

## Snapshot obtaining indemnity costs against a litigant in Jersey

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In a recent further judgment in *Cohen & Crooks as Joint Administrators for the Estate of James Donald Hanson & Anor v Arbitrage Research and Trading S.A. & Ors*, the Royal Court of Jersey confirmed and developed the test for when indemnity costs will be awarded against an unsuccessful litigant. Ogier successfully appeared for BDO and Creditforce, and obtained an indemnity costs order against a trustee previously found to have misappropriated trust assets.

1. The starting point for the Court remains for it to ask itself whether or not a costs order should be made in favour of the successful party. The Court has a very broad discretion in addressing this preliminary question.
2. Once a winning party is identified, the Court goes on to consider on what basis costs should be awarded. The choice is between a standard basis order, and an indemnity basis order.
3. Indemnity cost orders are infrequent, and the Court needs to identify one or more aspects of the proceedings which take the case out of the ordinary before such an order will be made.
4. Typically, it will be the conduct of the unsuccessful party in the course of the litigation which takes the case out of the ordinary so as to justify an order for indemnity costs. In *Cohen & Crooks*, examples of such behaviour were: i) the deliberate withholding of relevant material from discovery; and ii) successful attempts to prevent relevant discovery.
5. Conduct in the litigation however is not the only conduct which can justify an indemnity costs order. The substance and nature of the underlying proceedings can be justification for an indemnity costs order. For example, in *Cohen & Crooks* the Royal Court made extensive findings of dishonesty against the Fourth Defendant. That dishonesty was sufficient to take the case substantially out of the norm in a way which justified an indemnity costs order.

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