

JERSEY / JUDGMENT

Kuwait Oil Tanker Company -v- Al Mutawa and Chadwick [2017] JRC 049 (27 March 2017)

[2017] JRC 049

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judgment

the master:

Introduction

1. This judgment represents my detailed written reasons in respect of an application by the plaintiff for certain costs orders following on from my judgment in this matter reported at Kuwait Oil Tanker Company SAK-v-Al Mutawa and Chadwick

[2016] JRC 182 (the "October judgment") where I ordered the first defendant to provide further and better particulars to clarify whether the first defendant was an heir or creditor of her brother Faiz Abdul Aziz Almutawa ("Faiz"). Paragraph 28 of the October judgment stated as follows:- "28. What the pleaded case does not say however is how the benefit of the debt passed. It is therefore ambiguous. In my view either it passed by way of succession or it passed because the first defendant was a creditor. The two positions are also mutually exclusive. The first defendant can be an heir or a creditor but she cannot be both. In my judgment this is therefore not just an issue of evidence to be explored at trial. It is a material fact relating to the positive case pleaded by the first defendant. I have therefore reached the conclusion that the plaintiff is entitled to know what the first defendant's case is as to how the benefit of the debt passed to her. Ultimately and fundamentally she must make it clear whether it passed by way of succession or by virtue of the first defendant being a creditor." 2. However, the question of costs arising from the October judgment was leftover until receipt of further and better particulars from the first defendant. I therefore stated at paragraph 34 as follows:- "34. ... Likewise it is also a matter for another day what wasted costs might follow once the first defendant has clarified her case as ordered. Again it is premature to determine whether or not wasted costs have been incurred until the first defendant has clarified her case. However, it is right to record that during argument, I expressed the view that if the first defendant's case is that she is a creditor and not an heir of Faiz, wasted costs do appear to have been incurred in relation to the instruction of

Kuwaiti law experts by the plaintiff which were not necessary. An explanation on any such wasted costs application will therefore be required as to why the first defendant did not make her case clear earlier, should she contend that she is now a creditor and not an heir. In making these observations I make no criticism of Advocate Dann who has only recently taken over the conduct of this matter." 3. Subsequent to the October judgment being handed down on 27 th October, 2016, the first defendant answered the plaintiff's request for further and better particulars in compliance with the orders I had made. In her answers, the first defendant made it clear that she was not an heir to Faiz's estate but on a legal analysis was a creditor. 4. As a result of these answers and the first defendant clarifying that she was a creditor and not an heir, the plaintiff sought the following costs orders:- (i) Costs thrown away on an indemnity basis in light of the first defendant's reply to the request of further and better particulars; (ii) The costs of the application that led to the October judgment on the standard basis; and (iii) Costs of the costs hearing on the indemnity basis. The parties' contentions 5. In relation to the plaintiff's argument for wasted costs on an indemnity basis Advocate Lincoln contended as follows:- (i) There had been a clear change of case by the first defendant in filing her second witness statement. The first defendant had further allowed the plaintiff and the Court to proceed on the basis of an ambiguity - see paragraphs 28 and 30 of the October judgment. (ii) The first defendant had been invited to provide an explanation as to why she did not make her case clearer since November 2015 but had not done so. This lack of an explanation for over a year justified indemnity costs. (iii) The first defendant had also been invited to disclose any documentation setting out the first defendant's family tree and any documentation deriving from the administration of Faiz's estate, showing how the first defendant became entitled to the debt of Mr Al-Essa. This request was only necessary where the parties were proceeding on the basis that the first defendant was an heir. (iv) In an email sent by Advocate Lincoln dated 20 th November, 2015, at 17:28 to Advocate Blackmore, (who then had conduct of the case for the first defendant at Appleby) Advocate Lincoln stated as follows:- "As has been made clear in correspondence, however, my client has very real concerns about the absence of any documentation contained within your client's discovery in relation to a matter which is fundamental to your client's defence, namely how it is said that she came to effectively inherit the debt owed to your client's deceased brother, We have indicated to you that we hope and expect your client's evidence of fact to deal fully and properly with that issue, but in the event that it fails to do so, it may prove necessary for my client to seek to file such evidence as it might be able to adduce itself going to that issue. Needless to say, however, this is a factual matter that is not one that falls within my client's own knowledge and it may be forced therefore to rely on other sources if it should prove necessary and appropriate." (v) Despite these invitations the first defendant failed to provide the information requested. (vi) The lack of information led to orders being made by me on 9 th December, 2015, which firstly permitted evidence to be filed by the plaintiff in relation to the familial connections of the first defendant and secondly permitted expert evidence on the law of succession of Kuwait and the Lebanese Republic. (vii) Ultimately, the plaintiff retained a company known as Blackdot Solutions

Ltd ("Blackdot") to investigate the familial connections of the first defendant; a witness statement was produced by Mr Davies of Blackdot which witness statement was deployed for the strike out application brought by the first defendant leading to the judgment given in this matter last March reported at Kuwait Oil Tanker Company SAK-v-Al Mutawa and Chadwick

- [2016] JRC 074 . (viii) Kuwaiti evidence was also obtained by the plaintiff in the form of a report dated 14 th July, 2016, from Mr Abdullah Alkhurafi. (ix) Had the first defendant made her position clear, all of this work would not have been necessary; the first defendant could have made her case clear at any time but chose not to do so. (x) The work required which turned out to be unnecessary as a result of the first defendant's ambiguity in her case was:- (a) The instruction of Blackdot and production of the witness statement of Mr Davies of Blackdot; (b) The provision of expert evidence on Kuwaiti succession law; and (c) Correspondence between the parties and with the Court in relation to the instruction of Blackdot and provision of expert evidence on Kuwaiti succession law. 6. In relation to the amount of these costs, ultimately this was a matter for taxation and Advocate Lincoln accepted that any wasted costs claimed would have to be justified. 7. In relation to the costs of the application, Advocate Lincoln's submissions were limited to responding to my concerns set out in paragraph 35 of the October judgment about the quantum of these costs, because ultimately Advocate Dann did not oppose the principle of the plaintiff recovering its costs of the application that led to the October judgment on the standard basis. Rather the focus of Advocate Dann's submissions was on the proportionality of the costs claimed. 8. In relation to the amount of costs claimed, the total hours incurred amount to 322 hours with a total value of £101,177.50. These hours were incurred by nine lawyers in total, comprising five from Mourant Ozannes, two from Sutherlands, the English Solicitors advising the plaintiff and a Q. C. and a junior Barrister. 9. In relation to these costs Advocate Lincoln contended as follows:- (i) There was a need for an analysis of the pleaded case and the different statements previously made by the first defendant in order to decide whether or not to bring the application. For the same reasons, discovery previously provided had to be reviewed. (ii) There were also exchanges of correspondence with the first defendant's advisers inviting them to clarify their case. (iii) The case was significant for the plaintiff because it was part of a much greater web of litigation that was global in scope. The overall fraud by Mr Al-Bader that had led to the present proceedings involved \$135 million being misappropriated. (iv) The fraud was of a high profile nature against a government owned company and therefore gave rise to political and commercial concerns which justified a greater level of costs than might otherwise be the case. (v) The application also involved preparing an affidavit in support of the plaintiff's skeleton argument as well as preparing for the hearing itself. (vi) The plaintiff had taken a reasonable approach because it had indicated on an open basis it would settle its costs claim on the basis of payment of a figure of £50,000. No response had been received to this open offer. 10. Advocate Dann in response, in relation to the application for wasted costs, did not dispute that the Court had power to make such an order. The question was whether

the Court should exercise its discretion to do so. He therefore contended that there was nothing unusual in a case being clarified during the course of litigation. This was a case where there were different points of view which ultimately the Court had to resolve. While there was no challenge to a finding that the case was ambiguous, any wasted costs in his view were minimal. 11. He further argued that not all work was redundant. In particular, some of the evidence of the plaintiff's Kuwaiti law expert would be still be relevant at trial in particular paragraphs 3.13 and 3.19 which addressed how a family member, not being an heir, could assert rights to funds of a deceased person; this was still a live issue. The corresponding paragraphs in the first defendant's expert report, (Mr Barakat) were questions 1 and 2c. 12. The Blackdot report was also relatively short and simply related to reviewing corporate records. While it was a matter for Mr Thérin to review the reasonableness of the fees claimed, they were substantial in the context of the information ultimately produced. 13. In relation to the costs summons, he argued that the costs claimed of 322 hours for a two hour summons were disproportionate. The skeleton was 12 pages in length and the affidavit 8 pages. The issue was also a narrow one following on from the first defendant's answer and extracts from witness statements. Significant time was not needed to analyse the issue. 14. The importance of the case to the plaintiff and any political significance were irrelevant matters. The argument was a narrow point and, while the first defendant was unsuccessful, the costs claimed were astonishing and disproportionate. Decision 15. I start by reference to my decision in respect of the wasted costs claimed. 16. Firstly, I concluded it was appropriate to make a wasted costs order because, had the first defendant's position been made clear when she filed her answer, then the costs of instructing Blackdot, a Kuwaiti law expert and correspondence addressing the basis upon which the first defendant received monies from Faiz's estate would not have been necessary. These costs extended to taking instructions from the plaintiff in relation to obtaining this evidence and entering into the correspondence with the first defendant's Advocate. 17. I was also satisfied that an order on an indemnity basis was justified. Firstly, the first defendant was given every chance to make her case clear from 20 th November, 2015, and chose not to do so. This is despite the obligation on a party to make its case clear referred to in paragraph 30 of the October judgment. 18. Secondly, it must have been apparent to the first defendant and those advising her that the plaintiff and the Court were proceeding on the assumption that the first defendant's case was that she was an heir of Faiz. This is set out at paragraph 27 of the October judgment and there is no appeal against that decision. The first defendant at any stage could have made it clear that the plaintiff's and the Court's assumption were incorrect. Instead, the first defendant allowed orders to be made permitting Blackdot to be instructed and a Kuwaiti law expert to be retained. 19. Thirdly, the first defendant has not provided any explanation as to why she did not make her case clear earlier given she now accepts that she is a creditor and not an heir. I consider this is also a factor that justifies an order on an indemnity basis. Where the Court has been allowed to proceed on one assumption, I consider it is entitled to ask for an explanation as to why that assumption was not corrected when it could have been, and in the absence of an explanation the Court is

entitled to impose a sanction so that generally the other party who has also proceeded on an erroneous basis does not suffer any more loss than is necessary in terms of costs. 20. I should make it clear that in expressing my views I do not know why or whose decision it was to advance the case on the basis now abandoned and therefore this judgment should not be taken as containing any criticism of Appleby. I say this because I simply do not know why the case was allowed to proceed on a particular assumption and whose decision that was. 21. However, I have concluded that the question addressed by the October judgment was not just a question of clarifying a case as it developed. As set out in the October judgment there is a fundamental difference between being an heir and a creditor which in my view must have been apparent to the first defendant and her advisers. Where the money came from to acquire the property has always been the central issue in this dispute. This is not therefore a complex case with pleadings developing through a number of reiterations as new material emerges. 22. My one qualification to the conclusions above concerns paragraphs 3.13 and 3.19 of the plaintiff's expert report and paragraphs 1 and 2c of the defendant's expert's report on Kuwaiti law. These parts of the reports appear to relate to matters now in issue. Therefore the costs of production of these parts of both reports are left over to the trial judge following determination of the plaintiff's claim. 23. In relation to the amount of wasted costs claimed, ultimately this is a matter for taxation. Nevertheless it is right that I make the following observations to assist the parties and the Assistant Judicial Greffier in carrying out the taxation. This is in the context of the claim for wasted costs being calculated at a total figure of £79,200.62 broken down as follows:- (i) Maurant Ozannes costs of £13,543.50; (ii) Sutherlands Solicitors costs of £20,671.50; (iii) English Counsel's costs of £2,600; (iv) Kuwait's Expert's costs of £22,385.62; and (v) Blackdot's costs of £20,000. 24. Even though costs have been ordered on an indemnity basis where any doubt is resolved in favour of the receiving party, I am concerned about the following issues:- (i) The extent of the legal costs claimed in order to instruct two organisations i.e. Blackdot and the Kuwait law expert to provide reports; (ii) Why the majority of these costs were incurred by Sutherlands; (iii) The amount of costs for the Kuwaiti law expert which seems high for a report that is relatively straightforward and does not contain anything surprising, to a Jersey lawyer at least. On taxation therefore justification for the amount of these fees and why this particular expert was retained, including reviewing whether other experts could have been retained at a lower cost, should be produced; and (iv) The amount of the costs claimed for Blackdot because the affidavit produced is brief and simply refers to Blackdot carrying out enquiries on the internet through social media and publically available corporate records (see paragraph 9 of the first witness statement of Alex Davies). 25. In relation to the plaintiff's costs of its application, these were ordered on the standard basis as I have noted above. As set out at paragraph 35 of the October judgment my initial view which view did not alter was that ultimately in respect of the application the plaintiff was successful because the first defendant was compelled to make her case clear, even if I did not grant all of the relief asked for by the plaintiff. Applying the usual principles on costs, the plaintiff was therefore a clear winner in this case and accordingly a costs order in its favour was

justified. 26. Also in paragraph 35 of the October judgment however, I stated that I was "extremely concerned" at the level of costs claimed for the application that led to the October judgment which totalled £101,177.50 and 322 hours of chargeable time spread across Mourant Ozannes, Sutherlands and two counsel as I have noted above. 27. In my judgment the tasks that were needed for this application were as follows:- (i) An analysis of the first defendant's answer at paragraphs 7 and 16 and her witness statements, although it has to be noted that some of this work was carried out for the matters that led to the March judgment; (ii) Obtaining authority to issue a summons and drafting the same; (iii) Entering into correspondence with the first defendant's Jersey Advocate and the Court in relation to the summons; (iv) Preparing the affidavit in support of Mr Mark Stephen Aspinall (9 pages in length); (v) Preparing a skeleton argument (12 pages); and (vi) Preparing for and attending at the hearing. 28. Based on my previous experience in private practice and as Master, even taking into account the need to take instructions because the matter is politically sensitive, I reached the view that I could not see why on a taxation more than £25,000 of costs would be proportionate. This is applying the test in *Pearce v Treasurer of the States*

[2016] JRC 100 . While I would not go as far as Advocate Dann to suggest the costs incurred were astonishing, I was of the view that costs of this magnitude for a two hour hearing could never be justified on a taxation. Accordingly, I capped the amount of costs recoverable in the sum of £25,000. 29. Finally, in relation to the costs of the costs hearing itself, I ordered costs on the standard basis. While I have made a wasted costs order on an indemnity basis and ordinarily this might justify ordering the costs of the costs application to be paid on an indemnity basis, in my judgment such a factor was counter-balanced by the cap I have ordered and therefore the just order was that the plaintiff recovered its costs of the costs application on the standard basis. *Authorities Kuwait Oil Tanker Company SAK-v-Al Mutawa and Chadwick*

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Prepared on 22 October 2026 · Esheria