

JERSEY / JUDGMENT

Black and Others v JFSC [2008]

JCA 008 (23 January 2008)

[2008] JCA 008

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COURT OF APPEAL 23rd January 2008 Before : Dame Heather Steel, President; M. S. Jones, Esq., Q. C., and; J. V. Martin, Esq., Q. C. Between A P Black (Jersey) Limited APPELLANT/First Plaintiff And Mr Alistair P Black APPELLANT/Second Plaintiff And Mrs Eila A Black APPELLANT/Third Plaintiff And A P Black Limited (UK) APPELLANT/Fourth Plaintiff And The Jersey Financial Services Commission Respondent Appeal from the judgment delivered by Commissioner Page, sitting alone as a Judge of the Royal Court, on 23rd August, 2007. Mr A P Black for the Appellants Advocate M Pallot for the JFSC

JUDGMENT

1. This is the judgment of the Court. 2. There are two questions before this Court: first, should an order of the Royal Court requiring that the appellants provide security for costs be stayed pending the full hearing of an appeal against it? Secondly, should further security be ordered in respect of the costs of the appeal? 3. The circumstances in which these questions arise are fully set out in a written Determination of Beloff JA (sitting as a single judge of this court) dated 7th January, 2008. That Determination is annexed to this judgment. We therefore do no more than summarise the relevant facts. 4. These proceedings concern complaints by the respondent Commission about the appellants' conduct in relation to schemes involving investment in foreign currency options. The substantive proceedings are now over: the Commission's claim against the fourth appellant ("A. P. Black Ltd (UK)") has been struck out, and it has discontinued against the other appellants. 5. On 6th December, 2006 the Royal Court dealt with the question whether the Commission should be permitted to discontinue, and if so on what terms. Having allowed the Commission to discontinue, the Court (Mr Commissioner Page QC) dealt with the costs of the proceedings. It ordered that Mrs Black should not be awarded the costs of the proceedings against her, that costs orders previously made would remain in force and that otherwise there should be no order for costs. Mr Commissioner Page QC dealt specifically with one set of previous costs orders, under which the Commission had been awarded certain wasted costs, by directing that they should be referred to the Taxing Master for inquiry and report; but subject to that report he made an order for summary payment of the costs in the sum of £60,000 or such other amount as the Court might think appropriate. It appears from paragraph 10 of the Commissioner's judgment that the sum of £60,000 represented the only known asset of the first appellant ("A. P. Black (Jersey) Ltd"). 6. The Appellants sought leave to appeal these orders for

costs. On 19 th June, 2007 Mr Commissioner Page QC gave leave to appeal on one issue only, namely whether and to what extent it was open to the court to take into account on questions of costs that the proceedings had been brought by a body in pursuance of its public-interest functions. However, he invited further submissions on the question of whether leave should be conditional on the provision of security for costs of the appeal and he gave directions for determination of that issue. One of the directions was that any claim by the second appellant ("Mr Black") or Mrs Black to be unable to provide security should be supported by affidavits showing their current financial position. 7. On 23 rd August, 2007 Mr Commissioner Page QC ordered that security for the costs of the appeal be provided in the sum of £14,000. Having remarked that a notable feature of Mr and Mrs Black's submissions was the absence of any affidavit of means despite his earlier direction, he said the following (paragraphs 8 and 9 of his judgment): "In summary, therefore, the position is this. Mr Black, Mrs Black and Black's London [the fourth appellant] are all resident outside the jurisdiction. Black's Jersey is within the jurisdiction but, as far as is known, has assets which, at best, are likely to be insufficient even to satisfy existing costs orders in the Commission's favour. If the appeal is pursued and lost there will be no realistic possibility of the Commission recovering its costs of the application for leave or of the appeal itself. There is no material before the court to show that, on the basis of their present assets, annual income and expenditure, it would be oppressive for Mr and Mrs Black to be required to put up security of the order sought by the Commission. In these circumstances, it would be quite wrong for any of the Respondents to be free to pursue an appeal at no risk, in practice, to themselves even if unsuccessful; especially an appeal where the prospects of success are, perhaps, not good." 8. On 19 th September, 2007 or shortly afterwards the appellants gave notice of appeal to this Court seeking leave to appeal, without limitation, the entirety of the costs orders made on 6 th December, 2006. It is not altogether clear whether or not the document is meant to include an appeal in relation to the one issue where leave has already been granted, although the grounds of appeal are more than sufficiently wide-ranging for that purpose. We emphasise that the substance of the notice is not before us: it will if necessary be dealt with later in the stages identified in Beloff JA's Determination, and we will do no more than make directions for that purpose. 9. On 20 th September, 2007 Mr and Mrs Black wrote to the Royal Court seeking confirmation that the Court's order of 23 rd August, 2007 was stayed pending determination of the appeal (which, of course, it was not: Court of Appeal (Civil) Rules , rule 15(1)). On 28 th September, 2007 Mr Commissioner Page QC refused to stay that order. 10. By Notice dated 9 th October, 2007 the appellants applied to a single judge of this Court for a stay of the order of 23 rd August, 2007 pending the hearing of their Notice of Appeal dated 19 th September, 2007. 11. The application was dealt with by Beloff JA, and resulted in his

Determination.

As is apparent from it, he directed that the only issue before us would be "whether the stay sought by the [appellants] as to the order for the provision of security should be granted or whether (a necessary consequence of its refusal) security for costs as ordered by the Royal Court must be provided by the Blacks before any further steps are taken by either side in the proceedings". 12.

On 15 th January, 2008 the Commission made an application for further security for costs. The basis of the application is that the attempt by the appellants to appeal the whole of the order of 6 th December, 2006, rather than merely that part of it which they have leave to appeal, will inevitably cause the Commission to incur costs in addition to those for which security has already been ordered. Although that application was made after Beloff JA's Determination, the Commission had notified him of their intention to make it; and it is obviously sensible that we should deal with it as well as the issue identified in the Determination. 13. We had written and oral submissions from Mr Black on behalf of the appellants and from Advocate Pallot for the Commission. We are grateful to them both for their assistance, and wish to pay particular tribute to the attractive and moderate way in which Mr Black put his oral submissions. 14. We nevertheless make the following point. In paragraph 37 of his Determination, Beloff JA expressed the hope that the parties would focus their preparation on the issue he had identified. He did, however, also recognise that resolution of the issue could not be entirely divorced from other matters sought to be raised by the appellants; and they appear to have interpreted that as an invitation to restate all their complaints about the way in which they perceive themselves to have been treated by the Commission and the Royal Court. Although we understand that a strong sense of grievance is felt by Mr and Mrs Black, we find the continual repetition in court documents of their entire case both regrettable, in that it unnecessarily increases the time taken by the court in pre-reading, and counter-productive, in that it adds force to the Commission's argument that it is obliged to deal with irrelevant contentions at great expense. In substance, many of the appellants' submissions are that they should not have to give security because they are going to win the appeal. That misses the point. If security is ordered, it is to cover the possibility that the appeal will fail; and suggestions that it will not fail are of little if any relevance. 15. The Commission's primary contention was that the Court had no jurisdiction to hear either of the matters before it. The premise was that Article 13 of the Court of Appeal (Jersey) Law 1961 provided that no appeal lay from an order as to costs only, which by law are left to the court's discretion, without the leave of the court making the order and the only parts of the order of 6 th December, 2006 that were appealed were costs orders that came within that provision. That contention underlies an application made by the Commission on 8 th November, 2007 to strike out the appellants' application for leave to appeal, and is the substance of the second stage identified in Beloff JA's

Determination.

In the present context, the argument was that, since only the Royal Court could give leave to appeal, only the Royal Court had power to determine the terms on which that leave should be given, and this Court had no ability to interfere. 16. We do not accept that contention. There is on foot an application to the Court of Appeal in the form of the appellants' Notice of Appeal. The appeal may or may not succeed; but until it is dealt with substantively its existence seems to us to entitle the court to take decisions about its conduct under the general powers given by the Court of Appeal (Civil) Rules . We also consider that it would be unjust to the appellants to deal on this occasion with so fundamental an issue when Beloff JA's Determination stated that the issue would

be dealt with on a later occasion. We therefore proceed to deal with the applications on their merits. 17. Although it might be possible for us to regard the appellants' application for a stay as dependent on their ability to demonstrate that Mr Commissioner Page QC had exercised his discretion wrongly in refusing a stay, the real issue in relation to both applications is whether or not security should be given for the costs of the appeal. 18. Under rule 12(4) of the Court of Appeal (Civil) Rules, the Court may in special circumstances order that such security shall be given for the costs of an appeal as the Court thinks just. The meaning of the expression "special circumstances" was considered by Mr Hamon, Deputy Bailiff, sitting as a single judge of this Court in an unreported judgment in *Gheewala v Compendium Trust Company Limited*

[1999] JRC 40, from which it appears that the expression is to be construed in the light of its meaning in the Rules of the Supreme Court 1965 (which formerly governed the issue in England and likewise required the existence of special circumstances). In that context it was established that special circumstances included the impecuniosity of the appellant, the residence of the appellant outside the jurisdiction, and the making of an appeal that amounted to an abuse of process or was vexatious. The second of these was based on the additional expense of enforcing orders abroad, and came to be regarded in England as an insufficient ground in cases involving appellants resident in an EU state; but Jersey is not part of the EU and is not party to the Judgments Regulation, and has reciprocal enforcement arrangements only with the United Kingdom, Guernsey and the Isle of Man, Australia and Finland. The first two grounds are therefore potentially applicable to the present case, but we do not consider that the third is. It was never the case in England that the mere weakness of an appeal made it an abuse of process or vexatious, so that even if Mr Commissioner Page QC was right to think that the prospects of appeal were not strong the case would not come within this ground. Nor do we feel able to conclude at this stage that the appeal will certainly fail on the ground of lack of jurisdiction. 19. We have given careful consideration to the appellants' arguments that they should be entitled to pursue their appeal without the burden of having to provide security for costs. We have also taken into account the fact that the appellants have been involved in this litigation for many years, at considerable cost to themselves in time and money, and that ultimately that litigation has failed or been abandoned. However, we also have regard - as the Deputy Bailiff did in *Gheewala v Compendium Trust Company Limited*

- to the following passage from paragraph 59/10/32 of *The Supreme Court Practice 1999* (dealing with Order 59 rule 10 of the English Rules of the Supreme Court): "In deciding whether to award security for the costs of an appeal to the Court of Appeal, the Court takes into account the fact that the appellant has already had the issue determined in the court below, and it is prima facie an injustice to a respondent to allow an appeal to the Court of Appeal to proceed without security for costs being furnished in circumstances where the respondent will be unable to enforce against the appellant any order for costs made by the Court of Appeal; but the Court retains a discretion whether to award security and is not bound to do so in all cases where "special circumstances" are established". 20. The only one of the appellants that is resident within the jurisdiction is Blacks Jersey. Its only known asset

is the sum of £60,000 which is the subject of that part of Mr Commissioner Page QC's order dated 6 th December, 2006 that related to summary costs. If the appeal fails, which is the event against which security is sought, that sum will go in discharging the wasted costs order. Mr Black urged on us that the amount of the wasted costs might be less than that, but it is clear (in particular from paragraph 13 of the judgment of Mr Commissioner Page QC dated 19 th June,

2007) that the assumption underlying the Commissioner's order was that the £60,000 was all that might be available to discharge a much greater liability, albeit one that remained to be determined by the Taxing Master. We therefore approach the matter on the basis that there are no assets within the jurisdiction. Although all the other appellants are resident in the EU, none of them is resident in one of the countries with which Jersey has reciprocal enforcement arrangements (Mr and Mrs Black at one time lived in Finland, but now live in Brussels). It therefore seems to us that the second category of special circumstances exists. 21. We also consider that the first category, namely impecuniosity, exists. As Mr Commissioner Page QC remarked when ordering security, there is no real possibility that the Commission will be able to recover its costs if it succeeds on the appeal. We were concerned that the effect of ordering security might be to prevent the appeal proceeding altogether, but, quite apart from the fact that there is no evidence on which we could properly reach that conclusion (the appellants not having taken up the suggestion made by the Commissioner that they produce evidence of their means), Mr Black accepted before us that - given time - it would be possible to provide security up to about £30,000 from investments held by Mrs Black. 22. Notwithstanding that special circumstances exist, the Court must still consider whether overall it is fair to order security. That involves a consideration of the interests of both sides: the appellants' interest in seeking to right what they plainly regard as a wrong, and the Commission's interest in maintaining an existing judgment without having to incur further irrecoverable expense. 23. Having regard to these considerations, it seems to us that Mr Commissioner Page QC's decision to make leave conditional on the provision of security of £14,000 was entirely justified and struck a fair balance between the competing interests of the parties. We therefore refuse the application for a stay of his order, although we will extend the time for compliance with that condition for a further 28 days. 24. We are not, however, prepared to accede in full to the Commission's application for further security. We take that view not because we think it is in principle wrong (although we remark that the logical consequence of the Commission's jurisdiction argument is that we have no power to entertain it at all), but because we consider that to accede to it in full would represent a disproportionate and unfair obstacle to the pursuit of the appeal. There will be costs consequences of the present application which are likely to reduce the amount available to the appellants for the provision of security, and to order a figure in the region of the £32,500 sought by the Commission would be unfair. In the circumstances, we consider that a total figure for security of £20,000 is appropriate, and on the Commission's application order that it be a condition of the appellants' ability to pursue their appeal on any matter other than that for

which the Commissioner gave them leave that within 28 days they provide security in the sum of £6,000 in the same manner as envisaged in the order of 23 rd August, 2007. 25. If both sets of security are provided, the entirety of the order dated 6 th December, 2006 will be under challenge. The extent to which the appellants can maintain that challenge in relation to matters where no leave has yet been granted will have to be considered first: this is stage 2 identified in paragraph 26 of Beloff JA's Determination. We will therefore make the following directions: (i) If the security of £14,000 referred to in the order of the Royal Court made on rd August, 2007, and the security of £6,000 referred to above, are both provided in the form and manner set out in the Royal Court's order on or before 22 nd February, 2008 or within such period thereafter as a single judge of this Court may allow, the questions raised by the Commission's summons to strike out dated 8 th November, 2007 are to be tried before this Court before any other issue arising in the appeal. Skeleton arguments are to be exchanged no later than 28 days before the appeal is listed for hearing, strictly confined to the grounds identified in paragraph 1 of the Commission's summons; (ii) If the security of £14,000 is provided as set out above, but the security of £6,000 is not, then the issue for which leave was given on 19 th June, 2007 - but no other issue sought to be raised by the appellants' notice of appeal - is to be tried before this Court. The Notice of Appeal is to be amended so as to exclude all matters save those directed to the issue on which leave was given within 28 days after the provision of security, and skeleton arguments are to be exchanged no later than 28 days before the appeal is listed for hearing, strictly confined to the issue for which leave was given. 26. We will if necessary hear detailed submissions on the precise form our directions should take. Authorities Court of Appeal (Civil) Rules. Court of Appeal (Jersey) Law 1961. *Gheewala v Compendium Trust Company Limited*

[1999] JRC 40. DETERMINATION of Beloff JA Beloff JA sitting as a single Judge of the Court of Appeal 1. There are pending before this Court sundry applications by the First, Third, Fifth and Sixth Respondents ("the Black Respondents") arising out of orders made by the Royal Court [at all times presided over or constituted by Mr Commissioner Page QC] on 6 th December, 2007, 19 th June, 2007 and 23 rd August, 2007, and a refusal by the Royal Court to stay the latter orders on 28 th September, 2007. For reasons which hereinafter appear I have decided, with, as it seems, the concurrence of the parties, only to give directions in relation to the hearing now fixed before the full Court in the week commencing 22 nd January, 2008. It will be for the Court as then constituted to decide on the future disposal of these proceedings. 2. These proceedings have a long and complex history which I recite primarily to explain the direction that I have decided to make, but secondarily to seek to provide for the full Court a quick guide through the labyrinth. 3. The proceedings concern the operation in the early 1990s' of what the Royal Court dubbed the 'Delta Scheme'. The scheme involved investment by participant members of the public in currency option dealings by companies in the United States of America and the Bahamas. Many of those investors were clients of and/or invested through Blacks Jersey, of which Mr Black and Mrs Black were directors. The scheme ended disastrously with its collapse in

September 1993 and very substantial losses for a substantial number of those investors (said by the Commission to amount in aggregate, world-wide, to some US\$90 million and to some £30 million in respect of investments made via Blacks Jersey). 4. On 30 th June, 2003 the Commission brought the proceedings with a view to recovering losses incurred by investors in the scheme against Blacks Jersey, Mr. Black, Cater Allen Trust Company (Jersey) Limited ("CATCJ") and Mr. Peter Langton and applied to the Court for orders against the several Respondents under Article 20(7) of the Collective Investment Funds (Jersey) Law 1988 ("the CIF law") which provides: "If on the application of the Commission the court is satisfied (a) that profits have accrued to a person as a result of his failure to comply with any provision of this Law, or of any Regulation or Order made, or permit granted, or with any direction given, under this Law; or (b) that one or more investors have suffered loss or been otherwise adversely affected as a result of that failure; the court may make an order requiring the person concerned to pay into court for distribution as the court may direct such sum as appears to the court to be just having regard to the profits appearing to the court to have accrued and to the extent of the loss or other adverse effect". On the 12 th May, 2003 Blacks London was added as a respondent. 5. It was alleged that each of the Respondents had been guilty of misconduct within the terms of this provision and were liable to make a payment into court for distribution among those investors who had suffered loss. More specifically, the Commission alleged that the Respondents (i) acted as functionaries to the Delta Options Scheme under the provisions of Article 3 of the CIF Law and that they failed to obtain, indeed even apply for, a permit to act as a functionary to the scheme, as was required by Article 4; (ii) recklessly made statements and forecasts in relation of the scheme that were misleading, false and deceptive for the purposes of inducing participants, or potential participants to enter into investment agreements, or to refrain from exercising rights conferred by 'units' in the Delta Scheme, and thus committed offences under, and accordingly contravened, Article 9(1); and (iii) made statements and forecasts that created, and were made for the purpose of creating, a false and misleading impression in the minds of participants and potential participants as to the value of units in the scheme, and thus committed offences under, and accordingly contravened, Article 9(2) of the CIF Law. 6. The main events which thereafter unfolded were these:- (i) In June 2003: The Royal Court made Orders for discovery, exchange of affidavits of evidence-in-chief and for provisional listing of the proceedings for trial in January 2004: The Black Respondents refrained playing any further part in the proceedings and fail to comply with all current and subsequent orders for the next 17 months or so; (ii) In November 2003: The Commission settled with Cater Allen and Mr. Langton on terms approved by the Royal Court; (iii) In December 2004: The Commission obtained ex parte leave to join Mrs. Black as a respondent; Mr. Black (but not at that stage Blacks Jersey and Blacks London) sought leave to resume active defence of the proceedings. (iv) Between February and May 2005 Mr. Black took various steps towards complying with outstanding orders and demonstrating his intention to abide by future orders of the Court. As part of the terms on which Mr. Black was permitted to resume active defence of the proceedings, the Court ordered on th February, 2005 that he was to:-

"pay the costs of the Representor [the Commission] on an indemnity basis for all such matters as the Representor can demonstrate represent additional costs or wasted expenditure resulting from [Mr. Black's] failure to comply with the order of the Court dated 17th June 2003, and /or his failure to participate in the action thereafter until December 2004" (paragraph 4). (v) On 16 th May, 2005: Blacks Jersey and Blacks London took similar steps; (vi) On 16 th May, 2005: The Royal Court made similar orders against Blacks Jersey and Blacks London in relation to their failure to comply with the 17 th June, 2003 Order and their failure otherwise to participate in the action from that point until 16 th May, 2005; (vii) On 19 th May, 2005: Court Orders were made setting fresh deadlines for outstanding responses from Black Respondents; (viii) th June, 2005 : Mrs. Black issued a summons to strike out the proceedings against her; (ix) Following the hearing of Mrs. Black in August 2005, the Royal Court ordered proceedings against Mrs. Black to be struck out. It explained: "We are compelled in the end to conclude that it would be an abuse of process - or, as we would prefer to put it, that it would not be fair and just - for Mrs Black to be retained as a Respondent to these proceedings. We reach this conclusion on the basis of a combination of considerations: the late stage at which she has been joined; the difficulty of being able to discern with confidence the extent of her involvement and the strength of the case against her; and the bar on any possibility of joining CATCJ or Mr Langton [other parties who had settled with the Commission] as third parties to the claim against her. We have well in mind the very considerable losses that is said to have been suffered large numbers of investors, the considerable practical difficulties likely to be involved on the part of the Commission in investigating the background to these losses and the pursuit of redress from those believed to be responsible. But these considerations are, in our view, outweighed on this occasion by the potential injustice of Mrs Black being brought into these proceedings as a Respondent at this stage." (x) At the time of striking out the proceedings against Mrs. Black the matter of costs was reserved. For a variety of reasons, principally court availability and a succession of on-off negotiations between the parties, each of these matters of costs remained outstanding. 7. On 7 th June, 2006, the Commission gave notice of its wish to discontinue proceedings against the remaining Black Respondents and submitted that this should be permitted on the basis that there should be no further order for costs either way. 8. The issues before the Royal Court were accordingly three: (i) what costs the Commission could demonstrate as being recoverable by it within the terms of paragraph 4 of the Court's Order of 16 th February, 2005 and the corresponding provisions of the Court's Order of 16 th May, 2005; (ii) the appropriate order in costs to be made following the strike-out of proceedings against Mrs. Black; and (iii) the appropriate costs orders to be made on the Commission's application for leave to discontinue the proceedings against the remaining respondents. 9. On the 7 th November, 2006 the hearing of the Commission's application to discontinue took place. 10. On 6 th December, 2006 the Royal Court gave judgment and:- (i) granted the Commission ("the Commission") leave to discontinue proceedings on terms that all existing costs orders would remain in force but that no other order for costs would be made, save as for provided for in paragraph 3 of the order. (ii) refused the Sixth Respondent's ("Mrs Black")

application for costs following the striking out of the claim against her; (iii) ordered that the extent of the Commission's wasted costs arising from the failure of the Third and Fifth Respondents (Black Jersey, Mr Black and Black London respectively) to comply with the Court's orders of June, 2003, and otherwise to participate in the proceedings in the seventeen months that followed, should be referred to the Taxing Master for inquiry and would be subject to such report, there would be a summary award of costs in the Commission's favour against Black Jersey, Mr Black and Black London of £60,000 or such sum other as the Court thought appropriate; (the Commission was invited to propose detailed terms for giving effect to the intention of the Court); (iv) directed that, as regards the costs of and incidental to the matters concerned in the judgment referred to, all parties should have an opportunity to make written representations in response to paragraph 51 of the judgment by Thursday 14 th December 2006; (v) granted the parties liberty to apply should there be any loose ends not covered in the judgment; and (vi) ordered that, with immediate effect, each of the Black Respondents is required to refrain from procuring, encouraging or assisting directly or indirectly the transfer or charging of, or other dealing with, any assets or other resources of A. P. Black (Jersey) Limited pending further order of this Court, with liberty to all parties to apply, if necessary at short notice, for variation or discharge of this injunction. 11. The essence of the Royal Courts reasoning appears from the following passages in the judgment:- "30. The first thing to say is that there is nothing that would warrant the court taking the view that the Commission behaved improperly or unreasonably in seeking to join Mrs. Black as a party to those proceedings. Her success in striking out the proceedings did not turn on showing that the case against her was wholly unfounded (although the strength of that case was difficult to assess), but to a large extent on the procedural unfairness that might affect her position as a result of the release of some of the other respondents following the settlement in November 2003 and the substantial lapse of time since the material events. 31. Secondly, as the judgments of the Court given on 16 th May 2005 and on the hearing of Mrs. Black's application point out, over six months elapsed between the time when the Court originally gave leave ex parte for the Commission to join her as a Respondent on 8 th December 2004 and the service of her summons to strike out the proceedings on 24 th June 2005; that delay appears in part to have been the result of complications with Mrs. Black's legal representation (initially Crill Canavan, who were already acting for Mr. Black, then Sinels, then back to Crill Caravan) and in part the result of indecision whether or not to strike out the proceedings; very considerable indulgence was shown by both the Court and the Commission in allowing Mrs. Black to preserve the opportunity to apply to strike out well beyond what would ordinarily be expected of a litigant; and it was only in response to what was, in effect, an ultimatum that the matter was brought to a head when it was. Whatever the full explanation for this extended period may have been, it was not something for which the Commission bore any responsibility. It will inevitably have resulted in considerably increased costs for the Commission as well as Mrs. Black and not just in relation to the additional hearings that were necessary (as to which, specific costs orders in favour of the Commission were in some cases made). At best, Mrs. Black might

therefore argue that she should get her costs from 24 th June 2005 onwards. The costs of settling her formal Answer to the Commission's case would, it is true, have been incurred prior to its service, but the need for that pleading as such only arose because of the delay to hold up the entirety of the proceedings; and it was not until 29 th July and 17 th August 2005 respectively that her skeleton argument and affidavit in respect of the strike out application as such were served. 32. But there is also, importantly, the Commission's point that from 10 th March 2005 at latest an easy way out of the proceedings was open to Mrs. Black if only she had been prepared to swear an affidavit of her means and thereby verify her claim to be sufficiently impecunious to justify seeking legal aid

- and, indeed, securing such aid for a period (although that state of affairs appears later to have ceased). The Commission's position was stated straight-forwardly in its skeleton argument for the 10 th March 2005 hearing and repeated in its skeleton argument for the hearing on 22 nd June 2005. Thus, argued Mr. Pallot, while the Commission would not contend that Mrs. Black had brought the original application to join her on her own head, she had only herself to blame for the continuance of those proceedings after mid-March 2005. There is well established authority for the proposition that successful defendants may be refused part or all of their costs if they have "brought the proceedings on their own head" (to use the expression most commonly employed): see for example, *Watkins v. Egglisshaw* (ibid.). In most such cases this has been because defendants have behaved in a way that has helped to generate suspicion of material wrong-doing when they could have avoided or dispelled this had they been more sensible or co-operative. The present case is rather different. But the argument is analogous and, in my view, an entirely valid consideration in the context of costs. The Commission's invitation was not issued on its own initiative, out of the blue, but in response to a stance taken by Mrs. Black as to her financial situation. Having claimed limited financial resources for the purpose of legal aid, it is difficult to see why she should have been anything other than ready and willing to verify her means on affidavit; and if she had done that satisfactorily the Commission would, no doubt, have been ready to drop the proceedings against her: having publicly stated its position, it could hardly have done otherwise. 33. To deny Mrs. Black her costs successfully resisting the application would, no doubt, be "financially prejudicial" to her, though precisely how prejudicial I am in no position to estimate, given the absence of any authoritative evidence of her means. But taking account of the circumstances as a whole and those that I have specifically mentioned in particular, I am in little doubt that the just result is that Mrs. Black should bear her own costs of the strike out application. On the other hand, the Commission does not ask for, and if it did I would not make, any further orders for costs in favour beyond those already made on earlier hearings. D. Discontinuance against Mr. Black, Blacks Jersey and Blacks London 34. The Commission's wish to discontinue all further proceedings is said to be a pragmatic one: that "it is not considered to be in the public interest to continue an action against two companies of insignificant value, [save for the limited funds believed to belong to Blacks Jersey referred to elsewhere] and against an individual who has submitted sworn evidence to the Court that he is de facto impecunious". The Commission continues to

suspect that Mr. and Mrs. Black between them have access to considerable wealth but believes that without Mrs. Black as a party to the proceedings, the task of trying to trace and recover any such assets (assuming one or both of them at trial) would be of such expense and uncertainty as not to justify continued pursuit of the current proceedings. 35. It is not for this Court to inquire into the detailed considerations that have lead to this decision or to second-guess the wisdom or otherwise of the course that the Commission now wishes to take. But anyone with any experience of complex litigation and of the sort of considerations to which the Commission has alluded will know only too well that hard decisions of a practical kind have, not infrequently, to be made - usually involving an assessment of the likely return if the action is to be pursued weighed against the additional investment in costs likely to be required in order to secure that return. And where the expenditure of public funds is at stake, the need to keep that balance under review is all the greater." 12. By Notice served on 19 th January, 2007, the Black Respondents applied for leave to appeal the order of the Court dated the 6 th December, 2006. 13. On the 19 th June, 2007, the Court delivered its judgment in respect of those applications, and inter alia ,:- (2) Subject to (ii) and (iii) below, granted leave to appeal the costs order of the Court made on discontinuance of the proceedings by the Commission, limited to the following point: "Whether and if so to what extent the fact that proceedings have been brought by a body in pursuance of its public-interest functions (as in the present case) is a proper consideration to which a court may have regard in exercising its discretion in matters of costs generally and in the context of granting leave to such a body to discontinue proceedings in particular." (ii) Made such leave conditional on the Black Respondents, Mrs. Black apart, strictly confining their Notice of Appeal and all written and oral submissions on such appeal to the limited issue described in (i) above. (iii) Stated that the Court would hear further submissions in accordance with directions to be given separately as to whether such leave should also be conditional on the provision of security for costs (in such amount(s) and otherwise on such terms as the Court may direct) and/or subject to any other conditions. (iv) Refused leave to appeal on any other point or ground. (v) Ordered that the costs of these applications, so far as they relate to the limited issue described in (i) above, would be costs in the appeal. In all other respects the Commission's costs of these applications shall be paid by the Mr. Black, Blacks Jersey and Blacks London. (2) So far as concerned the application by Mrs. Black:- (i) Granted leave, to the same limited extent and on the same terms as that granted to Mr. Black, Blacks Jersey and Blacks London. (ii) Refused leave to appeal on any other point or ground. (iii) Provided that the costs of Mrs. Black's application, so far as they relate to the limited issue described in paragraph 17(i) of the said judgment, should be costs in any appeal. In all other respects the Commission's costs of these applications should be paid by Mrs. Black. The Court gave further directions concerning the determination of the provision for security for costs which included a timetable for lodging written submissions. 14. On 23 rd August, 2007 having heard particular argument on the issue of security for costs, the Royal Court stated "In summary, therefore, the position is this. Mr. Black, Mrs. Black and Black's London are all resident outside the jurisdiction. Black's Jersey is within the jurisdiction but, as far as is known, has assets which, at best, are likely to be insufficient even to satisfy existing costs

orders in the Commission's favour. If the appeal is pursued and lost there will be no realistic possibility of the Commission recovering its costs of the application for leave or of the appeal itself. There is no material before the court to show that, on the basis of their present assets, annual income and expenditure, it would be oppressive for Mr. and Mrs. Black to be required to put up security of the order sought by the Commission. In these circumstances, it would be quite wrong for any of the Respondents to be free to pursue an appeal at no risk, in practice, to themselves even if unsuccessful; especially an appeal where the prospects of success are, perhaps, not good. For these reasons, I consider that it would be just to order that security for the Commission's costs, limited to an amount of £14,000 ... should be required as a condition of leave to appeal". 15. The Royal Court therefore made the following

orders:

- (1) In the case of each of Blacks Jersey, Mr. Black, and Blacks London; (i) Subject to 1.(ii) and (iii) below, granted leave to appeal the costs order of this Court made on discontinuance of the proceedings by the Commission, limited to the following point:- "Whether and if so to what extent the fact that proceedings have been brought by a body in pursuance of its public-interest functions (as in the present case) is a proper consideration to which a court may have regard in exercising its discretion in matters of costs generally and in the context of granting leave to such a body to discontinue proceedings in particular ." (ii) Made such leave conditional (a) on the Black Respondents strictly confining their Notice of Appeal and all written and oral submissions on such appeal to the limited issue described in 1.(i) above, and on (b) filing with the Court by not later than mid-day on Friday 21 st September, 2007, an undertaking in writing that they will do this; (iii) Made such leave also conditional on the payment into Court by such Respondents or one or more of them, as security for the Commissioner's costs in respect of (a) such Respondents' applications for leave to appeal and (b) the appeal itself, of the sum of £14,000 (Fourteen Thousand Pounds), to be lodged by mid-day on Friday 21 st September, 2007, on terms that such security was to be available to satisfy any costs that the Commissioner may be entitled to recover from any one or more of such Respondents; (iv) Stated that paragraphs 17(iv) and (v) this Court's judgment of the th June, 2007, were to apply as before. (2) In the case of Mrs. Black; (i) granted leave to appeal to the same limited extent as that set out in 1(i) above; (ii) Made such leave conditional on Mrs. Black (a) strictly confining her Notice of Appeal and all written and oral submissions on such appeal to the limited issue described in 1.(i) above; and (b) and on filing with the Court by not later than mid-day on Friday 21 st September, 2007, an undertaking in writing that she would do this; (iii) Made such leave is also conditional on the payment into Court, as security for the Commissioner's costs in respect of (a) Mrs. Black's applications for leave to appeal and (b) the appeal itself, of the sum of £14,000 (Fourteen Thousand Pounds) by mid-day on Friday 21 st September, 2007; (iv) Stated that paragraphs 19 (ii) and (iii) of this Court's judgment of the th June, 2007, should apply as before. (3) Ordered in all cases; (i) Provided that (a) in the event of one or more of the Black Jersey, Mr Black and Black London putting up the requisite security on terms that it was also available to satisfy any costs that the

Commissioner might be entitled to recover against Mrs. Black, paragraph 2.(iv) above shall cease to apply; or (b) in the event of Mrs. Black putting up the requisite security on terms that it was also available to satisfy any costs that the Commissioner might be entitled to recover against the Black Jersey, Mr Black or Black London or any of them, paragraph 1. (iii) should cease to apply; the intent being that, provided that, one way or another, a sum of £14,000 was lodged with the Court on terms that it is available to satisfy any costs that the Commissioner might be entitled to recover against any one or more Respondent(s), only one such payment is required. (ii) Gave liberty to all parties to apply for the purpose of clarifying the intent of these Orders and/or putting them into effect. (iii) Ordered that the costs of the present application would be costs in any appeal. 16. The Black Respondents did not provide security by the time stipulated (i.e. 21 st September, 2007). 17. On the 20th September, 2007 the Black Respondents gave notice of intention to appeal the terms of the orders made by the Royal Court on 23rd August, 2007 and sought confirmation that the Royal Courts orders would be stayed pending determinations of the Appeal . 18. On 24th September, 2007 the Black Respondents filed a Notice of Appeal requesting this Court:- (i) to set aside the orders of the Royal Court of 6 th December 2006 and 23 rd August, 2007; (ii) to grant the Respondents leave to appeal without limitation and without having to provide any security for costs; and (iii) to stay the order of the Royal Court of 23 rd August, 2007. 19. On 28 th September, 2007 the Royal Court said:- "With reference to the letter from Mr. & Mrs Black dated 20 th September 2007 giving notice of intention to appeal the terms of the orders made by this Court on 23 rd August 2007 and their subsequent (most recent) notification that the matter has been fixed for hearing by the Court of Appeal in January 2008, I note: "1. that in their letter dated 20 th September Mr. and Mrs. Black have sought confirmation that this Court's orders are stayed pending determination of appeal;

2. that Advocate Pallot, responding on behalf of the Commission, has by letter dated 20 th September expressed various reservations and concerns about the basis of any such appeal and terms (as to security) on which any such application for a stay might be granted; 3. that no Summons as such has been issued by Mr. and Mrs. Black; and 4. that the request for confirmation of a stay was made (it appears) less than 24 hours before the expiry of the dates set by my orders of 23 rd August for the provision of security for costs of any appeal and the giving of certain undertakings; 5. that the effect of the orders from which it is sought to appeal is simply to determine the terms on which leave to appeal various earlier orders made by this is granted. In these circumstances, it appears to me to be inappropriate and unnecessary that I should stay the orders made by this Court on 23 rd August 2007, and that if Mr. and Mrs. Black want to pursue the matter the right course is for any such application to be made, on proper notice, to a single judge of the Court of Appeal ."" (my underlining) Hence I became seized of the matter. 20. On 11 th October, 2007 the Black Respondents served an application for a stay of execution of the Judgment dated 23 rd August, 2007. 21. The Commission responded with a summons seeking to strike of the Black Respondents Notice of Appeal on the substantive issues on various grounds, namely: (i) that it was res judicata; (ii) that the Court of Appeal (Jersey) Law 1961 confers no jurisdiction to apply to the

Court of Appeal where the subject matter concerns an application for leave to appeal a costs order or alternatively that the Royal Court's Order was final; and (iii) the appeal constituted an abuse of the process of the Court. In relation to the Appellants' application for a stay of the order of 23 rd August, 2007 that the application be struck out on the grounds that it is out of time, the Appellants had not applied for an extension of time and the application was otherwise an abuse of process. and to strike out their application for a stay on various grounds, namely: (a) that it was brought out of time. (b) that the Black Respondents had not sought any extension of time in relation there to and/or the application is otherwise an abuse of the process of the Court. The Commission also asked for security for costs in accordance with the Court's order and such further security as might be ordered by the Court of Appeal. 22. I had agreed to hear, as a single judge of the Court of Appeal, the Black Respondents application for a stay as a matter of urgency. (I rejected the suggestion made by the Blacks in correspondence that I should recuse myself because I am in the same chambers as a Leading (English) Counsel, who had previously acted for them in other matters outwith this jurisdiction). There could be no apparent bias, let alone actual bias, arising out of such professional relationship by itself. See generally Vaughan JA in *Re Esteem Settlement*

[2001] JLR 169 . 23. Unfortunately the individual Blacks suffered a family bereavement which necessitated a journey to Finland, and accordingly informed the Court that they would be unable to attend any hearing or make any submissions prior to their return to Brussels on 19 th December, 2007. 24. In the circumstances - albeit with regret

- I had no option but to adjourn the matter of the stay, and such ancillary matters as I considered appropriate, to the full Court. 25. It did, however, appear to me to be prudent to invite submissions as to precisely what directions, if any, I should as a matter of case management make in relation to such hearing. 26. The Commission's position set out in Advocate Pallot's letter of 11 th December, 2007 is clear. (i) i.e. that the security for costs application must be dealt with on its own, first and before undertaking any further work in respect of the Black Respondent's applications (Stage 1). (ii) Next that the summonses seeking to strike out the Black Respondents applications for leave to appeal must be heard (Stage 2). (iii) Finally the Black Respondents applications fall to be heard (Stage 3) but only if: (a) Security is not awarded or if it is awarded it has been paid; and (b) The Court has considered the Commission's applications for strike out and the Black Respondents are successful in defeating those applications. 27. In short the Commission submits that there is a three stage process which must, as a matter of good case management, be followed and that it is not until each stage has been addressed and completed that the next stage can be considered. 28. The Commission submits in particular that its application for security ought to be heard as a matter of urgency and prior to any of the remaining applications being heard (including the Commission's own applications to strike out the grounds of appeal, etc) for, inter alia, the following reasons:- (i) The Royal Court has already made an award of security for costs in the Commission's favour (in its judgment of 23 August, 2007) as regards the bringing of an appeal. This is relevant of itself but also in the context that it is the

Commission's case that only the Royal Court has the power to grant leave to appeal in this case (as to which) and therefore the conditions imposed by the Royal Court as to the granting of leave must remain intact and cannot be appealed; (ii) The Court of Appeal does not have the jurisdiction to grant leave to appeal in any event. This on the basis that there is no right of appeal under the Court of Appeal (Jersey) Law 1961 (Article 13(c)(ii)) without the leave of the "court making the order" in respect of "costs only which are by law left to its discretion", and that the subject matter of the appeal concerns "only" the matter of costs on the basis that the order being appealed against was a costs order. (iii) The said award of security was made on the limited basis upon which leave to appeal was granted and, given the unlimited nature of the grounds and notice of appeal brought by the Black Respondents, the requirement that security be awarded ought to be regarded as imperative in the context of that order and of the nature of the applications now being made by the Black Respondents; (iv) In the latter respect, the Black Respondents have sought to re-litigate the entire matter and bring into issue matters which have already been taken into account by the Royal Court in the context of the main proceedings and in respect of its previous application for leave to appeal; (v) The Royal Court has observed, even on the limited ground on which leave to appeal has been granted, that "the chances of the Court of Appeal holding that the Commission's status is irrelevant may not, I suspect, be particularly good."; (vi) The Black Respondents are all resident outside the jurisdiction with no assets in Jersey and, furthermore, they have already contended, in the premises of the main action and generally, that they do not have the means to pay; (vii) The application for leave to appeal before the Court of Appeal is both frivolous, vexatious and an abuse of the court process. (viii) Assuming that the Commission is correct its main contention i.e. the subject matter of the appeal concerns only the matter of costs, there is no right of appeal against the refusal to grant leave to appeal. The Commission rely on the statement in O'Hare & Hill's 'Civil Litigation' (8th edition) (at page 646) that: "The grant or refusal of leave cannot be decided by any court other than the court or courts authorised to give such leave. The imposition of such leave requirement is intended as a check to unnecessary or frivolous appeals (Lane v Esdaile

[1891] AC 210). The decision of the specified court or courts is final. It cannot be reviewed by any higher court." and on observations in Rickards v Rickards

[1990] Fam 194 , of Lord Donaldson MR: "In my judgment what Lane v Esdaile decided, and all that it decided, was that where it is provided that an appeal shall lie by leave of a particular court or courts, neither the grant nor refusal of leave is an appealable decision...". 29. The Black Respondents were ordered by me to make any response by 30th December, 2007 and to focus on the 3 stage approach requested by the Commission and, in particular, that the matter of security be dealt with before any other stage is reached. 30. Despite protests about the proposed timetable, the Black Respondents filed an elaborate document which stressed their entire innocence of any wrong doing, in connection with the Delta Scheme made vehement criticisms of the Commission, and, indeed of the Royal Court. They deal with security for costs in a single paragraph. "Further to the argument the regulator

should reasonably bear its own costs. APBJL is a Jersey company with £53,000 held under an allegedly illegal constructive trust by the Commission and Abbey International, Jersey. As Jersey companies are not required to pay security for costs then the Black Respondents should not be required to do so. APBJL was forced to pay taxes of £257,026 in 1995 and £288,708 in 1994 as a resident Jersey company paying 20% corporation tax as it was denied the right of set off against its losses by the Jersey Revenue. The States of Jersey is one of the greatest beneficiaries of this case. The Black Respondents suffered extensive losses from their investments in DOL. Consequently the Black Respondents should not be required to provide security for costs it is respectfully submitted." (A concentration of the points made in their Notice of Appeal (which devoted 9 pages to it with a supplementary 5 pages). In relation to the order for directions they deliberately abstain from making any positive case, leaving it (courteously) to what they formed my just discretion and wisdom (para 1.18 and 4.1). 31. It is inappropriate for me to say anything as to the merits of the general matters which the Black Respondents seek to raise before the Court of Appeal, or even those limited in particular to the issue of security for costs. 32. I am, however, persuaded by the Commission's argument that there should be a 3 stage process, in which

- depending on the Black Respondents acts or omissions - Stages 2 and 3 may never be reached. While acutely conscious of the further delay in this already protracted saga, I can see no good reasons why the Commission should spend further time and money until the issue of security is determined. From the Commission's perspective public monies are involved, and should not be unnecessarily disbursed. I am fortified in this conclusion by the lack of opposition from the Black Respondents as to the Commission's particular procedural proposal. 33. If the Commission are correct in their contention that the Court of Appeal lacks jurisdiction to deal with the Black Respondents' applications for leave to appeal the conditions on which the Royal Court gave leave to appeal the costs order, there may be a short answer to the points raised by the Black Respondents. But even if the Commission are correct in such contention that still would leave live the point identified by the Royal Court as worthy of the Court of Appeals consideration, namely whether, as a regulator operating in the public interest, it should enjoy any special tenderness in relation to the exercise of the costs jurisdiction. Expense will necessarily be incurred in dealing with these matters; and the Black Respondents recent submissions indicates an intent - if permitted to do so - to fight on the widest possible terrain. The perspectives of the parties as to the event originally generating these proceedings are radically different. The Black Respondents deny any wrongdoing; the Commission make no concession on that point but have taken a pragmatic decision that the game may not be worth the candle. 34. The Royal Court clearly considered it right that the Commission should not be obliged to contest the Black Respondents' applications without a measure of financial protection. The Black Respondents take issue with this, indeed assert that it violates their right of access to a Court. 35. At present there is an outstanding order for provision of security; and a stay has been refused. The question which necessarily arises is whether a stay should be granted. If it is granted, then the underlying issue of whether it should have been ordered in the first place becomes

effectively moot, since the Black Respondents can exercise their forensic rights without financial precondition: in relation to whatever issues the Full Court directs should next be heard. (If it is refused then unless security is provided the Black Respondents will be disabled from pursuing their application; if it is provided, the Commission have at least the measure of protection that the Royal Court considered they deserved. 36. In conclusion my direction is that in the week commencing 21 st January, 2008 the only issue before the Court of Appeal will be whether the stay sought by the Black Respondents as to the order for the provision of security should be granted or whether (a necessary consequence of its refusal) security for costs as ordered by the Royal Court must be provided by the Blacks before any further steps are taken by either side in the proceedings. If the Blacks either provide such security or are relieved of the obligation to do so by the full Court, that Court can make appropriate directions in the light of the circumstances as then presented to them as to the further stages (if any) of the proceedings. 37. Although I recognise that resolution of such issue cannot be entirely divorced from the other matters sought to be raised by the Black Respondents, I express the hope that the parties will focus their preparation on the issue I have identified. 38. Any skeleton arguments should be provided to the Greffe (and the other party) by 5pm on Tuesday 15 th January. A statement that reliance is placed on identified passages in earlier documents may suffice. Authorities Collective Investment Funds (Jersey) Law 1988. JFSC v A. P. Black (J) Ltd and Ors

[2005] JRC 119A . JFSC v A. P. Black and Ors

[2006] JRC 182 . JFSC v Black and Ors

[2007] JRC 118 . JFSC v Black

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[2001] JLR 169 . Court of Appeal (Jersey) Law 1961. Civil Litigation O'Hare and Hills (8 th Edition) (1997). Page Last Updated: 22 Jul 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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