Mubarik v Mubarak

Jurisdiction:	Jersey
Judge:	McNeill JA, Beloff JA, Montgomery JA
Judgment Date:	05 February 2009
Neutral Citation:	[2009] JCA 16
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Text

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COURT OF APPEAL

Before:

The Hon Michael Beloff, **Q.C., President**; J. W. McNeill, **Esq., Q.C., and**; Miss C. Montgomery, **Q.C**.

Aaliya Mubarak
Representor/First Respondent
and
Iqbal Mubarik
First Respondent/Appellant
The Craven Trust Company Limited
Second Respondent
Salem Mubarak and Noor Mubarak
Third Respondent
Advocate M. P. Renouf (as guardian ad litem of the minor beneficiairies Osman Mubarak

and Hamza Mubarak and representative of the unborn or unascertained beneficiaries)
Fourth Respondent

Advocate A. P. Begg **for the Appellant**.

Advocate C. G. P. Lakeman **for the First Respondent**.

Advocate J. M. P. Gleeson **for the Second Respondent**.

Advocate M. P. Renouf **in person**.

Authorities

Court of Appeal (Jersey) Law 1961.

Court of Appeal (Civil) Rules 1964.

In Re Elgindata Limited [1992] 1 WLR 1207.

Maçon v Quérée [2001] JLR 187.

Dixon v Jefferson Seal Limited [1998] JLR 47.

Abdel Rahman v Chase Bank (C.I.) Trust Company Limited [1990] JLR 136.

Pallot Limited v. Gechena Limited [1996] JLR 241.

Cepheus Shipping Corp v Guardian Royal Exchange Assurance plc [1995] Lloyd's Rep. 647, 648.

Macmillan v Bishopsgate (unreported, 1994).

Drake v Gouveia [2000] JLR 411.

Ridehalgh v Horsefield [1994] Ch 205.

Civil Procedure (Jersey) Law 1956.

Jersey Financial Services Commission v A P Black (Jersey) Limited [2007] JLR 1.

Bland v First National Commercial Bank [1997] JLR 80.

In Re Esteem Settlement [2000] JLR N 41A.

Costs judgment.

McNeill JA

1 By Act of Court of 19 November 2008 this court directed that submissions on costs pursuant to the decision of this court should be made in writing. This judgment deals with those submissions.

Submissions for the First Respondent

2 Advocate Lakeman presented submissions said to be joint submissions on behalf of the First Respondent and the Fourth Respondents. Standing submissions made by Advocate Renouf, as guardian *ad litem* of the minor beneficiaries, and as representative of the unborn and unascertained beneficiaries, I understand Advocate Lakeman's submissions to be on behalf of the First Respondent and on behalf of Advocate Renouf as guardian *ad litem* and representative. I shall, however, deal with Advocate Renouf's individual submissions separately.

3 Advocate Lakeman sought orders that:

> (i) In relation to the costs of the Appellant's appeal, the Appellant should pay costs on the indemnity basis;
>
> (ii) In the alternative there should be an order that, in relation to the main body of the Appellant's appeal, the Appellant should pay costs on the standard basis; and
>
> (iii) The Appellant's advocate should bear part of the costs personally upon the indemnity basis.

4 In addition, Advocate Lakeman sought an award of costs by way of summary assessment both for the appeal and for the hearing of 13 June 2008. He also sought an order that the court release the sum of £50,000 paid into Court as security of costs, to the First, Second, Third and Fourth Respondents as the Court saw fit. Advocate Lakeman suggested that the First Respondent should receive two-thirds of the amount.

5 Mr. Lakeman reminded the Court that costs in this Court are in the discretion of the court: see the Court of Appeal (Jersey) Law 1961, Article 16. He also pointed out that costs could be awarded on an indemnity basis: see Rule 18 of the Court of Appeal (Civil) Rules 1964.

6 He submitted that the principles to be applied, when considering costs orders, were to be found in the decision of the Court of Appeal in England and Wales in *In Re Elgindata Limited* [1992] 1 WLR 1207; those principles having previously been considered and applied by the Royal Court in the reported case of *Maçon v Quérée* [2001] JLR 187, 193.

7 Like the learned Commissioner (Page QC) in *Maçon v Quérée*, I propose to adopt the summary of relevant principles in relation to awards of costs set out by Nourse, L.J. in

In Re Elgindata which are conformable with justice and therefore appropriate to this jurisdiction. These are:

> ***"(i) Costs are in the discretion of the court.***
>
> ***(ii) They should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made.***
>
> ***(iii) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or a part of his costs.***
>
> ***(iv) Where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but may order him to pay the whole or a part of the unsuccessful party's costs."***

8 I would only add, as did Nourse, L.J. (at page 1215D) that what was the *"event"* of the proceedings and what were the issues in it are matters for debate; but that if there is to be a special order for costs in respect of a particular part, there must be justification for separating out that part of the subject matter.

9 As regards the basis upon which indemnity costs might (unusually) be awarded, Advocate Lakeman referred us to *Dixon v Jefferson Seal Limited* [1998] JLR 47, *Abdel Rahman v Chase Bank (C.I.) Trust Company Limited* [1990] JLR 136 and to *Pallot Limited v. Gechena Limited* [1996] JLR 241.

10 As did this Court in *Dixon v Jefferson Seal Limited*, I rely upon the views expressed by Mance, J. (as he then was) in *Cepheus Shipping Corp v Guardian Royal Exchange Assurance plc* [1995] Lloyd's Rep. 647, 648.

11 In that case, Mance, J. adopted as a useful summary views expressed by Millett J. (as he then was) in *Macmillan v Bishopsgate* (unreported, 1994) in the following terms:

> ***"The power to order taxation on an indemnity basis is not confined to cases which have been brought with an ulterior motive or for an improper purpose.*** Litigants who conduct their cases in bad faith, or as a personal vendetta, or in an improper or oppressive manner, or who cause costs to be incurred irrationally or out of all proportion to what is at stake, may also expect to be ordered to pay costs on an indemnity basis if they lose, and to have part of their costs disallowed if they win. Nor are these necessarily the only situations where the jurisdiction may be exercised; the discretion is not to be fended or circumscribed beyond the requirement that taxation on an indemnity basis must be 'appropriate'."

12 In preparing the ground for his application that an award of costs should be made personally against the appellant's advocate, Advocate Lakeman referred this court to *Drake v Gouveia* [2000] JLR 411 and to *Ridehalgh v Horsefield* [1994] Ch 205. Whilst an award against counsel will be exceptional, there is no doubt but that it can be made: see *Drake v Gouveia*, Article 2(1) of the Civil Procedure (Jersey) Law 1956 and Article 16 of the Court of Appeal (Jersey) Law 1961.

13 Advocate Lakeman reminded us that the appellant had filed two Notices of Appeal. The first appealed against a decision of the Royal Court to exclude the appellant's advocate's legal assistant from the hearing. The second notice appealed against to the substantive orders made by that court.

14 As regards the first notice, Advocate Lakeman observed that the appellant himself had decided not to participate in the Royal Court hearing in April 2008, that the points made in the notice of appeal were academic and that the notice of appeal was abandoned only at the very last moment (indeed, during the Appeal Hearing itself).

15 As regards the second notice, Advocate Lakeman submitted that, taken in the round, it was without merit as were its individually challenged components, to the extent that they had been comprehensibly identified. The argument that the proposals constituted a complete resettlement had been held not well founded. The argument that there ought not to be reinstatement of an excluded person was not properly developed. The argument that there had been no approval on behalf of the unascertained beneficiaries had been found to be without substance. The argument that there was no power to grant approval because there was no benefit for the Clause 8 or 9 beneficiaries had been wholly misconceived. The argument that there was no power to grant approval where there was an unreleased power had not been sustained. The argument in respect of the appellant's letter of 25 August 2006 had been rejected conclusively. The arguments in respect of there being no benefit to unborn beneficiaries had been rejected. The argument for the removal of trustees had only been faintly pressed. The argument as to why the appointment of receivers and the making of ancillary orders had been in excess of jurisdiction was barely advanced. In short in Advocate Lakeman's submission, the appellant's attitude to the deployment of argument in the Royal Court and Court of Appeal had been cavalier and chaotic.

16 As to the first respondent's application to debar the Appellant from the Court of Appeal hearing on the grounds of abuse of process Advocate Lakeman pointed out that, whilst the Court had found that there was no abuse of process, the findings indicated that the Appellant's conduct had been in its view unreasonable and designedly tactical, and not merely wrong or in hindsight misguided.

17 For all these reasons Advocate Lakeman sought costs on the indemnity basis, alternatively on the standard basis.

18 Advocate Lakeman also sought an award against Advocate Begg personally by way of a wasted costs order on an indemnity basis. Advocate Begg had not been at all properly rehearsed in his arguments or knowledge of the law. He had had to seek instructions either from his instructing solicitor or from English counsel on a wholly unacceptable number of occasions. His understanding of the general principles of trust law appeared questionable. Advocate Lakeman therefore submitted that Advocate Begg should be ordered to pay £10,000 by way of costs to the first respondent.

19 Advocate Lakeman also sought a summary assessment of costs by reference to Article 16 of the 1961 Law and Article 2(1) of the Civil Proceedings (Jersey) Law 1956. He submitted that the Court of Appeal had power to order such costs, as that to make such an order in this stance would do justice between the parties ensure that the levels of costs were no more than reasonable and necessary, avoid further delays. Advocate Lakeman referred us to the decision of Commissioner Page in *Jersey Financial Services Commission v A P Black (Jersey) Limited* [2007] JLR 1.

20 Finally, Advocate Lakeman sought the release of the £50,000 paid by the appellant into the Court for security for costs; two thirds of which should be put towards the First Respondent.

Submissions by Advocate Renouf as guardian *ad litem* and representative

21 As guardian *ad litem and representative*, Advocate Renouf adopted Advocate Lakeman's submissions insofar as they were relevant to his own position.

22 Advocate Renouf requested:

(i) A wasted costs order against Advocate Begg.

(ii) Alternatively that those costs be paid by Mr. Mubarik, with any shortfall being paid out of the IMK family trust.

(iii) That costs be summarily assessed.

(iv) That any taxation be on the indemnity basis; or alternatively on the standard basis.

(v) That if the monies held by the court by way of security were to be released and put towards awards of costs, the minor beneficiaries, unborn and unascertained beneficiaries should rank first.

23 Advocate Renouf particularly reminded the Court that, until about twelve hours before his appearing at the hearing before this Court, he had not expected to be required to attend; but that Advocate Begg had suddenly expressed in e-mail correspondence that there was a

"unassailable point" which required Advocate Renouf's attendance in court. Attendance at such short notice had caused very great inconvenience and disruption to Advocate Renouf and his firm. Furthermore in the judgment of the Court of Appeal, the so called unassailable point was devoid of substance.

Appellant's Submissions

24 Advocate Begg indicated that the submissions which he made were on his own behalf and in respect of the applications for a personal costs order against him only. He had no instructions to make any submissions on behalf of the Appellant himself.

25 By reference to the judgment of the Court dated 19 November 2008 Advocate Begg accepted, openly, that the various criticisms levelled at counsel were justified in respect of him. He invited the Court to take the view that criticisms were equally justified of Advocate Lakeman but accepted that, not having instructions, he could not go so far as to suggest that the Court make a personal order for costs against Advocate Lakeman.

26 Advocate Begg necessarily accepted that Mrs. Mubarak had prevailed both in the Royal Court and in the Court of Appeal. He submitted, however, that until each of the judgments was issued, it had been difficult confidently to predict the outcome of either hearing. He pointed to the fact that the learned Deputy Bailiff had emphasised that the case was exceptional but that the application, as originally formulated by Advocate Lakeman, had been rejected in favour of the *Saunders v Vautier* approach advocated by Advocate Gleeson on behalf of the trustee and Advocate Renouf on behalf of the minor and unascertained beneficiaries.

27 Advocate Begg also pointed to the mixed success of the parties in their various applications to the single judge on 10 September 2008.

28 Turning to the difficulties which he had during the principal hearing before this court in respect of trust matters, Advocate Begg explained, as he had done during the hearing, that he had felt obliged to put forward points upon which, as he regretted, he had not had an opportunity, in the short time available to him, fully to comprehend. As to the late filing of the Appellant's skeleton argument, Advocate Begg repeated that he had only become aware of Professor Harris's article at a very late stage.

29 Advocate Begg referred us to *Bland v First National Commercial Bank* [1997] JLR 80, *Drake v Gouveia* [2000] JLR 411 and *In Re Esteem Settlement* [2000] JLR N41 for the principles upon which an Advocate might be ordered to pay costs personally.

30 Advocate Begg contended that *Bland* identified situations where such an award of costs might be made. First where a client had suffered loss due to neglect or misconduct of his

advocate and, second, when an advocate had acted in proceedings without authority. Neither of those criteria was satisfied in the present case.

31 Advocate Begg noted that *Drake v Gouveia*, was a case of professional negligence where proceedings had been struck out for inordinate and inexcusable delay. Here there was no issue of professional negligence and no loss had been caused to Mrs. Mubarak.

32 Advocate Begg contended that views of the Court of Appeal expressed in *In Re Esteem Settlement*, constituted a warning to advocates not to play interlocutory games. In Advocate Begg's submissions, the possibly excessive use of e-mail correspondence in the present case did not take the present situation into the realm of interlocutory games.

Discussion

33 The highly unsatisfactory circumstances of the appeals in this matter are set out in the judgment of 19th November 2008. In my view, in the light of that rehearsal the Court should deal with costs as follows.

34 I deal, first, with the position of Advocate Renouf, whose situation was particularly stark. There was no reasonable excuse for the eleventh hour presentation to him of a so called “unassailable point”. It is beyond question that both as guardian *ad litem*, representative and as an officer of the court he was put into a wholly invidious position which was bound to cause (as it did) serious disruption to his professional arrangements.

35 On the other hand, from the information made available to the court in September 2008, the true cause of his being brought in so late was not culpable behaviour on the part of Advocate Begg but, rather, the very late instruction of English counsel by Mr. Mubarik or his London solicitors. In my view, this is not a situation in which a wasted costs order should be made against Advocate Begg.

36 However, I do consider that the circumstances are plainly such as should entitle Advocate Renouf to an award of costs on the indemnity basis. Whilst it is, perhaps, unusual for this Court to make a summary award, it seems to me that the Court does have the power to do so. Further, given the restricted nature of Advocate Renouf's work, as certified in the Bill of Costs submitted with his letter of 10 December 2008, it appears that this Court is indeed in a position to make an informed and confident judgment as to costs: *Jersey Financial Services Commission v A P Black (Jersey) Limited* at paragraph 17. Each item appears reasonable in itself and in the overall context, and the total sum is well within the boundaries of proportionality. In my view, the total sum brought out in the Bill of Costs should be released to Advocate Renouf's firm from the monies held by the Court by way of security.

37 Turning to Advocate Lakeman's submissions, to my mind the First Respondent is entitled to costs from the Appellant in relation to the first Notice of Appeal on the indemnity basis. The points raised in the first Notice related to the conduct of the hearing below: a hearing in which Mr. Mubarik had instructed his advocate not to participate. The points were wholly academic and the Notice of Appeal should have been withdrawn far in advance of the hearing before this Court.

38 Again, however, the information available to this Court tends to suggest that this position would not have been of the making of Advocate Begg but, rather, of the Appellant.

39 As regards the substantive appeal, there was mixed success in that the First Respondent's arguments in respect of abuse of process failed. Those arguments took up a considerable amount of the deliberation of this court but, as will be seen from the judgment of 19 November 2008, the Court felt constrained to take the view that the Appellant's conduct did not disbar the Appellant.

40 Further, a not insignificant amount of preparation and written submission may have been incurred in respect of the Respondent's Notice dealing with the impact of Article 9(4) of the 1984 Law. As indicated in paragraph 132 and 133 of the November 2008 judgment, this Court neither found it necessary nor appropriate to express a view on those issues.

41 As regards the individual trusts arguments put forward by Advocate Begg these were, in the end, wholly unsuccessful. While not all (contrary to Advocate Lakeman's submission) were unmeritorious, it has to be remembered that they were advanced in the context of litigation in which the Appellant was, I reiterate, simply seeking to avoid what, in the view of this Court, was the commitment which he had given in his letter of 25 August 2006 for the purposes of the English litigations.

42 There are occasions when the Courts must deal with issues of costs by using a very broad brush indeed. Having regard to the matters to which I have just referred, it seems to me that this is one such case. On the one hand the general conduct of the Appellant might lead one towards the view that an award of costs on the indemnity basis would be well justified. On the other hand, the multiplicity of issues, and the ability to identify individual sectors for these issues, might lead one to the view that to award the First Respondent her costs in relation to the entirety of the second Notice of Appeal would not be justified. Viewing the circumstances as a whole I am of the view that an appropriate order would be to award the First Respondent the entirety of her costs in respect of preparation for and attendance at the appeal proceedings (except insofar as already the subject of orders and except as regards the first Notice of Appeal issues dealt with above) and of these costs applications; but to do so on the standard basis. I would include within these the costs of the hearing of 13 June 2008, but propose making no order as to those of 10 September 2003, where success was mixed.

43 Again, I do not regard the matters already discussed as warranting the making by this Court of wasted costs order against Advocate Begg. Whilst some of his conduct of the appeal proceedings has already been the subject of serious criticism, I do not consider that his conduct comes within the ambit of instances such as seen in *Drake v Gouveia* or *Bland*; nor do I think that he was being intentionally dishonest or seeking to mislead the court or his colleagues.

44 Further, by contrast with the position of Advocate Renouf, the “Statement of Costs (summary assessment)” produced by Advocate Lakeman is insufficiently detailed or supported by documentation to allow this Court to make an informed and confident judgment and make a summary assessment of costs. Nor would I have expected this to be possible. It was clear at the hearing, and is clear from the summary statement of costs, that a significant amount of work had been carried out by Advocate Lakeman and his colleagues on this matter. The assessment of that work will have to be undertaken in the usual way, having regard to the decision of this court on these costs applications.

45 Upon costs being taxed or agreed, the remainder of the monies held as security for costs – after Advocate Renouf's costs have been met – should be applied in settlement of the Appellant's liability to the First Respondent.

Beloff JA **(PRESIDENT):**

46 I agree. Mr Mubarik's conduct in this prolonged affair has already been the subject of stringent criticism by Senior English Judges.

47 In my view Advocate Begg became an instrument rather than the inspiration of a litigation tactic which had little commend it and which, in the event, did not attain its apparent objectives. I endorse McNeill JA's analysis of the competing considerations and conclusions to which it led him.

Montgomery JA

48 I agree. An order for costs against Advocate Begg would have a penal effect upon him. Due to legal professional privilege, the Court cannot assess Advocate Begg's own responsibility for the manner in which the litigation has been conducted, as compared to the responsibility of his client and the client's other legal advisers. I would not make an order for costs against Advocate Begg unless I were to be satisfied that there was nothing that Advocate Begg could have said, if unconstrained by privilege, that could have explained or excused his conduct. For the reasons set out in McNeil JA's analysis and having regard to the view expressed by the President I am not so satisfied.