IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 19 of 2015

BETWEEN:

JOY HOPE ANN VERNON

PLAINTIFF

AND:

EILEEN JENNIFER GREEN

DEFENDANT

Appearances:

Mr Clyde Allen of Clyde H. Allen Chambers on behalf of the Plaintiff

Mr Andrew Woodcock and Mr Paul Keeble of Hampson & Company for the Defendant

Before: The Hon. Justice Kawaley

Heard: On the Papers

Close of submissions: 29 July 2020

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HEADNOTE

Costs of dismissed strike-out and summary judgment applications -GCR Order 62 rules 4 (2), (5) and rules 11(2) and (12(1)-relevance of Overriding Objective in Preamble to Grand Court.

RULING ON COSTS

Introductory

1. By a Judgment dated March 3, 2020, I dismissed the Plaintiff's Summons for Summary Judgment dated September 27, 2019 ("Summary Judgment Summons") and the Defendant's fourth Summons to Dismiss the Plaintiff's claim ("Strike-Out Summons"). I made the following provisional costs award:

> "*40… Unless any party applies within 21 days by letter to the Registrar to be heard as to costs, no Order shall be made as to the costs of either application*."

2. It seems that the Defendant sought to be heard as to costs because directions were subsequently agreed which resulted in the Defendant filing her Costs Submissions on July 8, 2020 and the Plaintiff responding on July 23, 2020. On July 29, 2020, the Defendant's counsel notified the Court that no reply submissions would be filed.

Provisional views as to costs

3. The provisional views recorded in the Judgment in relation to costs were as follows:

> "***Provisional views on costs***
>
> *35. Each party has succeeded in demonstrating that that their opponent has made an application which was not only unmeritorious but ought not to have been made. Both parties have flouted the spirit of the case management directions given by two different Grand Court Judges by veering off the prescribed path leading to a trial on the issue of liability.*
>
> *36. GCR Order 62 rule 4 provides:*
>
>> *'(2) The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court.'*

> *37. This rules complements the Overriding Objective by confirming that since litigation under the GCR generally must be conducted in an economical and expeditious manner, successful parties should only recover costs where they have litigated in a proper manner. Both the Defendant's Fourth Strike-Out Summons and the Plaintiff's Summary Judgment Summons have in my judgment, and subject to hearing counsel if required, been pursued in an unreasonable manner. My strong provisional view is that neither party is entitled to recover the costs of their successful opposition to the other's application. In other words, no order shall be made as to the costs of either of the present applications.*"

The Defendant's Strike-Out Summons

4. The following critical broad finding was recorded in the Judgment which is central to my provisional view that the Defendant had acted unreasonably in filing and/or pursuing her Strike-Out Summons:

> "*26. The complaint that an insured defendant to a personal injuries claim brought by a claimant of limited means is deploying litigation tactics to avoid having a trial on the merits is "bog standard" complaint in this legal context. As a personal attack on opposing counsel, the litigation tactics complaint comes nowhere near the gravity of the Defendant's counsel accusing their opponent of deliberately misleading the Court. It is a sufficiently merited complaint in this case because the Defendant has now made four unmeritorious applications to dismiss the action, applications which have been rejected by three different Grand Court Judges. In each case, it has been essentially been found that however improperly the Plaintiff's case has been conducted, seeking dismissal was a disproportionate response. The Court is quite familiar with the other side of the litigation tactics coin. A 'deep-pocket' defendant will often complain that an unmeritorious claim is being pursued in an abusive manner with a view to pressurizing the defendant into reaching an unjust settlement. In seeking to achieve the Overriding Objective, the Court must take into account the important 'merits' goal of "ensuring that the substantive law is rendered effective and that it is carried out" (GCR, Preamble, paragraph 1.2(a)). No defendant with an improbable complete defence should expect to be able to summarily dismiss an apparently strong claim on technical ground not going to the merits of the case."*

The Plaintiff's Summary Judgment Summons

5. The following critical broad finding was recorded in the Judgment which is central to my provisional view that the Plaintiff had acted unreasonably in filing and/or pursuing her Summary Judgment Summons:

> "*27. The Plaintiff's decision to file an application for summary judgment on the eve of the trial on liability is as incomprehensible as the Defendant's decision to apply to dismiss the action. There was no material change of circumstances which occurred since Williams J ordered a split trial on liability and quantum on November 24, 2017 which transformed a case which was suitable for trial on the question of liability into one which was more suitable for summary determination under GCR Order 14 or 14A.*"

6. The Judgment also addressed the importance of civility between counsel gave a warning that the jurisdiction make a wasted costs order against counsel (GCR Order 62 rules 11-12) might be invoked if the animosity displayed before me was not quelled.

The Defendant's costs submissions

7. The Defendant advanced submissions which resembled arguments advanced by way of appeal. Her counsel set out a detailed account of the procedural history of the matter, which seemed intended to serve as a counter-narrative to the way in which the Judgment interpreted the procedural history. An explicit attempt was to challenge substantive findings recorded in the Judgment on the merits of the applications which were being decided. For instance:

    (a) "*(u) at paragraph 20 of his Judgment, the Judge said:*

    > *'In the present case, after the Plaintiff had notice that the Defendant through the Fourth Summons was objecting to the relevant portions of the Plaintiff's September 27, 2019 Affidavit, the Affidavit was effectively abandoned and a fresh Affidavit was filed well in advance of the hearing of the Defendant's Fourth Summons.'*

The Judge wrongly seems to have thought that the Plaintiff had corrected the position by the beginning of December 2019. He referred only to the September 27, 2019 affidavit and not the December 5, 2019 Witness Statement or the December 5, 2019 affidavit. In that he was wrong. Not only had the Plaintiff not removed the offending Witness Statement from the Court file, but she had deliberately reproduced <u>*in a Witness Statement and in an affidavit both produced 10 weeks after the issue of the Defendant's Summons*</u> *passages which she had been ordered to remove from her first Witness Summons* [sic]. *Since the material struck out by Richards J. was (as she said) 'irrelevant', it had no place either in a witness statement or an affidavit….*";

(b) "*9. The Judge indicated in his judgment (paragraph 25) that the Defendant had failed in previous attempts to strike out the action. This is a complete misunderstanding. In each case the Court chose to exercise its discretion by making further orders with which the Plaintiff was to comply. The Court's generosity towards the Plaintiff has been remarkable.*"

8. Although, for reasons elaborated upon below, I find that that it is not open to a litigant at the costs stage to re-argue issues which have been determined against them in a substantive judgment on the merits of an application, I will briefly deal with the above complaints. Firstly, as regards the finding recording in paragraph 20 of the Judgment, the main gravamen of the conclusion reached was set out in the final sentence of that paragraph which the Defendant's submissions did not reproduce:

> "*20…This complaint reflects yet another instance of the Defendant making a mountain out of a molehill and seizing upon any available opportunity to dismiss the claim before it can be heard on its merits at trial.*"

9. The suggestion that I failed to appreciate the Defendant's complaints about the December 5, 2019 Witness Statement and Affidavit is contradicted by the following preceding paragraph in the Judgment:

> "*19. In my judgment it is impossible to fairly conclude that the Plaintiff's conduct in filing her Affidavit dated September 27, 2019 containing averments Richards J had ordered only two days earlier should be expunged from the Plaintiff's trial*

Witness Statement constituted a deliberate breach of the September 25, 2019 Order. On balance I would accept Mr Allen's submission that no breach occurred. Affidavits for in use interlocutory hearings can contain statements based on information and belief: GCR Order 41 rule 5 (2). At least one of the averments ("I am shocked to read the purported contents of the Defence filed on behalf of the Defendant by the law firm Hampson and Company") is not inconsistent with forcefully supporting an application for summary judgment, which application positively requires an averment (usually based at least in part on legal advice) that no triable issue exists: GCR Order 14 rule. To the extent that the Affidavit was defective in form because of some of its contents, GCR Order 41 rule 2 provides: "*An affidavit may, with the leave of the Court, be filed or used in evidence notwithstanding any irregularity in the form thereof.*"

10. The Judgment may not have made express reference to a further Affidavit filed by the Plaintiff after the December 5, 2019 Affidavit which I believed (but have been unable to subsequently confirm) was filed before the hearing and omitted the controversial paragraphs. It is possible that this conclusion was simply wrong. But my substantive finding on the issue, which makes any factual error immaterial, was that there was no merit to the Defendant's central complaint that the contents of the Affidavit initially sworn in support of the Plaintiff's Summary Judgment application constituted a deliberate breach of a Court Order. I did not regard the matter of the Witness Statement as being a matter which was properly before the Court because it could without any prejudice to the Defendant have been corrected before trial.

11. Secondly, there is the complaint that my finding that "*the Defendant had failed in previous attempts to strike out the action*" (Judgment, paragraph 25) reflected a "*complete misunderstanding*" of the fact that the applications had been refused on discretionary grounds in circumstances where the Plaintiff had been in default. This complaint is more clearly misconceived. In the same paragraph of the Judgment I made the following express finding:

"*25… In each case, it has essentially been found that however improperly the Plaintiff's case has been conducted, seeking dismissal was a disproportionate response…*"

12. As regards the costs of the Defendant's Strike-Out Summons, it was submitted:

"*14. The Judge exercised his discretion not to strike out the action despite its appalling history. That does not mean that the Defendant was not entitled to issue*

and pursue the summons. There has been no appeal against the Judgment of Richards J. but nevertheless the order she made has not been complied with.

15. In these circumstances the proper order for the Court to make having decided not to strike out the action with the appalling background set out above and with the Plaintiff still in breach of the Order of Richards J., is at the very least to penalise the Plaintiff in costs. For such reason the Defendant seeks an order that the costs of the Defendant's strike out summons be paid by the Plaintiff."

13. The difficulty with these submissions in that the decision to dismiss the Strike-Out Summons was based in part on the finding that it ought not to have been made, a conclusion which can only be challenged by way of appeal:

> "*25. The complaint that an insured defendant to a personal injuries claim brought by a claimant of limited means is deploying litigation tactics to avoid having a trial on the merits is a 'bog standard' complaint in this legal context...It is a sufficiently merited complaint in this case because the Defendant has now made four unmeritorious applications to dismiss the action, applications which have been rejected by three different Grand Court Judges. In each case, it has essentially been found that however improperly the Plaintiff's case has been conducted, seeking dismissal was a disproportionate response….*"

14. The Defendant's main submissions as regards the Plaintiff's Summary Judgment Summons were properly built on the findings recorded in the Judgment:

> "*10…At paragraph 27 of his Judgment the Judge referred to the decision to apply for summary judgment as 'incomprehensible'…*
>
> *12.In these circumstances the Defendant submits that the costs of the failed Order 14 summons should be the Defendant's in any event, to be taxed and paid forthwith…on the indemnity basis.*"

The Plaintiff's costs submissions

15. The Plaintiff's counsel's submissions appeared to adopt the primary position that the Court's provisional views on costs ought not to have been challenged by the Defendant and that a wasted costs order should be made in relation to the costs of the present costs application against the Defendant's attorneys:

> "*8. It is right that the Learned Judge did invite the parties at* page [sic] *40 of the Judgment to write to the Court if they considered they are entitled to costs, but it is my considered opinion that that should be read in light of the contents of the entire Judgment and the overriding objective and especially that set out at paragraphs 35 to 37 of the Judgment, where in short, the Court was quite clear that no order should be made as to the costs of the applications.*
>
> *10. I am concerned and request, that this Court having handed down a Ruling the '…equivalent of a footballing "yellow card"', that given the repetition in the Defendant's submissions of matters already canvassed before the Court and ruled upon by other Judges, to use the footballing analogy, that a 'red card' should be given and a wasted costs order made against the Defendant and/or their attorney.*"

16. As regards the Plaintiff's dismissed Summary Judgment Summons, the Plaintiff invited the Court to take into account the fact that relief by way of an Interim Payment had also been sought in relation to damage sustained in 2012. As regards the Defendant's Strike-Out Summons, it was submitted:

> "*18…Put simply it is an application that should never have been made and was rightly struck out and it is my humble opinion that costs should follow the event. The Court may recall that their application took up a substantial part of the hearing that day.*"

Findings: governing legal principles

<u>Preliminary</u>

17. Counsel did not address the legal principles governing disallowing costs to any meaningful extent in their written submissions. They implicitly accepted that the Court had jurisdiction to disallow the costs of a party incurred in relation to a successful application (as my

provisional costs order envisaged), and merely contended that the usual 'costs follow the event' rule should be applied.

18. There being no apparent reported or unreported judgments on the pivotal rule (GCR Order 62 rule 11(2)), I will explain what appear to me to be the governing principles more fully than might otherwise be required.

19. GCR Order 62 rule 4(2) sets out the overarching costs principle governing adversarial proceedings:

> "*(2) The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court.*"

20. In my judgment, the 'costs follow the event' rule which is also set out in GCR Order 62 rule 4 must be read in conjunction with the "*overriding objective of this Order*" set out in paragraph (2) of the same rule:

> "*(5) If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.*"

21. GCR Order 62 rule 11(2) most directly delineates the jurisdiction for displacing the usual 'costs follow the event' rule (wasted costs orders against attorneys apart[1]):

> "*(2) Where it appears to the Court in any proceedings that anything has been done or that any omission has been made improperly, unreasonably or negligently by or on behalf of any party, the Court may order that the costs of that party in respect of the act or omission, as the case may be, shall not be allowed and that any costs occasioned by it to any other party shall be paid by him to that other party.*"

[1] GCR Order 62 rules 11(3) and 12.

22. Although rule 11 appears in Part III of Order 62 ("***WASTED COSTS ORDERS***") under the subheading "***Personal liability of attorney for costs***" , it seems obvious that Order 11 rule 2 applies to misconduct by parties and that only Order 11 rule (3)-(4) and rule 12 apply to wasted costs orders against attorneys.

23. This is not as anomalous as it at first blush seems. The jurisdiction to make a wasted costs order against a lawyer and to sanction a litigant for misconduct is essentially the same under the CPR. In *Lahey-v-Pirelli Tyres Ltd* [2007] EWCA Civ 91, the English Court of Appeal (Sir Nicholas Phillips MR, Arden LJ and Dyson LJ-as they then were) opined (*obiter*, in a postscript to the judgment) as follows:

> "*30. The powers given to the court by rule 44.14 include powers that are similar to those available to a judge making a wasted costs order, since where rule 44.14(1) applies, the court may order the party at fault or his legal representative to pay costs which he has caused any other party to incur. It is unlikely that the draftsman intended that a legal representative could be ordered to pay costs under rule 44.14 in circumstances where a wasted costs order could not be made under section 51(6) of the 1981 Act in respect of costs incurred as a result of "any improper, unreasonable or negligent act or omission on the part of [the] legal representative". The word 'unreasonable' in section 51(6) of the 1981 Act has been construed quite narrowly. In our view, it should be given a similarly narrow meaning in rule 44.14(1) (b). Its meaning cannot vary according to whether the conduct in question is that of the party or his legal representative."*

24. I have identified one local authority which appears to be indirectly pertinent to the construction and application of GCR Order 62 rule 11(2). The Cayman Islands Court of Appeal in *Woods Furniture Ltd-v-James*, Civil Appeal No.1 of 2020, Judgment dated (unreported), Sir Bernard Rix JA held in relation to my own application of the indemnity costs rule in that case:

> "*75. I accept Ms Carver's submission that in awarding indemnity costs the judge erred in law in following a policy of enforcing the Overriding Objective of the GCR rather than confining himself to the requirements of GCR Ord 62, r 11(1). In my judgment when deciding whether costs should be taxed on the indemnity basis the Court should have regard exclusively to whether the requirements of GCR Ord 62, r4 11(1) have been met. With respect to the judge, it was not open to him to come*

up with a policy of his own devising that glossed and thereby widened the reach of this rule. Whether there should be such a policy is a matter for those responsible for amending and updating the GCR."

25. The relevant indemnity costs rule which I applied in that case was in fact GCR Order 62 rule 4(11). That rule is analogous to the rule under present consideration because it also confers a jurisdiction to be exercised where a party is found to have conducted proceedings "*improperly, unreasonably or negligently*". The Court of Appeal reached the same conclusion which I reached in *Woods* (that indemnity costs were appropriate in the circumstances of that case), exercising their own discretion afresh under GCR Order 62 rule 4(11). I construe that *dictum* as more a criticism of my legal reasoning in that case rather a criticism of the functional or practical elements of my approach, which evidently achieved a valid practical result. In my costs ruling in that case (*James-v-Wood Furniture Ltd,* Cause No. 511 of 2009, Judgment dated October 15, 2019 (unreported)), I failed to clearly explain the basis upon which I felt it legally permissible to take into account the Overriding Objective in applying the indemnity costs rule. I attempt to set out below a clearer explanation of why it is appropriate to take into account the Overriding Objective when exercising jurisdiction conferred by GCR Order 62.

26. It is firstly important to note that English authorities provide limited assistance when considering the Cayman Islands costs rules. Order 62 rule 11(2) is admittedly substantially the same as the English pre-CPR Order 62 rule 10(1), although the English rule did not permit costs to be disallowed on the grounds of acting "*negligently*". In *Burrows v Vauxhall Motors Limited* [1998] PIQR 48 (CA), Lord Woolf MR (as he then was) opined (apparently *obiter*) as follows:

> "*It is, perhaps, pertinent to observe that the relevant question under rules 10(1) and 28(1) of R.S.C., Ord. 62 is whether something has been done, or omitted, 'unreasonably or improperly'. To label as 'misconduct' an act which is unreasonable but not improper - in the sense which those words convey in this context, as explained by this court in Ridehalgh v. Horsefield [1994] Ch. 205, at page 232D-F- may lead to misunderstanding and should be avoided. But the judge was entitled to take the view – as the district judge had done when making the order which was under appeal - that the conduct which he described was unreasonable.*"[2]

[2] Cited in *Lahey-v-Pirelli Tyres Ltd* [2007] EWCA Civ 91at paragraph 28.

27. The English Court of Appeal in a later case considering CPR Rule 44.14 (now CPR 44.11), which contained broader wording, doubted the modern relevance of Lord Woolf's *dicta*: *Lahey-v-Pirelli Tyres Ltd* [2007] EWCA Civ 91 (at paragraph 12). This was primarily because the current CPR permits costs to be disallowed on broader grounds than unreasonable or improper conduct, so the meaning of "*unreasonably*" now had limited relevance. For similar reasons, it seems self-evident that GCR Order 62 rule 11(2) cannot be construed on the same basis as under the English pre-CPR case law. GCR Order 62 has its own overriding objective which is entirely absent from the pre-CPR Order 62 upon which rule 11(2) is itself substantially based[3]. And the Preamble to the Grand Court Rules contains an Overriding Objective which are required to be applied in relation to both the interpretation and application of all subsequent rules.

28. Although the underlying philosophy as regards disallowing costs for misconduct is probably broadly the same, the distinctive drafting of the current English costs rules combined with a variety of structural differences in the CPR costs scheme as a whole, makes it far from straightforward to be guided by modern English authorities in this regard. Where pertinent persuasive authority is available, it should of course be taken into account.

29. One is therefore fundamentally obliged to construe and apply the relevant Cayman Islands rules on their ultimately straightforward terms. Rule 11(2) entitles the Court to disallow costs to which a successful party would otherwise be entitled. It requires the Court to determine whether "*anything has been done or that any omission has been made improperly, unreasonably or negligently*". Rule 11(2) cannot, in my judgment, be viewed in isolation from the wider context of Order 62 as a whole. The drafters of the Rules clearly intended the Court to have to regard when dealing with costs generally to the overriding objective of Order 62, as articulated in GCR Order 62 rule 4(2). The latter rule makes it clear that, in the first place, a successful party's entitlement to costs is a qualified one. It only vests where that party has conducted the relevant proceedings "*economical, expeditious and proper manner*". The terms "*economical*" and "*expeditious*" speak for themselves but, in my judgment, "*proper*" (rule 4(2)) and "*improperly*" and "*unreasonably*" (rule 11(2)) do not. Confining oneself to the parameters of Order 62 itself, one can clearly conclude that conducting proceedings in any uneconomical or dilatory way will potentially be grounds for disallowing a successful party's costs.

30. The Preamble to the Grand Court Rules lays out the basic ground rules for conducting civil litigation, and the principles set out there are best source of guidance as to what improper or unreasonable litigation conduct is. In light of the Court of Appeal's injunction in *Woods Furniture Ltd-v-James* not to re-write GCR Order 62 rule 11 through giving excessive

[3] See e.g. Supreme Court Practice 1997 Volume 1.

effect to the Overriding Objective, it is necessary to consider with some precision to what extent it is permissible to draw water from this well. Paragraph 2 of the Preamble ("***Application by the Court of the overriding objective***") provides as follows:

> "*2.1 The Court must seek to give effect to the overriding objective when it-:*
>
> *(a) applies or exercises any discretion conferred by these Rules;*
>
> *(b) interprets the meaning of any Rule.*
>
> *2.2 These Rules shall be liberally construed to give effect to the overriding objective and, in particular, to secure the just, most expeditious and least expensive determination of every cause or matter on its merits*." [Emphasis added]

31. So the Court is positively obliged to "*seek to give effect to the overriding objective*" when exercising "*any discretion*" and interpreting the meaning of "*any Rule*". More broadly still, the Rules generally "*shall*" be liberally construed with a view to achieving the overriding objective and, in particular, "*the just, most expeditious and least expensive determination of every cause or matter*". Because the costs regime is an important tool in ensuring that parties conduct litigation in a way which is consistent with the overriding Objective, it is unsurprising that the language of GCR Order 62 rule 4(2) echoes (in a distilled form) that of the Preamble. There is hardwired into the structure of the Rules a close connection between the Overriding Objective and the interpretation and application of each and every rule, but with heightened emphasis as regards Order 62 and the costs regime.

32. Accordingly, when construing and applying GCR Order 62 rule 11(2) and considering whether a successful party's costs should be disallowed on the grounds that they have acted unreasonably, improperly or negligently, regard may fairly be had to both the overriding objective of Order 62 and the Overriding Objective set out in the Preamble to the Rules. In so doing, as the Court of Appeal pointed out in the *Wood Furniture Ltd* case, one must not lose sight of the fact that one is first and foremost construing and applying the specific provisions of GCR Order 62 rule 11(2). Against this background, and subject to these qualifications, the Court construing and applying the costs jurisdiction conferred by GCR Order 62 must have regard to paragraph 1 of the Preamble of the GCR :

"*1.1 The overriding objective of these Rules is to enable the Court to deal with every cause or matter in a just, expeditious and economical manner.*

1.2 Dealing with a cause or matter justly includes, as far as is practicable-

(a) ensuring that the substantive law is rendered effective and that it is carried out;

(b) ensuring that the normal advancement of the proceeding is facilitated rather than delayed;

(c) saving expense;

(d) dealing with the cause or matter in ways which are proportionate-

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues;

(e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other proceedings."

33. Finally, it is important to remember that paragraph 3 of the Preamble ("***Duty of the parties***") provides:

"*The parties are obliged to help the Court to further the overriding objective. <u>In applying the Rules to give effect to the overriding objective the Court may take into account a party's failure to help in this respect.</u>*" [Emphasis added]

34. A failure by litigants to assist the Court to give effect to the Overriding Objective may, it seems clear, validly be taken into account when exercising the costs jurisdiction under Order 62 generally and, in particular, when determining whether a party has acted "*unreasonably, improperly or negligently*" for the purposes of GCR Order 62 rule 11(2) as read with GCR Order 62 rule 4(2). It matters not that there is no equivalent rule to CPR 41.11, which expressly provides:

> "*11.2 Conduct which is unreasonable or improper includes steps which are calculated to prevent or inhibit the court from furthering the overriding objective.*"

Summary of applicable governing principles

35. The term "*unreasonably*" is ultimately a somewhat broad term which persuasive authority suggests should be narrowly construed: *Lahey-v-Pirelli Tyres Ltd* [2007] EWCA Civ 91 (at paragraph 30). In my judgment Lord Woolf's above-cited *obiter dicta* in *Burrows v Vauxhall Motors Limited* can be reconciled with the view expressed in *Lahey-v-Pirelli Tyres Ltd.* Lord Woolf appears to me to have been suggesting that "*unreasonably or improperly*" should be construed as synonymous rather than disjunctive terms. This was a tentative view, because he merely stated that to "*label as 'misconduct' an act which is unreasonable but not improper - in the sense which those words convey in this context… may lead to misunderstanding and should be avoided*". For the purposes of the present application, I assume that where a successful party has to a relevant and material extent conducted proceedings "*unreasonably*" but not "*improperly*", such 'misconduct' will not justify disallowing their costs under GCR Order 62 rule 11(2).

36. The term "improperly" under Order 62 rule 11(2) must include, more narrowly, conduct which to a material extent is inconsistent with the overriding objective of GCR Order 62, which is that a successful party should recover the reasonable costs "*incurred by him in conducting that proceeding in an economical, expeditious and proper manner*". Litigating in a way which is wasteful of costs and/or which delays the ordinary course of litigation must constitute potential grounds for disallowing a successful party her costs. What costs penalty is appropriate in individual cases is a fact-sensitive consideration, as is assessing how serious the relevant 'misconduct' is. What is "proper" is a somewhat more open-ended question. Improper conduct must include conduct analogous to abuse of process and non-compliance with the letter and/or spirit of this Court's Rules. General support for this conclusion is provided by *Autumn Holdings Asset Inc-v-Renova Resources Private Equity Limited* [2017 (2) CILR 136] where Chadwick P stated:

> "266. *The judge directed himself (at para. 3.11 of his costs ruling) that he should have some regard, in considering the overall costs of the proceedings, to the failure of the Renova parties to comply with their discovery obligations which, as he said (*ibid.*) he had found blameworthy and culpable. In giving himself that direction, he did not err in principle…"*

37. Conducting litigation improperly, for the purposes of GCR Order 62 rule 11(2) as read with GCR Order 62 rule 4(2), must include failing to comply with the obligation imposed on civil litigants by paragraph 3 of the Preamble to the Grand Court Rules to assist the Court to further the Overriding Objective. That such an obligation exists has been recognised by this Court. For instance, Williams J held that "*P must now recognize that she has an obligation to progress this case in a manner consistent with the overriding objective in the Grand Court Rules*": *Sandcroft-v-Reliable Industries Limited* [2019 (1) CILR 77]. That this Court's usual costs rules may be displaced by a litigant's failure to comply with the Overriding Objective finds some support in *Re Global-IP Cayman*, FSD No. 47 of 2020 (RPJ), Judgment dated July 21, 2020 (unreported). Parker J. held as follows:

> "*33…The general rule is the successful party should be awarded its reasonable costs incurred in conducting proceedings as long as they are conducted in an economical, expeditious and proper manner. The court can of course in the exercise of its discretion make a different costs order to 'costs following the event'…*
>
> *39. As to costs, this is an unusual case and as I have said it has not been conducted in a manner which is in accordance with the Overriding Objective…*
>
> *41. In my view, given the purpose for which the Petition was brought….they cannot be said to have been 'successful', as it was not in reality brought to pay such a small debt…*
>
> *42…and in the exceptional circumstances of this case the usual rule will not be applied and their costs (of the Petition and other related applications) will not be paid out of the assets of the Company on an indemnity basis.*"

Findings: costs of the Plaintiff's Summary Judgment Summons

38. The Defendant succeeded in dismissing the Plaintiff's Summons which I found in the Judgment ought not to have been filed at all on the eve of the trial. *Prima facie*, assuming the Defendant conducted this interlocutory matter in an economical, expeditious and proper manner, the Defendant is entitled to recover her costs of successfully defending the application, and probably on the indemnity basis. Looking at the defence of the Plaintiff's Summons very narrowly, the Defendant did admittedly respond to the application in a requisitely appropriate manner: GCR Order 62 rule 4(2).

39. Should the Defendant's costs be disallowed pursuant to GCR Order 62 rule 11(2) because "*anything has been done or …any omission has been made improperly, unreasonably or negligently by or on behalf of*" the Defendant? The Defendant did not simply respond to the Plaintiff's Summary Judgment Summons by seeking its dismissal. The Defendant filed an application of her own which I dismissed and found in the Judgment ought never to have been made. The two Summonses were heard together, and more Court time was consumed dealing with the Defendant's Summons than was occupied by dealing with the Plaintiff's Summons. The main new plank in the Defendant's fourth unsuccessful strike-out application was the alleged impropriety of an Affidavit filed by the Plaintiff in support of her Summary Judgment application.

40. Overall, I find that it would be artificial to find that the Defendant's conduct of her own Summons has no costs implications (for the purposes of rule 11(2)) for her entitlement to the costs of the Plaintiff's misconceived Summary Judgment Summons. The pursuit of that Summons can only fairly be viewed as part of (or an extension of) the Defendant's successful defence of the Plaintiff's Summary Judgment application. The pursuit of a fourth unsuccessful strike-out application as opposed to simply defending the Plaintiff's Summary Judgment was improper because:

(a) it was inconsistent with the Defendant's obligation to pursue proceedings in an economical and expeditious manner;

(b) it was inconsistent with the Defendant's duty to assist the Court to ensure that the substantive law was rendered effective. The Plaintiff's claim was for personal injuries sustained in a 2012 accident when the ambulance the Plaintiff was driving was in collision with a car driven by the Defendant who was subsequently convicted of careless driving and driving under the influence in connection with the incident. The Plaintiff has had from the outset an apparently strong claim which deserves to be tried on its merits rather than being summarily struck-out on technical grounds. Although the possibility that the Plaintiff was 100% contributorily negligent cannot be summarily ruled out, the Defendant's insistence that she bears no blame at all for the accident seems optimistic in the extreme. She has stubbornly resisted judicial encouragement to admit liability with a view to facilitating a settlement. Against this background, the Defendant ought to have appreciated after three previous strike-out applications were refused that a fourth application at a point when the case was essentially ready for a trial on liability would also be refused;

(c) it was inconsistent with the Defendant's duty to assist the Court to ensure that the normal course of the proceedings was facilitated rather than delayed;

(d) it was inconsistent with the Defendant's duty to assist the Court to ensure that the litigation proceeded in an economical way and without unnecessary expense. Less than half the time expended on the present cause would have been required to dispose of the Plaintiff's Summary Judgment application had the Defendant's unmeritorious application not been made;

(e) it was inconsistent with the Defendant's duty to assist the Court to ensure that its resources are not wasted on unnecessary or unnecessarily protracted proceedings.

41. These findings for costs purposes substantially overlap with the findings which formed the basis of the substantive decision to dismiss the Defendant's Strike-Out Summons and in relation to which the parties had an oral hearing. They are accordingly suitable for summary determination at this stage. For these reasons I find that the Defendant's costs of her successful opposition of the Plaintiff's Summary Judgment Summons should be disallowed pursuant to GCR Order 62 rule 11(2) as read with GCR Order 62 rule 4 (2) and the Preamble to the Grand Court Rules.

The costs of the Defendant's Strike-Out Summons

42. The Plaintiff succeeded in dismissing the Defendant's Summons which I found in the Judgment ought not to have been filed at all. *Prima facie*, assuming the Plaintiff conducted this interlocutory matter in an economical, expeditious and proper manner, the Plaintiff is entitled to recover her costs of successfully defending the application, and probably on the indemnity basis. Looking at the defence of the Defendant's Summons very narrowly, the Plaintiff did admittedly respond to the application in a requisitely appropriate manner: GCR Order 62 rule 4(2).

43. However, I found in the Judgment that:

> "*27. The Plaintiff's decision to file an application for summary judgment on the eve of the trial on liability is as incomprehensible as the Defendant's decision to apply to dismiss the action. There was no material change of circumstances which occurred since Williams J ordered a split trial on liability and quantum on*

> *November 24, 2017 which transformed a case which was suitable for trial on the question of liability into one which was more suitable for summary determination under GCR Order 14 or 14A.*"

44. The matter was listed for trial on October 1, 2019 and, albeit in circumstances where the trial was not able to proceed for administrative reasons attributable to the Court, the Plaintiff ought to have been pressing to obtain the earliest possible fresh date. Any application for summary judgment and/or an interim payment ought to have been made long before the fourth quarter of 2019, four years after the commencement of the action. It is self-evident that the filing of the Summary Judgment Summons on September 27, 2019 materially contributed to the decision of the Defendant to file her Strike-Out Summons dated October 3, 2019 which primarily complained about the alleged impropriety of the Plaintiff's September 27, 2019 Affidavit in support. It would be wholly artificial to conclude that this filing can be entirely severed from the Plaintiff's successful defence of the Defendant's Summons for GCR Order 62 rule 11(2) purposes. I find that the Plaintiff's successful opposition to the Defendant's said Summons was improper and/or unreasonable because:

    (a) it was inconsistent with the Defendant's obligation to pursue proceedings in an economical and expeditious manner;

    (b) it was inconsistent with the Plaintiff's duty to assist the Court to ensure that the normal course of the proceedings was facilitated rather than delayed;

    (c) it was inconsistent with the Plaintiff's duty to assist the Court to ensure that the litigation proceeded in an economical way and without unnecessary expense. No further interlocutory hearings ought to have been required before trial;

    (d) it was inconsistent with the Defendant's duty to assist the Court to ensure that its resources are not wasted on unnecessary or unnecessarily protracted proceedings.

45. These findings for costs purposes substantially overlap with the findings which formed the basis of the substantive decision to dismiss the Plaintiff's Summary Judgment Summons and in relation to which the parties had an oral hearing. They are accordingly suitable for summary determination at this stage. For these reasons I find that the Plaintiff's costs of

her successful opposition of the Defendant's Strike-Out Summons should be disallowed pursuant to GCR Order 62 rule 11(2) as read with GCR Order 62 rule 4 (2) and the Preamble to the Grand Court Rules.

Summary of findings

46. Having regard to the peculiar history of these proceedings and the fact that each party seemingly embraced an opportunity to pursue an unnecessary and unmeritorious interlocutory application rather than proceeding to trial, I find that the Plaintiff and Defendant both acted improperly in the GCR Order 62 rule 11(2) sense in the way they opposed each other's applications. This procedural misconduct was sufficient in all the circumstances to displace the 'costs follow the event' rule, because it involved a failure to comply with the overriding objective prescribed in GCR Order 62 rule 4(2) and the Overriding Objective of the Grand Court Rules as a whole set out in the Preamble to the said Rules. For the above reasons I make no order as to the costs of either application.

47. This seems to me to be a just result overall for a further more prosaic reason. If I had awarded each party their costs, the net position would have been that each party was entitled to recover, more or less, an equal amount from their opponent. It would have made no sense to order either party to pay the other's costs because each award would have effectively cancelled out the other. Further costs would have been wasted on a likely contentious taxation in that event.

Costs of the costs application

48. I summarily decide, in order to save costs, that there should be no order as to the costs of the present costs application. It is obvious that neither side achieved success overall.

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THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT