Appleby Trust (Mauritius) Ltd v Cristiana Crociani

Jurisdiction:	Jersey
Judge:	James McNeill, David Perry, Lord Anderson of Ipswich K.B.E.
Judgment Date:	25 July 2018
Neutral Citation:	[2018] JCA 136
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Court:	Court of Appeal
Date:	25 July 2018

Text

[2018] JCA 136

COURT OF APPEAL

Before:

James McNeill, **Q.C., President**;

David Perry, **Q.C., and**

Lord Anderson of Ipswich K.B.E. **Q.C.**

Between
Appleby Trust (Mauritius) Limited
Appellant
and
Cristiana Crociani
First Respondent
A (by her Guardian ad litem)
Second Respondent

B (by her Guardian ad litem)
Third Respondent

Advocate E. Moran **for the Appellant**.

Advocate E. B. Drummond **for the Respondents**.

Authorities

Crociani v Crociani [2018] JRC 013.

Royal Court Rules 2004 (as amended).

Crociani v Crociani [2017] JRC 146.

Crociani v Crociani [2014] UKPC 40.

Hong Kong Foods Limited and Another v Robin Hood Curry Limited and Another [2017] JRC 116.

Civil Proceedings (Jersey) Law 1956.

MacFirbhisigh and Anr v CI Trustees and Executors Ltd [2016] JRC 002A.

C v P-S [2010] JLR 645.

Pell Frischmann Engineering Limited v Bow Vallev Iran Limited [2007] JLR 479.

Appeal against a costs judgment of the Royal Court dated 17 January 2018

THE PRESIDENT:

1 This is the Judgment of the Court. Appleby Trust (Mauritius) Limited, the fourth defendant in the proceedings below, appeals a costs judgment of the Royal Court dated 17 January 2018 *Crociani v Crociani* [2018] JRC 013 (the "Costs Judgment") in favour of the plaintiffs and present respondents, Cristiana Crociani and two minors, leave having been granted by the trial judge (Clyde-Smith, Commissioner) on 17 January 2018. The respondents oppose the appeal.

Grounds of Appeal

2 In her Notice of Appeal, and before us, Advocate Moran seeks to set aside the order of the Royal Court dated 17 January 2018 that the appellant should jointly and severally with the first defendant below pay the costs of the plaintiffs of and incidental to the proceedings in

the Royal Court on the indemnity basis and have this court either remit the issue of indemnity costs to the Royal Court or substitute its own decision.

3 The order awarding indemnity costs made in January 2018 had been preceded by a consent order of 11 September 2017 that the appellant, together with the first and third defendants below were liable, jointly and severally, to pay to the plaintiffs on account, an amount representing 50 per cent of the plaintiffs' costs of and incidental to the proceedings calculated on the standard basis; with the plaintiffs' claim against the first, third and fourth defendants for costs to be awarded on the indemnity basis being adjourned to a later date.

4 For the appellant, Advocate Moran contends that, in reaching its decision on indemnity costs against the appellants, the Royal Court fell into a number of errors. The Royal Court is said to have taken into account irrelevant considerations in that it interpreted a salient part of the consent order regarding interim costs as fettering the discretion of the court by limiting its decision on indemnity costs to either an award of the whole of the plaintiffs' costs on the indemnity basis or no award on the indemnity basis. The Royal Court is said to have misdirected itself in reaching the determination that it had no power to make a percentage-based or issue-based award in relation to a possible indemnity uplift. It followed that the Royal Court had failed to take into account relevant considerations including (a) that the appellant was not the unsuccessful party as regards a number of discrete issues, which had been extensive and had taken up a considerable amount of time at trial and (b) that the plaintiffs had failed on certain discrete claims and issues. It would have been in accordance with the Overriding Objective under Rule 1/6 of the Royal Court Rules 2004 (as amended) to have adopted an issue-based approach. It was plainly wrong for the Royal Court to impose such liability in respect of costs which were neither incurred as a result of claims made against the Appellant or as a result of its relevant litigation conduct. In Advocate Moran's submission, there was only one issue that could warrant some level of indemnity costs and, looked at in the round, the correct order should have been that there should be no order for indemnity costs against the appellant.

Background

5 There are numerous judgments of the Royal Court, of this court and of the Judicial Committee of the Privy Council dealing with this litigation. The full background to the litigation will be found in the judgment of the Royal Court after trial *Crociani v Crociani* [2017] JRC 146 (the “Substantive Judgment”). For present purposes, the following details should suffice.

6 A family trust, known in these proceedings as the “Grand Trust” was settled on 24 December 1987 by the first defendant below, referred to in these proceedings as Madame Crociani. Parallel to the Grand Trust, Madame Crociani had settled property in what is known in these proceedings as the Fortunate Trust. By 2010 Madame Crociani was the sole beneficiary of the income and capital during her lifetime under the Fortunate Trust, and she had power to revoke the trust and withdraw all of the capital from it.

7 In 2010 an appointment was made by Madame Crociani and the other trustees of the Grand Trust, to Madame Crociani and the other trustees of the Fortunate Trust (the "2010 Appointment") of the whole assets of the Grand Trust apart from one significant asset. The 2010 Appointment was made under and by reference to Clause Eleventh of the Grand Trust deed, which gave the trustees power to appoint the trust fund to other trusts for the benefit of *"all or anyone or more exclusively of the others or other of the beneficiaries (other than the Settlor)…"*. The settlor of the Grand Trust, of course, was Madame Crociani who, by 2010, was not only the sole immediate beneficiary of the Fortunate Trust, but also held a power of revocation. By late 2010 – 2011 what had been a close relationship between Madame Crociani and her two children had broken down, with the plaintiffs being estranged from Madame Crociani and the other daughter, Camilla.

8 In June 2011 Madame Crociani revoked the Fortunate Trust and withdrew all of the assets which, by then, included all of the assets appointed under the 2010 Appointment. It appears that those assets have been disbursed by Madame Crociani around the globe and, whilst the Royal Court has made an order for disclosure at the instance of one of the defendants, Madame Crociani has refused to disclose where and how they are held.

9 In February 2012 Madame Crociani and the other trustees of the Grand Trust purported to retire as trustees and to appoint the appellant in their place. The appellant carries on a financial services business in Mauritius and the Deed of Retirement and Appointment also purported to change the proper law of the Grand Trust from that of Jersey to that of Mauritius (the "2012 Appointment"). The Royal Court found that, at least latterly, Madame Crociani and her daughter Camilla were acting together in trying to defeat the plaintiffs' claims. The plaintiffs challenged the 2012 Appointment as being a fraud on the power.

10 In August 2012, shortly after receiving a letter before action on behalf of the plaintiffs and sent to those acting for the former trustees of the Grand Trust and the present appellant, and prior to responding substantively to that letter, Madame Crociani and the former trustees, together with the present appellant as present trustee of the Grand Trust, entered into a deed of appointment known in these proceedings as the "Agate Appointment". By that appointment it was purported to appoint the appellant and one other as trustees of the Agate Trust, investing them with the right of the Grand Trust trustees to recover the assets appointed by the 2010 Appointment, should that appointment be found to be invalid. The Agate Trust was constituted for this purpose. The beneficiary of the trust fund was the Camillo Crociani Foundation IBC (Bahamas) Limited, formerly Camillo Crociani Foundation Limited ("the Foundation") a corporation beneficially owned by Madame Crociani. The plaintiffs duly challenged the Agate Appointment as being an excessive execution and fraud on the power.

11 The asset remaining in the hands of the Grand Trust following the 2010 Appointment was the benefit of a promissory note ("the Promissory Note"), issued by a Crociani family company. It was in the sum of 75 billion lira and bore an annual rate of interest of 8 per cent

with a final payment date of 10 December 2017. Under the provisions of the Grand Trust deed, the trustees were not obliged to enforce their rights under the Promissory Note.

12 The Order of Justice commencing proceedings below was issued on 18 January 2013 against the former trustees and the appellant. Initially, jurisdiction was accepted but, following a change in legal representation, a challenge to the forum was made, unsuccessfully, with the matter being taken to the Privy Council (*Crociani v Crociani* [2014] UKPC 40). The defendants were represented by the same legal firm and the defence, including the forum challenge was funded by Madame Crociani. After failure of the forum challenge, a composite answer resisting the claims of the plaintiffs was filed on behalf of the former trustees and the present appellant; but subsequently the former corporate trustee chose to be separately represented and filed separate answers. In July 2015 the plaintiffs amended their Order of Justice to include a claim for breach of trust against the former trustees and the appellant for failing to collect the interest on the Promissory Note from 2003.

13 In January 2016, without notice to the Court or to the parties other than Madame Crociani and potentially Camilla, the appellant purported to resign as trustee of the Grand Trust and to appoint GFin Corporate Services Limited (“GFin”), another company carrying on financial services business in Mauritius, in its place. The appellant also purported to assign to GFin the Promissory Note. Under and in terms of the deed of Retirement and Appointment, the appellant and GFin purported to amend the terms of the Grand Trust (which by its terms are unamendable) by conferring on the Mauritius courts jurisdiction over all disputes relating to the Grand Trust. The plaintiffs duly challenged the appointment of GFin and the amendments as being a fraud on the power.

14 Only days before purporting to retire as trustee, the appellant and the company which had granted the Promissory Note purported to amend the terms of the Promissory Note by extending the repayment date to 12 December 2022 at an increased annual interest rate of 11 per cent. That amendment was challenged by the plaintiffs as being a breach of trust.

15 In February 2016 GFin instituted rival proceedings in Mauritius relating to the matters in dispute in the present proceedings and, on 10 March 2016 applied for an anti-suit injunction against the plaintiffs. By July 2016 the Supreme Court of Mauritius had dismissed that application and GFin's appeal against that judgment was abandoned. In March 2016 GFin was joined as a party to the present proceedings, but it has refused to submit to the jurisdiction of the court. In March 2016, the Royal Court granted the plaintiffs an injunction against the present appellant and GFin, restraining them from dealing with the Promissory Note, such that it be held to the order of the Royal Court.

16 Madame Crociani funded the defence of the appellant up until November 2016. In January 2017 the Royal Court granted to the appellant an injunction against GFin on the same terms as that granted to the plaintiffs. In March 2017 the appellant applied to the courts of Mauritius for the injunction to be rendered executory in that jurisdiction. GFin resisted that

application and it is understood that the issue is yet to be determined.

17 In March 2015, following the failure of the forum challenge, the plaintiffs issued a summons seeking a pre-emptive costs order out of the Grand Trust in the sum of USD $5 million. The application was resisted by the appellant. The application was withdrawn by the plaintiffs shortly before it was due to be heard by the Royal Court in July 2015.

18 When the proceedings below came to trial in 2017 (lasting some eleven weeks between 16 January and 3 April) an issue of significance, referred to below as the "Key Underlying Issue" was whether it had always been intended that Madame Crociani would be able to benefit from the Grand Trust: not, clearly, as Settlor but as an indirect beneficiary through her ownership of the Foundation, which is one of the specified beneficiaries.

The Judgment below

19 The Costs Judgment dealt with the plaintiffs' application for indemnity costs as against Madame Crociani, the first defendant, and BNP Paribas Jersey Trust Corporation Limited, the third defendant, as well as against the appellant. The court commenced by noting that, when the Substantive Judgment was handed down, certain costs orders had been made with the consent of the third and fourth defendants, who had agreed to pay all of the costs of the plaintiffs of and incidental to the proceedings on the standard basis and to apportion that liability between them; and, accordingly, that no argument had been heard on costs. In particular, the Orders had included:

> *"32 Ordered that the Plaintiffs' claim against the First, Third and Fourth Defendants for costs of and incidental to these proceedings on the indemnity basis be adjourned to a date to be fixed*.
>
> *33 On the basis that the Third and Fourth Defendants accept that they should pay the costs of the Plaintiffs on the standard basis and the Commissioner has found that he would award the Plaintiffs' costs against the First Defendant on at least that basis, ordered that the First, Third and Fourth Defendants shall jointly and severally pay to the Plaintiffs a payment on account representing 50% of the Plaintiffs' costs of and incidental to these proceedings calculated on the standard basis, namely a payment to the Plaintiffs in the sum of £2,884,437.83 and this within twenty eight days of the date hereof.* The Third and Fourth Defendants have agreed (whilst reserving their rights to seek contribution from the First Defendant, Fifth Defendant, Sixth Defendant and Eighth Defendant) to apportion this payment on account between themselves in the ratio seventy five per cent (75%) to twenty five per cent (25%), the Third Defendant paying the sum of £2,163,328.39 and the Fourth Defendant paying the sum of £721,109.46 within twenty-eight days of the date hereof.
>
> *34 Ordered that the Plaintiffs' costs calculated on the trustee indemnity basis and not actually recovered pursuant to the above orders shall be borne by the*

Trust Fund (equally as between Cristiana's Fund and Camilla's Fund).”

20 Insofar as relevant to this appeal, the learned Commissioner proceeded upon the following basis.

21 As regards the principles to be applied in respect of the award of indemnity costs, reference was made to the judgment in *Hong Kong Foods Limited and Another v Robin Hood Curry Limited and Another* [2017] JRC 116 (Birt, Kt, Commissioner) at paragraphs 9 and 10. The requirement was for something unreasonable in the conduct of the paying party which took the case out of the norm.

22 The learned Commissioner then noted the argument by Advocate Moran for the fourth defendant and present appellant that, in addressing the issue in respect of indemnity costs, the court should approach the matter on an issue-based approach, her submission being that the fourth defendant had had no involvement in some of the issues and only a limited involvement in the Key Underlying Issue. As part of this argument, Advocate Moran had submitted that, under the existing (interim) costs order, the Taxing Greffier would decide which issues the fourth defendant had or had not been involved in, or had been successful in, and tax the plaintiffs' bill of costs down accordingly.

23 In the view of the learned Commissioner, it was for the trial judge, not the Taxing Greffier, to make separate orders reflecting the outcome of different issues. He also expressed a concern that, to allow the fourth defendant to argue the matter of indemnity costs on an issue-based approach could result, arguably, in its liability to the plaintiffs being less than that already accepted under the standard basis. In his view, the only matter before him was whether the costs already ordered by consent should be paid by the third and fourth defendants on the indemnity as opposed to the standard basis.

24 In dealing with the position of the fourth defendant and present appellant at paragraphs 43 to 48 of the Costs Judgment, the learned Commissioner referred, first, to points which he had considered in respect of the conduct of the third defendant, at paragraphs 29 to 42, where he had concluded, taking an overview of the litigation, that the third defendant's conduct had come within the bounds of what is acceptable in hard fought litigation, thus not justifying an award on the indemnity basis. He considered various aspects of the litigation.

25 The first was the Agate Appointment. As the learned Commissioner indicated at paragraph 40, that matter had troubled him but, on balance, he accepted that it was not unreasonable for the third defendant as former trustee, and its advisers, to work, on the basis of information derived from Madame Crociani as settlor, on the assumption that the Foundation was there as a beneficiary to enable her to benefit. It was that assumption which underpinned the whole of the Agate Appointment.

26 Second was the forum challenge. Albeit lengthy and costly, the costs of that exercise had

been dealt with by all three courts involved and none of the three courts had criticised the taking of the point. It could not be used as a ground for awarding indemnity costs upon the basis of conduct.

27 On these two matters the learned Commissioner considered the position in respect of the present appellant to be the same as that of the third defendant. However, as he indicated at paragraph 43, he considered that the overall position of the fourth defendant and present appellant fell to be distinguished from that of the third defendant.

28 In the first place, it had acted unreasonably in deciding to join with the former trustees in actively resisting the proceedings. As regards the original Order of Justice, there had been no claim made against the present appellant. The challenge against the 2010 Appointment out of the Grand Trust was a challenge to the exercise of the requisite power by the former trustees. Not only did the present appellant have nothing to defend, it had an interest in funds being recovered for the benefit of the trust of which it was a trustee: see paragraph 44.

29 Not only that, a new trustee in its situation would ordinarily be expected to take a neutral role and make independent enquiry, especially where the claim represented a potentially very substantial asset of the trust of which it was trustee. To the contrary, the present appellant had made no enquiry of the beneficiaries of Cristiana's Trust, nor did it seek the directions of the Court as to the stance it ought to take.

30 In the second place, when the first plaintiff sought a pre-emptive costs order out of the Grand Trust, the fourth defendant and present appellant opposed the application in strong terms. But it must have known that it was in a position of conflict: a request for a distribution was being made by a beneficiary and should have received independent consideration without delay, whereas the appellant had decided to join in the active resistance of the proceedings. Such circumstances might have suggested either that the directions of the Court be sought or that the discretion should be surrendered to the Court.

31 In the third place, the appellant's secret actions in respect of the Promissory Note displayed a position of hostility to the claims of the plaintiffs. The appellant had interfered with the administration of justice by agreeing to the amendments to the Promissory Note, by appointing GFin as trustee, by signing the Promissory Note to GFin and thereby placing it beyond the jurisdiction of the Royal Court, and by amending the provisions of the Grand Trust. All this had given GFin a platform to commence rival proceedings in Mauritius, which it promptly then did.

32 In the fourth place the appellant had not only joined with the former trustees in actively resisting the proceedings, it had taken its own steps in relation to the Key Underlying Issue. It had obtained fresh material from Madame Crociani or her advisers (Madame Crociani having made a deliberate decision, as had Camilla, not to be represented at the trial) and

having instructed its own experts on that matter for the purpose of fighting the joint defence. However, in contrast to the third defendant, whose conduct had been found to be within the bounds of what was acceptable in hard fought litigation, the appellant had engaged in a matter on which it had nothing to defend (the Key Underlying Issue), had failed to seek directions when in a position of conflict (the pre-emptive costs application) and had interfered with the administration of justice (the Promissory Note). In the view of the learned Commissioner, that conduct went far beyond anything that could be described as reasonable or within the norm and justified an order for indemnity costs: see paragraph 48.

The Grant of Leave to Appeal

33 In a judgment dated 17 January 2018 distributed only to the parties, the learned Commissioner expressed his reasons for granting leave to appeal.

34 The learned Commissioner recognised that the circumstances in which the costs orders were made had been unusual. On 11 September 2017 the Court had been presented with an agreed order as to costs and, as shown by the transcript, the learned Commissioner had been at pains to stress the court's understanding that the fourth defendant had agreed to pay all of the costs of the Plaintiffs on the standard basis; not just costs relating to certain issues. The order had been made on that basis and the learned Commissioner did not think it open to the fourth defendant to argue that indemnity costs could be dealt with on an issues basis. In the view of the learned Commissioner, however, the appeal depended upon the proper interpretation of the order of 11 September, upon which competing arguments could be advanced. He was therefore prepared to grant leave to appeal.

Appellant's Contentions

35 For the appellant Advocate Moran submitted that the salient orders set out in the Act of Court of 11 September 2017 had to be construed by their language and the context in which they were made. Part of the context was that the plaintiffs' application for indemnity costs was adjourned in its entirety. Whilst the appellant had agreed to pay the standard costs of the plaintiffs jointly and severally with the third defendant without reference to issues, this had only been on the basis of a right of contribution against the third defendant and a resulting agreement that the third defendant would pay 75 per cent of the costs payable on account. There was nothing in the wording of paragraph 33 that could be interpreted as meaning that the appellant was precluded from arguing for an issue-based approach in relation to indemnity costs. The conclusion of the learned Commissioner at paragraph 14 of the Costs Judgment that allowing the appellant to argue indemnity costs on an issue basis could arguably result in its liability to the Plaintiffs being less than already accepted under the standard basis was incorrect. The appellant was not seeking to overturn the order on standard costs: the issue was the extent to which there should be an increment on those costs in relation to some or all of the issues.

36 On any analysis the present was a case in which the court should apply either an issue-based or percentage-based approach to indemnity costs. The appellant had not been involved in substantial aspects of the case and so it could not be said that the plaintiffs were the winning party against the appellant in relation to those issues. It would not accord with the overriding objective of doing justice between the parties for the appellant to be ordered to pay the plaintiffs' costs on the indemnity basis.

37 As regards the matters raised by the learned Commissioner, the position of the appellant in respect of the Agate Appointment was no different from that of the third defendant. As to the pre-emptive costs application, the costs of the application (£105,000) is almost inconsequential when compared with the alleged overall costs to the plaintiffs of some £7 million.

38 Turning to the Key Underlying Issue, the appellant's defence of the Agate Appointment had included reference to that issue. It was effectively an administrative matter which required determination for the proper administration of the Grand Trust.

39 As for the 2016 breaches of trust in respect of the appointment to GFin, Advocate Moran accepted that it was open to the learned Commissioner to find the appellant liable for indemnity costs in relation to those discrete issues. However, the appellant had conceded before trial that the transfer to GFin was void and, in the overall scheme of things, the costs attributable to the breaches were not substantial.

Plaintiffs' Response

40 For the plaintiffs, Advocate Drummond surveyed the background to the orders. The Skeleton Argument filed by the appellant for the hearings on 8 and 11 September in respect of consequential matters made no reference to an issue-based costs order being sought. The appellant had submitted that all but one of the defendants should contribute towards the plaintiffs' costs; but, having agreed a provisional costs split with the third defendant, was content for the court to order joint and several liability as between all but one of the defendants (subject to potential applications for contribution). As regards indemnity costs the appellant had simply contended that it did not accept that it would be appropriate for indemnity costs to be awarded against defendants other than Madame Crociani as the conduct of the case as a whole did not warrant such an order being made.

41 Further, Advocate Drummond noted that Advocate Moran had not demurred from the Commissioner's statement during the 11 September hearing when he stressed the understanding of the court “that the Third Defendant and the Fourth Defendant have, as we understand it, agreed to pay the costs of the Plaintiffs on the standard basis. If that is not the case, then of course we must have an argument on it, but we understood that that had been conceded or agreed. So we put off the application for indemnity costs for another date.” Advocate Drummond also noted that, at the outset of the appellant's contentions to this

court, it was made clear that there was no appeal against the liability of the Appellant “to pay the Plaintiffs' costs on the standard basis on a joint and several basis with the First Defendant (Madame Crociani) and the Third Defendant (BNP).”

42 Turning to the indemnity costs hearing, Advocate Drummond observed that Advocate Moran on numerous occasions had submitted that it would be open to her, at taxation, to identify that the present appellant should not be liable in respect of issues in which it had not taken any active stance. The argument had not been merely that the indemnity uplift should be dealt with on an issue-based approach.

43 It followed that the argument for the appellant that the Commissioner had closed his mind to the possibility of making an issue-based order on the indemnity uplift was misplaced as such an argument had not been advanced at the indemnity costs hearing.

44 Further, if the appellant had wanted to argue for an issue-based costs order, it had to have done so when the judgment was handed down on 11 September. As it had not, the decision of the learned Commissioner, based upon the consent order of 11 September, was plainly within his discretion.

45 As to the grounds of appeal, Advocate Drummond contended that the Royal Court had considered and rejected the argument that an issue-based approach should be applied in circumstances in which it was fully aware that the first plaintiff had not succeeded on all of her claims and that the appellant had had no interest in defending some of the claims. The Royal Court was perfectly entitled to take into account the orders of 11 September and to reach its view on interpretation. The court had not misdirected itself in that it had full power to determine by whom and to what extent costs are paid: see Article 2 of the Civil Proceedings (Jersey) Law 1956. There was no lack of jurisdiction.

46 The decision was plainly within the ambit of the discretion of the Royal Court. As purported trustee the appellant was interested in the funds under the 2010 Appointment being recovered; yet it sought to thwart the plaintiffs' claims to recover them. It eschewed neutrality and made no independent enquiries. Opposing the pre-emptive costs application might have resulted in the stifling of the claim if the first plaintiff had not later secured litigation funding. There had been a palpable interference with administration of justice as regards the Promissory Note. Separately, even after the trial had begun, the appellant had asserted common interest privilege over communications between it and Madame Crociani. Not only that, but during the trial the appellant adopted Madame Crociani's witnesses, liaised with members of her team and cross-examined both the first plaintiff and her husband on the Key Underlying Issue and on Madame Crociani's wealth.

47 In the submission of Advocate Drummond, such conduct manifestly merited an order for indemnity costs.

The Tests on Appeal

48 It is well known that, for an appellate court to interfere with a determination on costs by the court of first instance, there must be a particularly cogent basis for doing so. Instances of relevant changes in circumstances since the decision below, and of occasions where a decision is plainly wrong, will be rare. For an appeal to be successful, the appellate court must be able, as a minimum, to identify a material misdirection as to the principles to be applied in exercising the discretion, or the taking into account of irrelevant matters or the failure to take account of relevant matters. Yet, even where the appellate court is sure that one or more of these failures has occurred, it may err on the side of declining to interfere, especially in lengthy and complex cases, in deference to the work of the judge who has presided over the whole trial and gained a cohesive, as opposed to piecemeal, understanding as to how the litigation has been conducted.

49 As has been stated by a very experienced Commissioner, and endorsed by this court:

> ***"The discretion as laid down in Article 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*** *AEI Rediffusion Music Limited v Phonographic Performance Limited* [1999] 1 WLR 1507." (*Watkins and Another v Eglishaw and Four Others* [2002] JLR 1 ***at paragraph 7***).

50 Article 2(1) provides:

> ***"Subject to provisions of this Part and to the 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."***

51 It therefore follows that misdirections as to principles will be rare occurrences in respect of costs decisions. Further, where a relevant matter has been overlooked or an irrelevant matter taken into account it may well be that only the trial judge is properly placed to say to what extent, if any, the relevant correction would have altered the determination.

Discussion

52 We take first, and address together, the appellant's second and third grounds of appeal. Albeit characterised differently as an irrelevant consideration (ground 2) and misdirection as to applicable principles (ground 3), each has the same substratum: that the Royal Court incorrectly interpreted the consent order in paragraph 33 of the order of 11 September 2017

as precluding it from entertaining a percentage-based or issue-based award of costs in respect of the indemnity uplift.

53 On this matter we consider that the learned Commissioner erred; but we have considerable sympathy with him because, as appears from the transcript, the position of the appellant at that time was far from clear. The learned Commissioner was quite correct to express a concern that the position of the appellant as to an issue-based approach might result in the plaintiffs receiving less than already ordered. The appellant was indeed considering asking the Taxing Master to approach taxation by reference to issues and we noted that the appellant considered it necessary to make it clear in its written contentions on the appeal that there was no appeal against the liability of the appellant to pay the plaintiffs' costs on the standard basis, jointly and severally with Madame Crociani and the third defendant.

54 However, notwithstanding the fact that the appellant had accepted in the consent order that costs on the standard basis were not to be approached by reference to individual issues and the participation, success or failure in relation to them, we are persuaded that an issue-based approach could be adopted in relation to what has been referred to as indemnity uplift. In a more ordinary situation, where the court is to make a single determination as to costs and is persuaded to do so on an issue-based approach, there would be no objection to the costs of some issues being awarded on the standard basis and others on the indemnity basis. Unusual as it may be, there seems no reason in principle or logic to reject the notion that an unsuccessful litigant might accept liability for costs on the standard basis on a unitary basis but seek to persuade the court that indemnity uplift should be viewed issue by issue. This possibility was not acknowledged by the learned Commissioner, with the result that he did not address his mind to the issue of whether the question of indemnity costs should be approached by reference to individual issues.

55 It follows that the appeal must be allowed and the order for costs set aside. We must therefore consider whether the matter should be remitted to the Commissioner or whether this court is in a position to make a determination of its own. We unhesitatingly adopt the former course. This was complex litigation and, at the most obvious level, we do not have the comprehensive overview of the Commissioner to enable us to determine whether it is appropriate to deal with costs here on an issue-based approach.

56 It will be a matter for the Commissioner therefore as to how to proceed, whether to call for further submissions and whether to determine costs on the basis of an overall approach or an issue-based approach. As it seems to us, however, the matter is now more straightforward than it was when last before the Commissioner. The appellant has made it clear that it accepts liability to pay the plaintiffs' costs on the standard basis jointly and severally with the first and third defendants. The only matters requiring determination are as follows. First, whether the Royal Court considers it appropriate in the whole circumstances of this litigation to approach the question of liability on the indemnity basis through an issue-based approach. Second, if so, which issues are to be accorded indemnity costs. We wish to emphasise that it is a matter for the Commissioner to decide, in the exercise of his discretion, whether or not to adopt an issue-based approach, or a unitary basis, as he is

best placed to make that evaluation.

57 It is appropriate to record that both parties referred us to the decision in *MacFirbhisigh and Anr v CI Trustees and Executors Ltd* (Hunt, Commissioner) [2016] JRC 002A. We note that, at paragraph 39, the court indicated that, in the circumstances of that case and the application made by the defendants for indemnity costs to be dealt with on an issue by issue basis, the exercise of trying to identify the costs referable to the individual issues would give rise to disproportionate complexity and confusion. For our own part we endorse the view that this may be a relevant consideration. In some litigation discrete matters may have been dealt with in such a way that it is easy to identify issues which have been separated out in pleadings, preparation and trial; in others this may not be the case.

58 As this court has affirmed on previous occasions, the result of the indemnity costs exercise is to find what would be fair and reasonable in all the circumstances. But, in addition, the purpose of the exercise is to achieve a fairer result for the party in whose favour the award is made than would be the case if only costs on the standard basis were given: *C v P-S* [2010] JLR 645 at paragraph 7, quoting from *Pell Frischmann Engineering Limited v Bow Vallev Iran Limited* [2007] JLR 479. Thus, the court will have identified that litigation conduct entitles the successful party to indemnity costs, it being that conduct which makes it fairer, as between the parties, to lessen the financial burden that litigation always brings. In the ordinary case it may well be that, although the conduct has manifested itself only in a part or some parts of the litigation, it is viewed as having taken the case so far out of the ordinary as to justify the indemnity award. In other cases it may be that the court discerns that the unreasonable litigation conduct might be argued to affect only individual and discrete parts of the litigation. Even so, as in MacFirbhisigh, the carrying out of this general discretionary exercise, seeking to achieve a fairer result for the party in whose favour the award is made, may leave it open to the court to determine that, albeit an issue-based approach may be appropriate in principle, the value of any possible benefit to the paying party is outweighed by the deficit to both parties of the inevitable additional burdens in time and cost which the complexities of an issue-based approach would impose.

59 Having reached the view, under the appellant's second and third grounds of appeal, that the learned Commissioner erred in his construction of paragraph 33 of the consent order of 11 September 2017, we can deal briefly with the first ground of appeal. Our decision, as set out in paragraphs 52 and 53 above, leads to a similar conclusion as regards the appellant's ground of appeal 1(a), namely that the Commissioner should have recognised that paragraph 32 of the order had adjourned the whole matter of indemnity costs without any fetter on the court's discretion. As regards ground 1(b), consistent with the views which we have set out in paragraphs 55 to 59 above, we express no view as to whether it is appropriate to approach an indemnity uplift in respect of the costs of the litigation on an issue-based approach. Again, given the views which we have set out in paragraphs 55 to 59 above, we express no view on ground 4 which sought to argue that the decision was plainly wrong for similar reasons as set out in ground 1(b).

60 For all of these reasons we shall remit this matter to the Commissioner to determine

whether it is appropriate that the plaintiffs should be entitled to an award of indemnity costs through an issue-based approach and, if so, which issues are to be accorded indemnity costs and to make appropriate orders.