

# Mubarik v Mubarak

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	Pleming JA
<b>Judgment Date:</b>	25 July 2008
<b>Neutral Citation:</b>	[2008] JCA 119A
<b>Reported In:</b>	[2008] JCA 119A
<b>Court:</b>	Court of Appeal
<b>Date:</b>	25 July 2008

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## Text

[2008] JCA 119A

### COURT OF APPEAL

Before:

Nigel Pleming, **Esq., Q.C. sitting as a Single Judge.**

Between  
Aaliya Mubarak  
Representor/First Respondent  
and  
(1) Iqbal Mubarik  
First Respondent/ Appellant  
(2) The Craven Trust Company Limited  
Second Respondent  
(3) Salem Mubarak and Noor Mubarak  
Third Respondent  
(4) Osman Mubarak and Hamza Mubarak (the minor and unascertained beneficiaries)

## Fourth Respondent

**Advocate C. G. P. Lakeman for the Representor.**

**Advocate A. P. Begg for the First Respondent.**

**Authorities**

Court of Appeal Rules (Civil) 1964.

*A E Smith & Sons Limited v. L'Eau des Iles (Jersey) Limited* [\[1999\] JLR 319](#) .

*Les Pas Holdings Limited v. H.M.'s Receiver General* 2002/131 .

Pleming JA

**Introduction**

- 1 Throughout this judgment Aaliya Mubarak will be referred to as the First Respondent and Iqbal Mubarik will be referred to as the Appellant.
- 2 By paragraphs 2 and 3 of her Summons dated 14th June 2008, the First Respondent, seeks security for costs orders on her own behalf and on behalf of the Fourth Respondents as follows:

*" That the ... Appellant pay not less than the sum of £500,000 (or such other sum as the Court may deem appropriate in the circumstances) by way of security for the Representor's costs in respect of the appeals hearing dated the 22nd to 26th September 2008, or generally to the Judicial Greffier within 30 days of the hearing of this summons."*

*" The ... Appellant pay not less than the sum of £100,000 (or such other sum as the court may deem appropriate in the circumstances), by way of security for the Fourth Respondents' costs in respect to the appeals hearing dated 22nd to 26th September 2008, to the Judicial Greffier within 30 days of the hearing of this summons."*

- 3 It will be seen from the dates in the Summons that this decision in relation to security of costs is being made only six weeks before the date set for the substantive appeal.
- 4 The Summons is supported by written submissions from Advocate Lakeman for the First Respondent, and also by an Affidavit from the First Respondent to which is exhibited a Skeleton Bill of Costs. That bill of costs is broken down into a Costs Summary on the final page which shows that at the cost to date are £970,456.59, the estimated future costs are £110,246.38 and the total costs expected to be incurred are £1,080,702.97. The Bill of

Costs focuses entirely on the costs to be incurred by the First Respondent and, therefore, it is unnecessary for me to consider separately the position of the Fourth Respondents. Even if I did consider the Fourth Respondents' position I would not expect there to be at any substantial additional costs incurred on their behalf, as their interests are effectively the same as the First Respondent's interests in the appeal.

- 5 The application for security of costs is opposed by the Appellant on the following broad grounds. First, on the basis of that I have no jurisdiction to entertain this application because it is in conflict with orders made by the Royal Court on the 13th of June 2008. Secondly, that if I do have jurisdiction I should exercise my discretion by rejecting the application on the basis that either special circumstances do not exist, or, if they do, that this is a case where the balance of the argument favours the Appellant who may be deterred by a security for costs order from pursuing his appeal. This is but a very short summary of the detailed Written Submissions produce by Advocate Begg for the Appellant dated the 7th of August 2008, supported by a detailed Affidavit from the Appellant, exhibiting earlier affidavits and the Questionnaire.

## Jurisdiction

- 6 I can take the jurisdiction point quite shortly. Following a Royal Court hearing on the 13th of June 2008, the Bailiff made an order specifically reserving the issue of security for costs to the Deputy Bailiff following the handing down of the reasoned judgment - see paragraph 8 of the Bailiff's judgment:

*" 8. So far as security for costs are concerned I adjourn consideration of that part of this summons to the Deputy Bailiff when judgment is handed down."*

On the basis of that Order (assuming it to be valid) the Appellant submits that the issue of Security of Costs has been reserved to the Deputy Bailiff and the Royal Court alone is therefore seized of the issue, so that it cannot now be taken over by the Court of Appeal.

- 7 On that basis it is said by the Appellant that the Court of Appeal's jurisdiction under the Court of Appeal Rules (Civil) 1964, rule 12(4) is not engaged. I reject that submission. The Court of Appeal is clearly now seized of the appeal, and it follows that *all* the case management powers in Rule 12 can be exercised to ensure that there is a fair hearing of the appeal. There is some support for this conclusion in Rule 12(5): "**the powers of the Court in respect of an appeal shall not be restricted by reason of any interlocutory order from which there has been no appeal**". That sub-rule provides a clear indicator that the Court of Appeal should not be distracted from exercising its own powers because, for example, there has been an incomplete resolution of procedural matters in the Royal Court. However, I do take fully into account the fact that the reason for the adjournment of the Security of Costs issue by the Bailiff must have been because it was intended that the issue of security for costs should be linked to the merits of any appeal, as understood in the light of the Deputy Bailiff's judgment. That judgment will not be available until Friday 15th August.

- 8 I do not accept that there is a jurisdictional bar here to the application for security of costs. However, I do accept (as noted above) the submissions made on behalf of the Appellant that the basis for paragraph 3 of the Summons is not made out on the evidence before me, and it can be disregarded and should be dismissed.

## Discretion

- 9 Proceeding on the basis of that I have jurisdiction, it is common ground that when exercising my discretion I should follow the approach set out in cases such as *A E Smith & Sons Limited v. L'Eau des Iles (Jersey) Limited* [1999] JLR 319, and *Les Pas Holdings Limited v. H.M.'s Receiver General* 2002/131. In this case, the particularly relevant factors are as follows - the risk that what is said to be an important appeal will be stifled if security is imposed which cannot reasonably be provided by the Appellant, the long history of the various proceedings between the Appellant and the First Respondent not only in Jersey, and the likelihood of the Appellant meeting any order for costs if the appeal fails and, finally, the proximity of the Appeal.
- 10 Overall I must balance on one hand the possible injustice to the Appellant if he is prevented from pursuing a genuine appeal by an order for security of costs which could be seen as restricting, to a disproportionate extent, freedom of access to the courts (contrary to the European Convention on Human Rights) and, on the other hand the risk of injustice to the First Respondent if she is successful in resisting the appeal but is unable to recover her costs from the Appellant.
- 11 It is accepted that the Appellant is not resident in Jersey, nor does he have assets in the jurisdiction. But it is also the case that the First Respondent is not resident in Jersey, and she has brought the Appellant before the Jersey courts by her claim to gain access to the money protected by the IMK Family Trust.
- 12 However, this seems to me to be a clear case for the ordering of some security for costs. There is, in my view, a real risk that the First Respondent's costs will not be paid even if she is completely successful. There are exceptional circumstances here, including but not limited to the fact that the Appellant is resident out of Jersey and has no assets here. The central issue for me is not whether security should be ordered at all, but the amount of such security, and the terms upon which it is ordered.
- 13 As to the amount, the quantum, as noted above the First Respondent refers in evidence to the legal costs in the total sum of £1,080,702.97, but that includes costs to date of £970,456.59, when the focus should be on the costs of this appeal. The summons limits the claim for security to £500,000, but that appears to be a wholly random figure. If the Skeleton Bill of Costs is analysed with the focus on the likely reasonable costs of this appeal, the overall figures are considerably reduced - see paragraph 7 dealing with Estimated Future

Costs. This is not, of course, a process of taxation but I accept at least some of the criticisms made by the Appellant as to the detail of these figures. It may be that, in the end, all sums can be justified, but there appears at this stage to be unnecessary duplication and a degree of exaggeration. In my opinion, the upper limit for a security for costs order is £60,000, representing just over one half of the figure of £110,246.97 claimed in respect of future legal costs of the appeal.

- 14 What then of the position of the Appellant? In his Affidavit he states that he already owes his English solicitors £240,000, and his Jersey lawyers £40,000, and claims that he would "struggle to meet" any order that exceeds £10,000. I do not accept that the Appellant is in such an impoverished state. This is inconsistent with the body of evidence I have read, and with the conclusions and comments of the English courts. I would be very surprised indeed if the Appellant's English solicitors were prepared to run up such high bills without at least the assured expectation that funds will be forthcoming.
- 15 In my opinion, the justice of the case is met by the imposition of an order for security for costs of £50,000, that sum to be paid by the Appellant to the Judicial Greffier not later than 4pm on Friday 5th September 2008.
- 16 What then of sanction? My real difficulty (anticipated by the Bailiff when adjourning the costs summons then before him) is gauging the public importance of an appeal from the substantive decision of the Deputy Bailiff. It is said by Advocate Begg (for the Appellant) that "nothing should prevent this Appeal from coming before the Court of Appeal for its opinion" and the "Court's [i.e. the Deputy Bailiff's] reasons ...are anxiously awaited not only by the parties but also the whole of the Jersey legal profession and, indeed, all professionals involved in the offshore industry and lawyers advising on trusts worldwide". This may be an advocate's hyperbole, but I accept that this may be an appeal raising important points of principle. I do not consider this to be a case where the appeal should automatically be struck out in the event of default, or that the appeals should be "stayed and remain unlisted" (see paragraph 5 of the First Respondent's Summons). It is simply too close to the dates already fixed for the hearing, and it may be that the matters raised are so important that the public interest in Jersey calls for a decision of the Court of Appeal on the substantive claim. Accordingly, in my view, the right course in these unusual circumstances is to give liberty to the First Respondent to apply to the Court in the event of default, thereby allowing the Court to examine any reasons advanced for such default, and if appropriate in all the circumstances to dismiss the appeal - or allow it to continue, on terms if necessary. By that time, the Court will have the benefit of the reasoned judgment from the Deputy Bailiff.
- 17 In relation to the costs of this summons, in my opinion the correct order is that the costs should be costs in the appeal.
- 18 I order accordingly.

