being sought in the summons. The first of these letters conceded the breach of Article 103 of the 1991 Law on the basis that the 2010 SHL accounts did not properly account for the Ivegill Preference Shares (paragraph 1(i) of the summons). It also conceded that the consolidated balance sheet of the 2010 SHL accounts was wrong and misstated having regard to the liabilities created by the Ivegill Preference Shares (paragraph 1(ii) of the summons). It further conceded that the defendants had breached Article 105(4) of the Companies (Jersey) Law 1991 in that the 2010 SHL accounts failed to give a “true and fair view…so as to show…the state of its affairs at the end of the period”.

(iii) The letter dated the 7 th November, 2019 further conceded that the defendants had breached Article 103(a)(i) of the 1991 Law but on the strict wording placed in a draft Consent Order that:-

“Contrary to Article 103 of the Companies (Jersey) Law 1991, the accounting records of SHL are insufficient as they do not show and explain the Ivegill Preference Share transaction”

(iv) On Advocate Kelleher's submission, it was clear that the concessions that had been made by the defendants were made solely on the basis of the wording of the orders being sought under the summary judgment summons and this was evidenced by the wording of the consent orders that they had proposed to the plaintiff. On the contrary, he argued the consent order presented by the plaintiff and the form of the orders sought by the plaintiff at the hearing were both considerably beyond the wording of the summons before the court. The plaintiff relied upon the comments of Commissioner Clyde-Smith in *Caversham Trustees Limited v Patel and others* [2008] JRC 020 at para 6:-

"6. It is fundamental to the administration of justice that parties are given proper notice of orders that are being sought against them – hence the requirement for a written summons or pleading – and the additional substantive orders of the kind applied for by Mr Sinel simply cannot be lumped under the request in the summons for "further, ancillary or other relief" and produced like a rabbit out of a hat, at or close to the hearing. It is axiomatic that such relief must be ancillary or incidental to the substantive order set out in the summons. The proper course for Mr Sinel would have been to apply to amend his summons which would inevitably have led to an adjournment of the case to enable Mr Hoy to take instructions and prepare a response. Even though Mr Hoy had seen the skeleton argument filed before the hearing, he was perfectly entitled to rely upon the relief sought in the summons (security for costs) as being the only matter before the Court."

13 On the issue of the lack of evidence filed by the defendants in response to the affidavit and report filed by the plaintiff, Advocate Kelleher contended that there was no requirement to file evidence where the defendants had already conceded the thrust of the arguments brought by the plaintiff on the issues of Articles 103 and 105 of the 1991 Law as set out in the summons. Furthermore, it would be inappropriate for the court to act in a manner which seeks to validate or approve the contents of the report from Mr Ballamy at this stage. He contended that the contents of Mr Ballamy's report strayed well beyond what was requested in the summons. Adoption of it by the court would amount to approving his comments on issues which should rightly be seen as matters for consideration and determination at trial with the benefit of full legal argument and cross examination.

14 Lastly on the topic of Article 109 of the 1991 Law, Advocate Kelleher submitted that it was beyond the powers of the Judicial Greffier to make orders that would amount to determinations of criminal culpability. Article 109 was clearly worded as a criminal offence and the power to commence criminal proceeding lay with the Attorney General only. Moreover, it was brought to the court's attention that the plaintiff had not included a provision for the acceptance of a breach of Article 109 of the 1991 Law in the draft Consent Order which it had produced to the defendants. In the view of the defendants, this was evidence of the fact that the plaintiff knew that it was a weak point.

15 In reply Advocate Sharp asserted that the case of *Caversham* was not on point. That case

was an example of an extreme departure from the intended nature of the orders being sought from the Royal Court whereas, in this summons, the plaintiff's requested order was fundamentally the same as the orders requested in the summons. There was no reasonable way in which this could be described as an ambush as the defendants had known what was being sought for some while. In short the plaintiff was merely asking the court to produce a judgment that adopts the relevant parts of the plaintiff's Affidavit evidence and the admissions made by the defendants.

Decision on the Summary Judgment

16 The question of whether a summary judgment would be granted by the court was never in doubt from the moment that the defendants issued their initial concessions under cover of their letter of the 17 th October, 2019. When now considered in tandem with the second letter of the 7 th November, 2019, the real issue for the court is what should be the extent of the summary judgment.

17 On the one hand, the plaintiff asks for summary judgment on all three Articles (103, 105 and 109) of the 1991 Law and requests that the court adopts aspects of the evidence of Advocate Banks's affidavit and Mr Ballamy's report in its judgment. On the other hand, Advocate Kelleher for the defendants urges the court to dismiss any application purporting to seek an order confirming a breach of Article 109 and to limit any other orders to the express wording in the summons.

18 I have concluded that the correct order must be one that is bound by the wording set out in the summons. I am persuaded by the principle in *Caversham* that any party who is required to answer a summons might be entitled to rely on the exact wording of the summons in order to know what it is that they are being asked to defend. It was open to the plaintiff to apply to amend the wording of his summons where he sought any orders beyond those in the original wording. This application was not made and therefore the scope of the orders that can be made must be limited to the wording requested in the summons.

19 I do not accept that is appropriate to adopt the contents of the report by Mr Ballamy in this hearing. Should this matter ultimately require adjudication before the Royal Court, that court may, having heard full argument and cross examination, conclude that it can adopt Mr Ballamy's report. I am not persuaded by the plaintiff that because the defendant has not filed rebuttal evidence this court should accept the filed evidence on behalf of the plaintiff as unchallenged. The defendants had conceded the substance of the application; namely the breaches of Article 103 and 105 of the 1991 Law (albeit late in the day in respect to Article 103) which would negate the need for filing evidence. In this regard, I have taken note of the Lord Sumption's statement in *Prest v Petrodel Resouses Limited and Others* [2013] UKSC 34 at para 44 when he said:-

> ***"In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to***

matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party may be either reduced or nullified."

20 I also accept the submission of the defendants that Mr Ballamy's reports extends well beyond mere comment on the efficacy of the accounting principles applied in the SHL 2010 accounts. Even the Introduction and summary of opinions, from which Advocate Sharp quoted extensively, included comments on matters of contractual interpretation which ought rightly to be argued fully. It would therefore be premature for this court to adopt the report, either in part or in whole, in this judgment. For the sake of clarity, nothing in the above is intended to express any criticism of the provision of the report, its author or its contents.

21 The plaintiff also seeks an order that the defendants have acted contrary to Article 109 of the 1991 Law. This court is not the correct forum for making pronouncements relating to criminal culpability. Irrespective of whether or not the wording of Article 109 implies that the offence is one of strict liability, it is neither helpful nor appropriate for such a declaration. To do so would be to usurp the jurisdiction of the Attorney General or those to whom he delegates his powers and I intend to leave it to his office to decide what if any action needs to be taken in light of the concessions made by the defendants.

22 Having regard to all the reasons above, the decision of the court is to grant summary judgment to the plaintiff on the following terms:-

(i) The SHL 2010 Accounts do not properly account for the 4 million, fully paid, redeemable, cumulative 10% preference shares of £1 each that SHL issued to Ivegill Holdings Limited in March 2010. The SHL 2010 Accounts were therefore materially misstated in this regard.

(ii) The consolidated balance sheet at page six of the SHL 2010 Accounts is materially wrong and misstated. It records positive net assets of £3,011,321 whereas the consolidated balance sheet should have recorded a deficit of net assets, having regard to the liabilities created in respect of the Ivegill Transaction.

(iii) In light of the findings above:-

(a) SHL acted contrary to Article 103 of the 1991 Law in that the company failed to keep accounting records that are sufficient to show and explain the Ivegill Transaction.

(b) SHL acted contrary to Article 105(4) of the 1991 Law in that the SHL 2010 Accounts failed to give a true and fair view of the state of the company's affairs

at the end of the period.

Costs:

23 Having concluded that the plaintiff is entitled to summary judgment in the terms set out above, the parties requested that I determine the issues of costs. Advocate Sharp submitted that whichever way the court choses to view the application, the plaintiff has succeeded in obtaining a summary judgment and should be considered the clear winner. It therefore followed that the plaintiff was entitled to his costs of and incidental to this application and that those costs should be granted on an indemnity basis. Finally, Advocate Sharp sought an order that the defendants make an interim payment of 60% of the costs claimed so as to avoid prejudice to the plaintiff who had already had to expend a sizeable sum in legal costs to this point.

24 In support of the costs claim, the plaintiff filed a costs schedule. That schedule set out seven distinct aspects of the legal costs covered to date as follows:-

(i) Advice in the case and consideration of volumes of evidence;

(ii) Further advice and drafting of Letter before Action;

(iii) Pre-action correspondence, starting to draft order of justice when no response received and then dealing with 70 pages of Carey Olsen's letter of 12th December;

(iv) Dealing with Carey Olsen complaint to the Law Society, filing a detailed reply to that complaint and providing Law Society with all related documents. Consider Law Society rejection of that complaint;

(v) Draft order of justice, tabling action and pre-action correspondence;

(vi) Issue summons for summary judgment, evidence from Mr Ballamy, draft Mr Banks' affidavit, serve evidence, deal with related correspondence, two date fix hearings, application for summons re direction re defence evidence, consent order arising therefrom draft skeleton argument for final hearing on 8 th November, prepare joint bundle indices admissions by Carey Olsen and draft consent order and related correspondence thereafter; and

(vii) Dealing with the defendants summons re application to extend time and summons to stay the summary judgment application.

25 Advocate Sharps submitted that there were three reasons to justify an order for indemnity costs. First, the defendants advanced a hopeless defence to the summary judgment application. All that was required was for the defendants to explain their own accounts. They must have known of the errors within the accounts from a very early stage. No answer had been filed and no evidence produced to rebut the position of the plaintiff. Ultimately, late concessions were produced, even as late as the day before the summons was heard.

26 Second, there had been a personal attack upon the plaintiff (and Advocate Sharp and a third party who had been a putative plaintiff) in the form of an invalid complaint to the Jersey Law Society. The complaint related to the content of the letter before action in which the plaintiff had alleged that the defendants had acted fraudulently. For the purposes of this judgment, it is not necessary to set out in detail the fraud allegations or indeed the decision of the Jersey Law Society. Suffice it to say that, after several months of investigation, the complaint was dismissed on the basis that there was no case to answer. Advocate Sharp argued that the complaint made several statements regarding the SHL 2010 Accounts which were blatantly and knowingly false and which had now been confirmed as such by the concessions made by the defendants in response to this summons. In short, an unmerited complaint to a regulatory body by a party to seek an advantage in litigation placed the matter outside of the range of normal behaviour and allowed the court to order indemnity costs.

27 Thirdly, the defendants had been playing procedural games in order to delay the hearing of the summary judgment application. In support of that submission, Advocate Sharp drew my attention to the fact that despite having no obligation to file an answer (once the summary judgment application had been issued), the defendants themselves issued a summons seeking a three months extension to the date for filing an answer. Having entered into a consent order for the three month extension they then failed to file the answer by the agreed deadline by which time the summary judgment application had been delayed to the 8 th November, 2019. In addition the defendants issued and then abandoned a summons for a stay of the summary judgment application and moreover refused to voluntarily agree a date for the filing of the defendants' evidence. This final act led to the plaintiff's having to issue a further summons for an order for filing of evidence only for the defendants to agree the same on the eve of filing submissions to the court.

28 In response, Advocate Kelleher contended that the making of any broad costs orders would be premature when it is unclear what the effect of the summary judgment would have on the overall claims. The order of justice was silent on the topic and did not show the relevance of the errors in the SHL 2010 accounts to the claims made by the plaintiff. In short, having obtained summary judgment on the points conceded, Advocate Kelleher asks what does the plaintiff receive or gain? In his submission, there is no relief granted, it does not improve the prospect of settlement being obtained and there is no saving in costs or reduction in the time at trial. The issue of the errors in the SHL 2010 Accounts still required a trial judge to determine whether they were intentional, accidental or even negligent.

29 On the issue of whether any award of costs should be made on the indemnity basis, Advocate Kelleher asserted that the case of *Fitzpatrick Contractors Limited v Tyco Fire and Integrated Solutions (UK) Limited* [2008] EWHC 1391 at paragraph 3, stated that conduct becoming of an indemnity costs award had to be " ***unreasonable to a high degree***" and that did not mean ***"merely wrong or misguided in hindsight"***. It followed that the defendants' decision to not immediately concede the errors within the SHL 2010 accounts was not *"unreasonable to a high degree"*. The letter before action had not made the

allegations regarding the errors that appear in the summary judgment summons. Moreover, the accounts had been audited by Deloitte, a global accountancy firm of high regard, and the accounting treatment of the Ivegill Preference Shares had been carried forward through the following years of accounts without the errors being noted. There was no good reason for the defendants to know that the accounts were wrong. In addition, once this had been brought to their attention there were difficulties in gathering the relevant evidential documents due to the passing of time and several leading players in the events having left the defendants' companies. This had delayed getting witness evidence. Having taken independent advice since the summons had been issued, the defendants concluded that they could not challenge the assertion that the SHL 2010 accounts were incorrect and had made the concessions appropriately.

30 The defendants also submit that it would be inappropriate to criticise them for not making concessions immediately upon receipt of the letter before action on 4 th September, 2018. Advocate Kelleher submitted that the letter before action was not focused upon the SHL 2010 accounts but rather upon the alleged breaches of contract and fiduciary duty and upon the alleged fraud. How then would it have been reasonable for the defendants to have made concessions regarding the SHL 2010 Accounts given that so little focus had been directed to them at that point? The letter before action made no mention of failing to account properly for the Ivegill Preference Share transaction as now alleged. Neither did it contain any allegation regarding inaccuracies in the balance sheet or that there had been related breaches of the 1991 Law.

31 On the topic of the complaint to the Jersey Law Society being motivated by litigation tactics and constituted a personal attack on the plaintiff and Advocate Sharp, Advocate Kelleher asserted that the decision to complain had nothing at all to do with the SHL 2010 accounts and related issues. It was entirely to do with professional conduct. In the defendants' submission, the issue of the complaint and the costs incurred therewith were unrelated to the litigation and should not be included with any costs orders by this court. In support of that position, Advocate Kelleher relied upon the dicta in *Roach v Home Office* [2010] 2 WLR 746 at paragraph 29 where it states:-

> ***"29. Next I was referred to the well-known case of*** *re Gibson's Settlement Trusts* [1981] 1 Ch.179. ***This is an important case because it seeks to marshall a number of relevant authorities and to set out some principles or guidelines (since widely followed) to be applied in assessing whether costs incurred for work done prior to any civil proceedings being commenced may be recoverable as costs of and incidental to the proceedings.*** In the course of his judgment, Sir Robert Megarry VC referred to a number of cases, including Pêcheries Ostendaises; *Wright v Bennett* ***(which the Vice-Chancellor explained at p.185D); and Envoy Farmers.*** His review of the authorities led him to conclude that there were at least three "strands of reasoning" to be applied: that of proving of use and service in the action; that of relevance to an issue; and that of attributability to the [paying parties'] conduct (p.186 H). He then helpfully explained that at some length." [Emphasis Added]

32 He argued that in order to justify any award of costs for works undertaken prior to the commencement of proceedings there must be all three strands of reasoning in place. By the simply assertion that the complaint to the Law Society has no relevance to the litigation now in train, the application does not fulfil the three strands and therefore the costs incurred in the complaint should not be included in any award of costs pursuant to the summary judgment application. Moreover, it is also contended that the issue at the heart of the Law Society complaint was the allegation of fraud contained in the letter before action and given that, the allegation had not been included within the order of justice which was subsequently issued, it would be inequitable to punish the defendants for costs incurred by the plaintiff in dealing with the topic that does not form part of the pleaded claim.

33 Lastly, in response to the allegation of playing procedural games, the defendants asserted that contrary to the view advanced by the plaintiff, they had at all stages sought to deal with the matters appropriately and timeously. On a closer examination of the chronology of events and the contents of the correspondence between the parties, it had been the plaintiff who had been unhelpful and unreasonable.

34 Each of the summonses issued by the defendants had been a valid and proportional response to the circumstances at the time. The first summons seeking a three month extension of time to the 27 th September, 2019 to file their answer had been issued because the response received from the plaintiff to the informal request to that end had been unclear and conditional. Given the complexity and size of the order of justice, it was not extraordinary to seek a lengthier period than the usual 21 days provided by the Rule 6/6(4) of the Royal Court Rules. That extension was agreed by consent and so far as the costs of that application are concerned, the court is now *functus officio* because the court had already ordered costs in the cause on this application.

35 The second summons issued by the defendants sought an order staying the summary judgment application until after the filing of the answer and for the plaintiff to provide affidavit evidence in support of that application. It is argued that, as the court ultimately set a date for the 8 th November, 2019 for the summary judgment hearing, the defendants no longer needed a stay and therefore reasonably withdrew their summons. The plaintiff ought to have sought its costs at the time of the withdrawal and in any event, there was very little work undertaken by either party in relation to their summons for a stay.

36 In regard to the third summons, being the plaintiff's summons for a timetable for the filing of the defendant's evidence in the summary judgment hearing, Advocate Kelleher argued that the behaviour of his clients was entirely reasonable. The summons followed on from correspondence between the parties in which Advocate Kelleher submitted that the plaintiff changed the date by which they wished for the defendants to file their evidence on several occasions. In a letter dated 2 nd October, 2019, Advocate Sharp wrote suggesting filing by the 18 th October, 2019. In a letter dated 7 th October, 2019 addressed directly to the court and copied to Advocate Kelleher (a practice which is becoming more common but which

remains unwelcome by the court save in exceptional circumstances), Advocate Sharp sought an order that the defendants file their evidence by the 23 rd October, 2019. Finally, in the summons issued by the plaintiff, they sought that the defendants file by the 25 th October, 2019. The matter was finally settled by consent. The defendants argued that the plaintiff's contrary stance in regard to the dates has resulted in unnecessary additional costs to the parties.

37 By way of general submission, Advocate Kelleher advanced that his clients had made the concessions they had as swiftly as they were able. In his view, the plaintiff had been excessively aggressive in the litigation to date and that the consent order that Advocate Sharp had invited the defendants to agree so overstepped the boundaries of the prayer of the summons that it made a settlement of the summons application unrealistic. In short, the plaintiff had been playing procedural games whereas the defendants were taking matters seriously, had made appropriate concessions before the date agreed for the filing of evidence (thereby negating the need for filing any such evidence) and had been required to deal with preparing for the summary judgment application at the same time as drafting a thorough answer to the claim.

Decision on costs

38 I start from the position that this was a hearing to determine the application for summary judgment on the aspects of the case set out in the body of the summons. I accepted the defendants' position that to make orders for summary judgment beyond that set out in the summons would be inappropriate and would offend the principles set down in *Caversham*. Nevertheless, the plaintiffs have succeeded in the majority of the summons as drafted. The only exception was that they requested an order declaring that the defendants had breached Article 109 of the 1991 Law which I declined for the reasons set out above.

39 Two matters trouble me in regard to the summons. First, it is right to note that a sizable proportion of the written and oral submissions of the plaintiff focused on the complaint to the Jersey Law Society. It was characterised as a personal attack and made up one of the limbs to justify an award of indemnity costs. It therefore follows that a sizable proportion of the costs incurred by the plaintiff of and incidental to this hearing related directly to the matter of the Jersey Law Society complaint. I am content that this episode is outside the boundary of the litigation. The complaint was entirely based upon a perceived professional misconduct that arose from the letter before action. It was dealt with by the Jersey Law Society within the rules and regulations governing its members. It is therefore not appropriate to seek recovery of costs incurred in that matter through the present proceedings.

40 The second is the lateness of the final concession by the defendants on the eve of the hearing. Whilst I understand that the defendants have had to overcome several obstacles in order to be able to gather the necessary evidence and obtain the correct professional advice, I have not been convinced that the defendants were not able to make this

concession earlier than they did. I have no doubt that had that concession been made alongside the letter of the 17 th October, 2019, considerable costs could have been saved in the preparation for the hearing.

41 Advocate Sharp based his submission for indemnity costs on the defendants' triumvirate of sins: pursuing a hopeless defence, a personal attack in the Jersey Law Society complaint and playing procedural games. I am sympathetic to the first limb in that I am surprised that it has taken so long for the defendants to concede the issues referred to above. In regard to the other two limbs, the plaintiff has not succeeded in convincing me. In light of my conclusion that the costs of the Jersey Law Society complaint fall outside the costs of and incidental to the summons, it follows that the issue of the alleged personal attack cannot be part of my consideration on the nature of the costs awarded. As to the allegations of procedural games, I am left with the impression that both parties might have chosen to proceed in a manner more helpful to the court and to the speedy resolution of this dispute. I reach the conclusion that the threshold for indemnity costs has not been reached in the present proceedings and such costs as are to be awarded shall be on a standard basis.

42 The plaintiff seeks costs dating back to July 2018, some 11 months before the order of justice was issued. In order for the plaintiff to be in a position to seek an order for pre action costs following a successful summary judgment, there would need to be clarity on the effect of the summary judgment on the case as a whole. Where the summary judgment concludes the litigation or substantially settles the majority of the issues in dispute, then the court may be in a position to grant such a costs award, or at least give consideration to doing so by applying the test set down in *Roach* at para 29. In my estimation, the extent to which the summary judgment granted in this judgment affects the litigation as a whole is far from clear. As the defendants asserted, the plaintiff has received none of the relief pleaded in the Order of Justice as a direct consequence of this judgment. It must therefore be premature for any award of costs outside of the costs of and incidental to this summons.

43 It is therefore the decision of this court that the plaintiff is entitled to costs of and incidental to this summons, such costs to be agreed between the parties or failing agreement to be taxed at the standard rate. For the sake of clarity, I perceive those costs to encompass the costs incurred in matters (vi) and (vii) in paragraph 24 above. The sole exclusion are the costs incurred in the defendants' summons for an extension of time for file their answer, which costs have already been adjudicated as costs in the cause. All other costs incurred by the parties shall be reserved to the adjudication of the trial judge. Given the limited costs detailed in sections (vi) and (vii) above and in the plaintiff's costs schedule, the exclusion of the costs incurred to the defendants' summons and the payment on the standard basis, I do not deem it appropriate to order a payment on account by the defendants.

44 On a final point, the defendants volunteered at the end of the hearing that they would be in a position to file their answer with 21 days of the date of the judgment being issued. In response Advocate Sharp indicated that his client would be able to file any necessary reply within a further 21 days. As this timetable was consented to by the parties at the hearing, I

so order.