Case update: Jersey Royal Court clarifies the scope of costs 'of and incidental to' proceedings

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A very brief costs overview

A successful party to litigation will likely wish to try and recover its legal costs.

The general rule is that legal costs follow the event, with the 'loser' being ordered to pay the 'winner's' legal costs. However, in more complex litigation, parties can (and often do) win and lose on different issues. Deciding an overall winner can be difficult. The Royal Court has previously noted that it is a mistake to strain 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. Consequently, the Royal Court has adopted a more flexible issue-based assessment as to who should be ordered to pay legal costs.

Unless a party's costs have been awarded by way of summary assessment (a process reserved for interlocutory (non-final) hearings lasting no longer than one day), a costs order will be made on the standard or indemnity basis.

A payment on account of a party's costs can be made (typically requiring the payment of a percentage of a party's costs within a few weeks) but, crucially, neither a standard nor indemnity costs order specifies an amount to be paid. That is up to the Judicial Greffier, the clerk to the Royal Court, who will tax the receiving party's costs, having regard for the basis of the costs order made and the submissions of the relevant parties.

The Judicial Greffier's approach to taxation on the standard and indemnity basis, respectively, is set out in the Royal Court Rules 2004 (as amended), as follows.

Standard basis

On a taxation of costs on the standard basis there shall be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the Judicial Greffier may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party.

Indemnity (higher) basis

On a taxation of costs on the indemnity basis, all costs shall be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred and any doubts which the Judicial Greffier may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party.

An indemnity costs order is an exceptional order. If the Royal Court is being asked to make one, the key question is whether there is something in the conduct of the action of the other party or the circumstances of the case which takes the case out of the norm, recognising that there will nearly always need to be a clear demonstration of a degree of unreasonableness on the part of the other party. It is evidence of unreasonableness which is the hallmark of an award on the indemnity basis.

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Of and incidental to

Costs are routinely awarded 'of and incidental to these proceedings' (on a standard or indemnity basis) so that a successful party is not limited to claiming its costs of only attending the hearing(s), for example – legal proceedings can be commenced months or years after they were originally intimated. However, the ambit of this type of award has remained somewhat uncertain until very recently.

The Royal Court, relying on Re Gibson's Settlement Trusts [1981] 1 All E R 233 and Official Solicitor v Clore [1984] JJ 81, noted as follows.

- Costs which would otherwise be recoverable are not to be disallowed merely because they were incurred before the litigation was brought.
- The addition of the words 'incidental to' in a costs order extends rather than reduces the ambit of the order as compared with an order simply for the costs of the proceedings.
- However reasonably incurred, costs which are neither costs 'of' the proceedings nor costs 'incidental to' them cannot be awarded under such an order. It is therefore important to identify the proceedings. This involves not only taking the correct stage of the proceedings, but also determining the nature of those proceedings. Only when it is seen what is being claimed can it be seen what the proceedings are to which the costs relate.
- Neither the fact that no proceedings had been issued at the time when the costs were incurred, nor the fact that the immediate object in incurring the costs was to ascertain the prospective litigant's chances of success will *per se* suffice to exclude the costs from being regarded as part of the costs of the litigation that ensues. Of course, if there is no litigation there are no costs of litigation. But if the dispute results in litigation, the question then arises how far the ambit of the costs is affected by the shape that the litigation takes.
- The matters in dispute before a pleading is issued may differ considerably from the matters raised by the litigation once issued. A wide-ranging series of disputed matters may be followed by a pleading which raises a few of the issues. If the proceedings are framed narrowly, then antecedent disputes which bear no real relation to the subject of the litigation cannot be regarded as part of the costs of the proceedings. On the other hand, if these antecedent disputes are in some degree relevant to the proceedings as ultimately constituted and the other parties' attitude made it reasonable to apprehend that the litigation would include them, then there is no reason for them not to be included.

Therefore, in order to decide whether costs are 'incidental' to proceedings, it is ultimately necessary to identify the proceedings in question and the nature of those proceedings (i.e. what is being claimed, what are the proceedings about and are the costs really connected to the same).

The Royal Court's clarification is a very welcome addition to Jersey's flexible and pragmatic costs regime which is intended, like everything else, to do justice between the parties.

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