

JERSEY / JUDGMENT

BNP Paribas Jersey Trust Corporation v Camilla de Bourbon des deux Siciles [2021] JRC 268 (01 November 2021)

[2021] JRC 268

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judgment

the commissioner: 1. On 18 th October 2021, I awarded the Representor its costs on the indemnity basis arising out of three summonses issued by the Respondent, which were dismissed for reasons set out in the judgment (the "Judgment") handed down that day (BNP Paribas Jersey Trust Corporation Ltd v C. de Bourbon des deux Siciles

[2021] JRC 253). I declined to consider further the possibility of making a wasted cost order against Advocate Mistry, representing the Respondent, personally. I now set out my reasons. 2. The background is set out in the Judgment, which I will not repeat. There were three summonses, the first seeking a bank guarantee from the Court before payment of the balance of the fine imposed upon the Respondent for contempt of Court. Following receipt of two e-mails sent to Advocate Mistry by the Bailiff's Judicial Secretary on my behalf, expressing the view that such an application was wholly misconceived, and should be reconsidered, but making it clear that I was open to be persuaded otherwise with authority. The Respondent took the view that by these e-mails I had made up my mind on the application and the Respondent would not receive a fair hearing. Rather than asking me to recuse myself on the grounds of bias, the Respondent issued two further summonses, seeking successive declarations under Article 6 of the ECHR. 3. The Court found the two successive summonses issued under the ECHR to be "wholly misconceived." I declined to recuse myself applying the principles set out in AB v AG (Capacity)

[2020] JCA 094 . The Court then dismissed the first summons seeking a bank guarantee as "wholly inappropriate" . 4. Having issued the Judgment in draft, but before it was handed down, I took the view that the issuing of these three summonses might be regarded as tantamount to an abuse of process for the following reasons: (i) Having received the e-mails sent on my behalf, Advocate Mistry did not respond explaining the basis upon which such an unusual order was being sought and producing authority in support. (ii) Advocate Mistry conceded at the hearing that there was no such authority. Indeed, he was unable to produce an example of any Court involving itself in what the Respondent described as a commercial transaction in this way. (iii) The very notion of a contemnor

subject to a fine for contempt of Court seeking a bank guarantee from the Court should her appeal succeed was, in the view of the Court, extraordinary. (iv) At the hearing, Advocate Mistry failed to draw the Court's attention or even acknowledge the existence of well-established authority that wholly undermined his arguments in relation to Article 6 of the ECHR. I noted in this respect that Rule 3.1 of the Code of Conduct provides that members must take reasonable steps to ensure that the Court has before it all relevant decisions. Those authorities were produced by BNP and were determinative of the application. I accept that this was not deliberate on Advocate Mistry's part and he apologised for it, explaining that he simply did not do the necessary research. (v) The application for a bank guarantee was pursued notwithstanding that its purpose (as confirmed by the Respondent in her second affidavit) was to assist the Respondent, as a judgment debtor, avoiding the claims of the Representor as a judgment creditor. The Court took the view that to seek such a remedy from the Court for such a purpose was completely inappropriate. Wasted costs order 5. Counsel were agreed as to the general principles to be applied in the making of a costs order against an advocate personally, which I will summarise. 6. Under Jersey law an application for wasted costs can be made personally against a party's advocate - see, for example, *Drake v Gouveia*

[2000] JLR 411 and *Mubarik v Mubarak*

[2009] JCA 016 in which the Court of Appeal noted that: "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 ." 7. It would appear from these authorities that the far more detailed grounds set out in English case law are relied on in this jurisdiction, as made clear in *CI Trustees v Sinels* and *Carey Olsen*

[2017] JRC 130A . 8. The authority for the jurisdiction in England derives both from statute (section 51(6) of the Senior Courts Act 1981 (the "SCA")) and the inherent jurisdiction of the court. Unlike in Jersey, the English procedure for making such an application is specifically set out in the relevant court rules (CPR 46 and the accompanying practice direction). 9. Section 51(7) of the SCA provides: "In sub-section (6) "wasted costs" means any costs incurred by a party- (a) As a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative or (b) Which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay. 10. English Practice Direction 46 paragraph 5.5 sets out the principles established in *Re a Barrister (Wasted Costs Order) (No 1 of 1991)*

- [1993] QB 293 and applied in *Ridehalgh v Horsfield* and another
- [1994] CH 205, namely that it is appropriate to make a wasted costs order against a legal representative only if the following three element test is met: (i) The legal representative or other representative has acted improperly, unreasonably or negligently. (ii) Their conduct has caused a party to incur unnecessary costs or has meant that costs incurred by a party prior to the improper unreasonable or negligent act or omission have been wasted. (iii) It is just, in all the circumstances, to order the legal representative to compensate that party for the whole or part of those costs. 11. *Ridehalgh* is the leading authority on the test for "improper, unreasonable or negligent" conduct in the context of wasted costs. (i) "Improper" means a significant breach of substantial professional duty and conduct that would be regarded as improper by a consensus of professional, including judicial, opinion. This includes, but is not limited to, conduct which would justify suspension, striking off and disbarment from the legal profession, or other serious professional penalty. (ii) "Unreasonable" means vexatious, designed rather to harass the other side, than progress the case. The test is whether the conduct permits a reasonable explanation. (iii) "Negligent" should be understood in an un-technical way, to denote failure to act with the competence reasonably to be expected of ordinary members of the profession. 12. After establishing the relevant conduct (the first element), the second element is to demonstrate that the action complained of caused unnecessary costs to be incurred (see *R (Mach) v Secretary of State for the Home Department*)
- [2001] EWCA Civ 645. In *Harrison v Harrison*
- [2009] EWHC 428, the High Court held that wasted costs were neither a punitive nor a regulatory jurisdiction, but rather a compensatory one, and thus as a prerequisite an applicant had to show that the conduct complained of had caused them loss. Where conduct is proved, but no waste of costs can be shown to have resulted, the case may instead be a suitable one for referral to the appropriate disciplinary body. A schedule of 'wasted costs' should identify what costs are said to have been wasted by the relevant conduct. 13. The third element which must be shown is whether it is just to make the wasted costs order. The Royal Court appeared to accept in *CI Trustees* that the same three elements must be established as a matter of Jersey law (see, for example, paragraphs 26 and 27). 14. It would seem that, after applications for wasted costs (mainly against representatives of legally aided litigants) grew in England during the 1980s and early 1990s, the English Court of Appeal set out to deter satellite litigation in *Ridehalgh*. In *Medcalf v Weatherill* and others
- [2002] UKHL 27, the House of Lords reinforced this approach and made clear that wasted costs orders should be confined to a small number of specified instances. 15. In *West African Gas Pipeline Company Ltd v Willbros Global Holdings Inc*
- [2012] EW\HC 396 (TCC), Ramsey J stated that it was "only generally, in cases where there had been a mistake or error which has had significant consequences in terms of time and cost, that the court will generally make an order for costs which have been wasted." 16. Under

the CPR Practice Direction 46 (5.7), applications for wasted costs involve a two-stage process. At the first stage (after the application is made) the Court must be satisfied that: (i) It has evidence or other material before it which, if unanswered, would be likely to lead to a wasted costs order being made, and that (ii) The wasted costs proceedings are justified, despite the likely costs involved. 17. At the second stage, the legal representative whose conduct is complained of is then given an opportunity to give reasons why the court should not make a wasted costs order. This can be dealt with by way of written submissions or attending a hearing of the matter. The burden of demonstrating that the conduct complained of justifies the making of a wasted costs order is with the applicant. Practice Direction 46 paragraph 5.8 provides that the court may proceed to the second stage described in Practice Direction 46 paragraph 5.7 without first adjourning the hearing if it is satisfied that the legal representative has already had a reasonable opportunity to make representations. In *CI Trustees*, the Royal Court appeared to accept the two-stage approach applied in Jersey, albeit not in any formalistic sense. 18. Relevant to this case, Sir Thomas Bingham M. R. said this in *Ridehalgh* at page 223 under the heading of "Pursuing a Hopeless Case": "A legal representative is not to be held to have acted improperly, unreasonably or negligently simply because he acts for a party who pursues a claim or a defence which is plainly doomed to fail. As Lord Pearce observed in *Rondel v Worsley*

[1969] AC 191 275:- 'It is easier, pleasanter and more advantageous professionally for barristers to advise, represent or defend those who are decent and reasonable and likely to succeed in their action or their defence than those who are unpleasant, unreasonable, disreputable, and have an apparently hopeless case. Yet it would be tragic if our legal system came to provide no reputable defenders, representatives or advisers for the latter.' ... Legal representatives will, of course, whether barristers or solicitors, advise clients of the perceived weakness of their case and of the risk of failure. But clients are free to reject advice and insist that cases be litigated. It is rarely if ever safe for a court to assume that a hopeless case is being litigated on the advice of the lawyers involved. They are there to present the case; it is (as Samuel Johnson unforgettably pointed out) for the judge and not the lawyers to judge it. It is, however, one thing for a legal representative to present, on instructions, a case which he regards as bound to fail; it is quite another to lend his assistance to proceedings which are an abuse of the process of the court. Whether instructed or not, as legal representative is not entitled to use litigious procedures for purposes for which they were not intended, as by issuing or pursuing proceedings for reasons unconnected with success in the litigation or pursuing a case known to be dishonest, nor is he entitled to evade rules intended to safeguard the interests of justice, as by knowingly failing to make full disclosure on ex parte application or knowingly conniving at incomplete disclosure of documents. It is not entirely easy to distinguish by definition between the hopeless case and the case which amounts to an abuse of the process, but in practice it is not hard to say which is which and if there is doubt the legal representative is entitled to the benefit of it." 19. Whilst a court can initiate an inquiry into wasted costs, I accept that save in the most obvious cases, it should be slow to do so. In

this case, I decided it was not appropriate to pursue such an inquiry for the following reasons: (i) The Representor was not seeking a wasted costs order against Advocate Mistry. (ii) The Respondent has not waived legal privilege and as Advocate Gregory, for the Representor, says, the Court is in no position to know the extent to which Advocate Mistry is responsible for the issuing of the three summonses. He appears to have pursued a hopeless case, but it would not be safe to assume that the summonses were issued on his advice. The lawyer's job is to present the case, not judge it, and clients are free to reject their lawyer's advice on the weakness of their case. (iii) To pursue such an inquiry at the instance of the Court would require the Court to institute the two-stage process referred to above, which would entail further hearings and costs which would be disproportionate in the context of these three summonses. Indemnity costs 20. The Representor sought its costs on the indemnity basis, and whilst it was not directly affected by the outcome of the three summonses, it is the Representor in the substantive action, and was the only respondent to the three summonses. It was rightly concerned to ensure that the Court had a full and accurate picture before determining applications in this matter, and that the Respondent's submissions were not potentially partial or misleading, whether as to the facts or the law. 21. The Representor assisted the Court by setting out the relevant legal principles and case law in relation to all three summonses and in particular in relation to Article 6 of the ECHR, having received Advocate Mistry's skeleton argument from which it was clear that the case law he cited was either (unintentionally) misleading and/or failed to understand the basic principles of the ECHR. The Representor concurred with the Court that the application for a bank guarantee was misconceived and extraordinary. 22. Advocate Gregory referred me to the principles governing an award of indemnity costs as helpfully summarised by Commissioner Sir Michael Birt in paragraphs 9-10 of *Hong Kong Foods Limited v Robin Hood Curry Limited*

[2017] JRC 116 : "9 The principles in relation to indemnity costs are well established. A convenient summary is to be found in the decision of the Court of Appeal in *C v P-S*

[2010] JLR 645 where Beloff JA said this at paragraph 11:- '.... We do not accept that it is appropriate to import such a restrictive approach on the discretion of the court to make an award of costs on the indemnity basis. The question will always be - is there something in the conduct of the action by one of the parties or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs, recognising there will usually be some degree of unreasonableness? We do not consider that there is a need for the claiming party to show a lack of moral probity or conduct deserving of moral condemnation, or malicious or vexatious conduct.' The Court of Appeal specifically approved the observation of Page, Commissioner in *Pell Frischmann Engineering Limited v Bow Valley Iran Limited*

[2007] JLR 479 where the Commissioner said at paragraph 25:- '25 At the risk of over simplifying matters, the result of these English authorities may be said to be this: that the circumstances in which an award of indemnity costs may, as a matter of discretion, be

ordered are less restrictive than they used to be; there must, ex hypothesi, still be something to take the case out of the ordinary, but the range of potentially relevant considerations is considerable and need not involve any finding of a lack of moral probity; the test, in a word, is unreasonableness; the purpose of such an award is to achieve a fairer result for the party in whose favour it is made than would be the case if he were only able to recover costs on the standard basis; in the end, it is a question of what would be fair and reasonable in all the circumstances.' " 23. Advocate Mistry submitted that there should be no order as to costs at all, or if such an order was made, it should be on the standard basis. Furthermore, he said, the Court should consider the first substantive summons and the second and third ECHR summonses separately, the latter being brought about in response to the two e-mails sent on behalf of the Commissioner. It was not unreasonable, he said, for the Respondent, facing what she feared would be an unfair hearing, to have brought proceedings under the ECHR. 24. In my view, this submission has no relevance to the position of the Representor. It was made a party to all three summonses and properly incurred costs in respect of all three. It is not open to the Respondent to say that it was reasonable to issue the ECHR summonses in the light of the Court dismissing them as misconceived. 25. All three summonses were out of the norm and demonstrably unreasonable, given the findings of the Court. I agree with Advocate Gregory that this is a paradigm case where the Representor should have its costs on the indemnity basis, and I so ordered. *Authorities BNP Paribas Jersey Trust Corporation Ltd v C. de Bourbon des deux Siciles*

[2021] JRC 253 . *AB v AG (Capacity)*

[2020] JCA 094 . *Drake v Gouveia*

[2000] JLR 411 . *Mubarik v Mubarak*

[2009] JCA 016 . *CI Trustees v Sinels and Carey Olsen*

[2017] JRC 130A . *Senior Courts Act 1981. Re a Barrister (Wasted Costs Order) (No 1 of 1991) [1993] QB 293. Ridehalgh v Horsfield and another*

[1994] CH 205 . *R (Mach) v Secretary of State for the Home Department*

[2001] EWCA Civ 645. *Harrison v Harrison*

[2009] EWHC 428 . *Medcalf v Weatherill and others*

[2002] UKHL 27 . *Hong Kong Foods Limited v Robin Hood Curry Limited*

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