

JERSEY / JUDGMENT

Benest v Syvret

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Estate – application for leave to appeal. [2012]JRC079A Royal Court (Samedi) 17 April 2012 Before : W. J. Bailhache, Q.C., Deputy Bailiff, sitting alone. Between Simon David Benest Applicants/ Defendants Julie Yvonne Benest And Richard Charles Ahier Syvret as Executor of the Estate of the late Dorothy May Benest (née Turner) Respondent/Plaintiff Application for leave to appeal. Advocate H. Brown for the Applicants. The Respondent appeared in Person.

judgment

the deputy bailiff: 1. This is a reserved judgment on the application for leave to appeal my decision handed down on 15th December 2011 to make no order for costs on the discontinuance of the Plaintiff's actions against Mr Simon David Benest solely and against the Applicants jointly. Legal Principles 2. The applicable principles as to whether or not leave should be given against a costs order alone are well settled. Those principles have been developed having regard both to the obligations of the Court of Appeal if leave were to be granted and the appeal heard, and to the obligations of the trial judge. The obligations of the Court of Appeal are only to intervene in an exercise of discretion, such as is an award of costs, in three cases – where the judge misdirected himself with regard to the principles in accordance with which his discretion was to be exercised; where the judge in exercising his discretion has taken into account matters which he ought not to have done, or has failed to take into account matters which he ought to have done; and thirdly, where his decision is plainly wrong. As to the obligations of the trial judge, he must take into account that, by virtue of Article 13(c)(ii) of the Court of Appeal (Jersey) Law 1961, (“the Law”), no appeal lies to the Court of Appeal from any order for costs only without his leave; and while he must be very ready to grant leave if there is an arguable point that would affect his order, it is his duty to refuse leave if satisfied that there is no realistic prospect of success. For the cases which summarise these various principles, I refer to *Glazebrook v Housing Committee* 2002/217, *Maçon v Querée* [2001] JLR 187, *Tomes v Coke-Wallis* 2002/10 and *Britannia Building Society v Milborn*

[2007] JRC 001. 3. I would like to add my own view also about these provisions. In my judgment the reasons for a requirement for leave from the trial judge, in a matter of costs only, includes not only the obligation to prevent the Court of Appeal from being faced with wholly unmeritorious appeals on costs alone, as Birt, DB said in *Tomes v Coke-Wallis*, but also a need to prevent ongoing satellite litigation when the main case is over; and a recognition that the trial judge has a much better handle on how the proceedings were conducted and where the justice of a costs order lies than any appeal court can have merely on reading transcripts, because the trial judge has lived through the proceedings

with the parties. Furthermore, the Law anticipates that the judge's decision on costs where the substantive issue is undisturbed will be final and without appeal, so there is no injustice in itself in that. There should indeed be no rule that as the decision is otherwise final, a judge must give leave or be embarrassed at not doing so, because the Law contemplates that this may sometimes be the result. 4. The Applicant's skeleton argument on costs ran to 28 pages. In addition, Advocate Brown addressed me for approximately 2½ hours seeking not only to make again the same points as were contained in the skeleton, but also responding to some of the questions which I had to put to her in relation to the argument. She put her submissions to me in a forthright but courteous manner, which is to her credit. Thereafter I heard briefly from the Respondent. I reserved the decision because I was conscious that if I were to refuse the application, the decision was final, and I wanted to be quite sure that I had made every allowance for the arguments which might be run if I were to reach that conclusion. 5. The background facts for the decision are set out at paragraphs 2 to 34 of the judgment. The legal principles which were to be applied were set out at paragraphs 35 to 39 of the judgment. The reasons for the decision were set out at paragraphs 41 to 44, and it is clear from paragraph 40 that each of those reasons stood alone in leading to the exercise of discretion. 6. I now turn to the basis of the application for leave under the distinct headings. Has something clearly gone wrong? 7. Advocate Brown submitted that the judgment was clearly wrong in the following ways:- (i) The Court misdirected itself as to the nature of a costs order which could be made against an executor; (ii) The Court misdirected itself as to the relevant legal principles to consider in determining whether or not costs should be allowed where an action has been withdrawn and discontinued; (iii) The Court took into account the provisions of Article 24 of the Probate (Jersey) Law 1998 which was irrelevant; (iv) The Court took into account irrelevant facts and did not take into account relevant facts; and

- (v) The conclusions at paragraph 37 of the judgment were clearly wrong. 8. One might think that a judge would be unlikely to consider his decision was plainly wrong, but I recognise absolutely that in the course of making an application for leave to appeal, something may be said which causes him to doubt his exercise of discretion. Nonetheless in all that I have read and heard on this subject in this case there was nothing which caused me any such doubts at any level. 9. In this part of her submissions, it seemed to me that Advocate Brown proceeded on some false assumptions. The first was that the Court did not understand that it could make an order for costs against an executor. This was a bold submission to make but it appeared to be based on paragraphs 23 to 25 of the judgment. These paragraphs were inserted because Advocate Jones, who then appeared for the Applicants, made it plain that whereas previously he had sought in written documentation before the Court indemnity costs against the Plaintiff personally, on this occasion he was not seeking indemnity costs against him personally but against him as executor, but on the basis that he could nonetheless pursue the executor personally in any event as a matter of logic and principle. I found that submission to be wholly wrong, which is what paragraphs 23 to 25 of the judgment are about. It is not reasonably possible to read those paragraphs in such a way as

to conclude that the Court did not realise it could make a costs order against an executor. Furthermore, paragraph 41 of the judgment makes it plain that the Court would normally have expected any costs order made against an executor in hostile third party litigation to be payable by the estate.

10. The second false assumption was that the Court did not start in the right place, because *Dick v Dick* [1990] JLR N 2C was not applied. This too was surprising. At paragraph 36 of the judgment, the Court noted that very frequently in cases where proceedings had been commenced and were withdrawn, the Court visited the costs of those proceedings on the withdrawing party on an indemnity basis, and *Dick v Dick* was expressly referred to. The reason that course is often taken is that to do so recognises that costs frequently (but not always) follow the event – the “event” here not being the substance of the litigation but the fact that there once was litigation but now there no longer is. If a party brings proceedings and then withdraws them, the defendant goes from a position of not facing proceedings, through facing proceedings to not facing proceedings again. The substance of the proceedings has not been adjudicated upon; but the defendant has “won” to the extent that he no longer faces proceedings. Furthermore it is generally not the case that the court will be inclined to have a full hearing on the merits to determine which of the parties would have won had the case gone to trial so that it then knows who the “winner” of the substantive litigation would have been. This shows how the “event” is different whether one is talking about a withdrawal or discontinuance on the one hand or a hearing on the merits on the other.
11. Advocate Brown accepted that despite *Dick v Dick*, the Court did have a discretion as to whether a costs order should be made. In exercising that discretion, the Court would have regard to the principles in the cases set out in paragraphs 37 and 38 of the judgment.
12. In the course of the application, it was also submitted that the Court erred by not considering whether to make an award of costs against the Respondent personally. This too was a bold submission to make. The Applicants, who were represented by Advocate Jones, did not make an application for costs personally against the Respondent. It is unsurprising the Court did not consider an application which was not made. A considerable part of both the skeleton and the oral hearing was taken up with this point which, as I say, not only was one not raised before me but also arises out of a misreading of the purpose of paragraphs 23 to 25 of the judgment.
13. I now turn to the criticisms of the reasons given in the context of whether evidence or facts have wrongly been taken into account. It is said that the Court ought not to have concluded that the benefit of the lion’s share of the assets which the deceased Mr and Mrs Benest possessed, had devolved on the Defendants. The basis of this submission was that the matter had not been determined at trial. However it was plain from all the argument before me from time to time in this case that this was not an issue in dispute. The Applicants did have the benefit of the lion’s share of the assets of the late Mr and Mrs Benest. It is wrong to say that a trial was needed of something which was not in fact disputed. The exercise of

discretion in Article 41 was therefore made upon the basis that it would be unjust in the circumstances of this case to penalise the daughters, who would be entitled under the estate of the late Mrs Benest, by making a costs order against the estate when their brother and his wife had had the lion's share of the assets.

14. Different judges might see this particular factor in different ways. Another way of putting that is that there is frequently more than one reasonable view of a particular factor. The Law makes it plain that the assessment of matters such as this is for the discretion of the trial judge. There is no realistic prospect of the Applicants succeeding on this assertion.
15. As to paragraph 42 of the judgment, the reason given is that the First Defendant brought the proceedings on the Applicants by his conduct. Once again, there was no dispute about the facts set out at paragraph 42 of the judgment. The assessment of those factors insofar as costs were concerned was a matter for me, and I see no realistic prospect of any successful appeal against the exercise of discretion in that respect.
16. Advocate Brown submitted that the Court failed to take into account the affidavit of Advocate Marcus Pallot, which at paragraph 46 of the judgment was described as being not particularly helpful. The judgment confirms that the affidavit and the exhibits were read. It cannot be said therefore that they were ignored. The fact that not much weight may have been given to them is neither here nor there. Allocation of weight to factors which go to the exercise of discretion is a matter for the judge exercising the discretion. In his submissions, Mr Syvret asserted that the Applicants seemed to think that the affidavit of Advocate Pallot should be accepted without question whereas other affidavits should be examined critically. Although in her reply Advocate Brown said that her criticism was that the affidavit had not been taken in context, she added that the Court should give special weight to the fact that the affidavit came from an officer of the Court. It seems to me that that is similar to what was being alleged by Mr Syvret in relation to the weight to be given to the document. I think it is clear that the Court gives such weight to such documents as it thinks fit. This is not in any sense a criticism of Advocate Pallot or of his credibility – it is merely to say that I did not find the contents of the affidavit to be particularly helpful as to the decision which I had to take. The assessment as to whether the affidavit and the exhibits established that the Respondent had all the information which he needed in advance of the commencement of the proceedings was a matter for me, and I am quite clear from my review of all that took place that the affidavit did not establish that proposition such that the proceedings ought not to have been commenced. A question of general principle to be decided for the first time
17. There was some duplication of these submissions, but it is convenient to deal with two points under this heading albeit the Applicants contended they were also relevant under the headings of something clearing having gone wrong and/or something involving a question of importance upon which further argument and a decision of the Court of the Appeal would be to public advantage. These points are firstly the extension of the principles in *Jersey Financial Services Commission v A P Black* [2007] JLR 1 set out at paragraph 37 of the judgment and secondly the reference to legal aid at paragraphs 39 and 44.

18. What paragraph 37 was saying in this connection was that the principles of Jersey Financial Services Commission v A P Black could be extrapolated to cases involving executors who are also required to make honest, reasonable and sound administrative decisions. I accept that executors do not act in the public interest. If the extension of the principles of Jersey Financial Services Commission v A P Black had stopped there, then I can well see that this would be a matter decided for the first time where the views of the Court of Appeal could be usefully ascertained. However, the extrapolation is not on that basis. What is being said at paragraph 37 of the judgment is that the executor had not received candid full and unambiguous replies from those of whom he makes proper enquiry. This is linked to what follows later at paragraph 42 where, evaluating the different factors, the Court reached the conclusion that the Mr Benest had brought the proceedings upon himself, and that it was wholly unsurprising that the executor would want to investigate. Such extension as there is of the principles of Jersey Financial Services Commission v A P Black is very limited because it is linked to the lack of candid full and unambiguous replies from the First Defendant.
19. I now turn to the question of legal aid. I should immediately add that I received an application from the Jersey Law Society for the Society to make written submissions on this question with the request that leave to appeal might be granted so that the Court of Appeal could consider paragraph 44 of the judgment. I agreed that the Society should make those submissions, which it has, and which I have considered. Advocate Brown substantially identified herself with the Law Society's position, but she did indicate that she did not accept that part of the submissions which suggested that I could in some way qualify paragraph 44 of the judgment if leave were not to be granted.
20. The underlying facts in relation to the legal aid issue are set out at paragraphs 27 and 32 of the judgment; the law at paragraph 39, where there is a typographical error in that the judgment should have referred to the case of R v G [2006] JRC 112 instead of Ani v Barclays Bank Plc [2004] JLR 165. It is clear that this is a typographical error from a review of paragraph 44. I regret that it occurred and it is unfortunate that when the draft judgment was circulated neither party made reference to it.
21. In essence the submission of the Law Society was that R v G was a matrimonial case, and the decision of Birt, DB in that case should therefore be confined to matrimonial causes; secondly that in any event R v G was wrongly decided to the extent that the Court indicated it could take the legal aid obligation into account because it relied upon a number of English cases where the underlying factual matrix concerning legal aid was self evidently different from that which applies in Jersey; and that in any event this was a matter which had not been previously determined in the Court of Appeal and it would be useful for it to be heard there. These three submissions were all adopted by Advocate Brown on behalf of the Applicants.
22. In his reply Mr Syvret agreed that there was a public interest in considering legal aid matters. However he also added that this would not be the first occasion on which a court had taken the fact of legal aid into account in a non-matrimonial matter, and he referred

indeed to Jersey Financial Services Commission v A P Black where Page, Commissioner, said when reviewing how his discretion should be exercised on discontinuance of the proceedings, at paragraph 54:- “Nor is it clear to what extent Mr Black personally will suffer financially if no award of costs is made in his favour. Given his legally aided status, much of his costs will almost certainly fall on others. In any event, his costs up to the point of his decision to take no further part in the proceedings may not have been extensive ...”

23. From this extract, it is clear that the question of taking into account legal aid in a non-matrimonial case has been considered previously in the Royal Court albeit it may not have previously been considered in the Court of Appeal. I am aware from my own experience that the Royal Court has on many occasions taken the fact of legal aid into account in deciding the extent to which a costs order would be made. Nonetheless I recognise that it may well be that of more recent years the practice of doing so has become less common.
24. Mr Syvret also submitted that it was not desirable to use an individual case such as the present one, where a litigant represented himself, to determine an issue of principle of this kind. I reject that submission. The Respondent could be represented on appeal. Indeed if I had been minded to grant leave on this ground, I would have been very open to making a protective costs order the results of which would have been to ensure that the Respondent could not be ordered to pay the costs of the appeal whatever the result, and indeed I might also have been minded to convene the Attorney General with a view to the protective costs order extending, subject to receiving submissions, to an order that the costs of the respondent arguing the appeal be met out of public funds. I say all this simply to acknowledge that this issue is capable of being a matter which could properly be put before the Court of Appeal at some future date.
25. I do not think however that this is the right case to do so nor do I think it is unfair on the Applicants so to resolve. The reasons for that view are firstly that this is only one reason out of four, each of which is a standalone reason as to why no costs order was made in this case. Secondly, to ventilate the argument in the Court of Appeal when the result would have no impact on the decision appealed against would not be appropriate. Thirdly, the Court of Appeal would not have the considered views of the Royal Court on the detail of the legal aid scheme and upon the various arguments which might be advanced on either side for determination in that Court. In a matter of this kind, where judicial policy plays a significant part in the decision taking process, and recognising that the Court of Appeal is substantially populated by judges who do not have a first hand experience of how the legal aid system works in Jersey, the absence of the Royal Court’s considered judgment on all that detail would be particularly unhelpful for the Court of Appeal. The absence of some of the basic material could no doubt be put right by the convening of the Law Society and possibly the Attorney General to any such appeal, with directions as to what documentary evidence should be advanced, but even that material once produced would still leave the Court of Appeal in this case without the considered views of the Royal Court.

26. When I put to Advocate Brown the fact that paragraph 40 of the judgment indicates that the four paragraphs which followed were stand alone reasons for the exercise of discretion, her submission was that if one factor was incorrect, the whole exercise of discretion should be reconsidered. That submission really amounted to a submission that the Court did not really mean it when it said in paragraph 40 that the exercise of discretion was made for each of the reasons which followed. This was a brave submission, and it does not help me on the issue of how it would be right to grant leave on this point when the result would be unaffected.
27. I think it is also right to reflect that at paragraph 39 of the judgment, the Court reiterated that the relevance of legal aid to a cost decision would depend on the circumstances of each case, but legal aid might be relevant if the only result would be to deplete the assets of the paying party and benefit the receiving party's advocate. Essentially, that was the same comment made in Jersey Financial Services Commission v A P Black. The principle reflects the underlying purpose of a costs order which is intended to benefit not the advocate but the receiving party who would otherwise have the obligation to pay his lawyer. It may well be thought that in the circumstances there is nothing very surprising about the principle.
28. For all these reasons, leave to appeal the order that there should be no order for costs on the discontinuance of the two sets of proceedings is refused. Authorities Court of Appeal (Jersey) Law 1961. Glazebrook v Housing Committee 2002/217. Maçon v Quérée [2001] JLR 187. Tomes v Coke-Wallis 2002/10. Britannia Building Society v Milborn [2007] JRC 001. Probate (Jersey) Law 1998. Dick v Dick [1990] JLR N 2C. Jersey Financial Services Commission v A P Black
- [2007] JLR 1. R v G [2006] JRC 112. Ani v Barclays Bank Plc [2004] JLR 165.

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