

JERSEY / JUDGMENT

Syvret v Benest [2011] JRC 233 (15 December 2011)

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judgment

the deputy bailiff: 1. There have been numbers of interlocutory summonses in these proceedings. On 17 th June the plaintiff applied to discontinue all the proceedings which he had commenced. The Court made the order requested against an undertaking by the plaintiff that he would not recommence the actions against the defendants or either of them without leave of the Court. Following discontinuance, the defendants have applied for an order for costs. I heard argument on 17 th June, and invited further written contentions on the issue of the without prejudice negotiations between the parties. These have been received from both the plaintiff and the defendants, and are dealt with below. Although initially I sat with Jurats on th June, because it was not clear at that stage that there would merely be an argument about costs, the Jurats did not sit for the whole of that argument as costs are a matter for the Bailiff alone, and they have not played a part in this judgment. The Claims 2. Dorothy May Benest (neé Turner) ("Mrs Benest") died on 18 th February, 2007, aged 86. On 14 th February, 2008, the plaintiff obtained probate of her Will and codicils, as executor dative. Mrs Benest was survived by the first defendant Mr Simon David Benest, and two daughters. 3. At the date of Mrs Benest's death, the first defendant was the sole beneficial owner of two companies incorporated in Jersey - SG Benest and Son Limited ("SGBSL") and Le Squez Holdings No. 2 Limited ("SPSL"), formerly South Pier Shipyard Limited. On 9 th July, 2010, the plaintiff, as executor, obtained judgment against SPSL in the sum of £379,830 plus interest and costs. A week later, the plaintiff obtained judgment against SGBSL in the sum of £76,000 plus interest plus costs. Neither company appeared to have any liquid assets to meet those judgment debts. 4. The plaintiff brought two actions against the defendants - the first action was against the first defendant alone and sought reimbursement of exceptional charges deducted from the proceeds of encashment of a Norwich Union bond that was claimed to be an asset of the estate. The second action was against the two defendants jointly and severally seeking reimbursement of two loans made by Mrs Benest to the defendants during her lifetime. On 17 th August, 2010, the plaintiff commenced further proceedings by way of order of justice seeking disclosure orders and injunctions against the defendants in support of the claims which he had made and which are set out above. 5. In order to understand the nature of the plaintiff's claims, they have to be placed in context. 6. Mrs Benest was the widow of Stuart Nicole Benest ("Mr Benest") who died on 10 th September, 2002. It appears that Mr Benest had been a successful

businessman and had accumulated a substantial number of assets. He was the owner of a substantial house, in which he and Mrs Benest lived, namely Tamale in St Lawrence; he was the owner of shares in SG Benest and Son Limited jointly with the first defendant, and he had other estate. He and Mrs Benest essentially made reciprocal Wills. Tamale was devised by Mr Benest to his widow if she survived him, and if she predeceased him then it was left to his two daughters. Similar provisions were made by Mrs Benest - if she survived her husband then all her personal estate, other than a yacht, which was left to the first defendant, was left to her two daughters in equal shares absolutely. If she did not survive her husband, then she left all her estate both real and personal to him, save and except a bequest of her personal effects and jewellery, which went to the two daughters equally. 7. SGBSL was a substantial company. The plaintiff's assertion was that the fairness of the arrangements made by the Wills of Mr and Mrs Benest was that on the death of both of them the first defendant would have received the business of SGBSL and an equal share with his sisters of the property Tamale, and the two daughters would have received the remaining assets, which indeed included substantial loans of £170,000 in or due by SGBSL to Mr Benest, and bearing interest. Events after Mr Benest's Death 8. The plaintiff's allegation was that between 29 th September, 2003, and the date of Mrs Benest's death, SGBSL did not pay any interest to Mrs Benest on the loans which were due. As at 29 th September, 2003, Mrs Benest was the sole owner of Tamale and had intangible movable property, including the value of the loans due by SGBSL, of something in the order of £470,000. 9. Between January and April 2004, Mrs Benest transferred £50,000 to the defendants. Despite the transfer being made to them, the amount was added to the existing loan account in the books of SGBSL as monies due to Mrs Benest by the company. 10. On 6 th October, 2004, Mrs Benest transferred £100,000 to SPSL by way of loan. 11. On 29 th September, 2005, Mrs Benest transferred a further £60,000 to the defendants. This was not added to the existing loan account in the books of either SGBSL or SPSL. 12. On 29 th November, 2005, a valuation of Tamale in the sum of £1.2 million was provided to Jersey Home Loans Limited and the first defendant. In January 2006 Mrs Benest sold Tamale to the defendants for a consideration of £750,000. £738,867.50 of this amount was remitted to Mrs Benest's bank account. The balance of the consideration due from the defendants remained unpaid. The same day that the money was received, instructions were given by Mrs Benest to the bank to transfer £250,000 back to the defendants, although this transfer was not in fact made until 26 th January, 2006. 13. In February/March 2006, Mrs Benest paid £240,000 by way of investment in a Norwich Union step down bond. The bond was issued in the joint names of Mrs Benest and the first defendant, and was an investment which was taken out on a joint life second death basis - that is to say the bond would continue until encashment or death of the second life. The death benefit was to be 101% of the value of the units or, if greater, the amount originally invested in the fund less any money taken out. 14. On the sale of Tamale to the defendants in January 2006, Mrs Benest acquired the property 52 Primrose Place for a consideration of £299,999. In December 2006 she executed a guarantee in favour of HSBC Bank Plc Jersey guaranteeing the debts and obligations of SPSL towards that bank with a limit of £300,000, charging 52 Primrose Place as security. After Mrs Benest's death, the daughters, who had acquired 52 Primrose Place under Mrs Benest's Will, sold the property and the full amount of the bank's claim of £300,000 was paid out of the proceeds of sale to the bank pursuant to Mrs Benest's guarantee. The debt of

SPSL towards the bank was therefore subrogated to the plaintiff as executor, but as SPSL appears to have no assets, the debt appears to carry a paper value only. 15. If the summary of the position is as the plaintiff claims, it is apparent that there was a very substantial diminution in the overall value of the estate of Mrs Benest. The majority, by a substantial margin, of the assets available to Mr and Mrs Benest had, if the claim was correct, been applied either to the first and/or second defendants or to their benefit by payments to the companies which the first defendant owned beneficially and which currently have no assets. That that was not the intention of Mrs Benest appears to be shown by a perusal of the codicils to her Will. In January 2006 she made a codicil bequeathing to her two daughters the sum of £750,000 as a first charge on her estate. 16. After the death of Mrs Benest, the first defendant is alleged to have procured the full surrender of the bond, which by then vested in his sole name, in two tranches of £120,000 and £95,637.12. The balance of the bond represented exceptional charges which were made for early redemption. The monies from the redemption of the bond were paid to the account of the defendants, and then utilised for the purposes of the first defendant's business. The early encashments were the subject of litigation in the Royal Court and as a result of that litigation the defendant repaid to Mrs Benest's estate the proceeds of both encashments, but did not reimburse the exceptional charges. A claim for these charges was one of the claims brought by the plaintiff against the first defendant. The second set of proceedings sought reimbursement of the two loans alleged by the plaintiff to have been made by Mrs Benest to the defendants during her lifetime. 17. The order of justice which commenced proceedings in August 2010 contained injunctive relief and various orders of disclosure made against the defendants. The disclosure orders were based upon:- (i) The allegations made against the first defendant with regard to his use of Mrs Benest's assets after her death in his businesses; (ii) The highly suspicious circumstances in which the defendants received a substantial sum of money from Mrs Benest in January 2006; (iii) The apparent position that the two companies in which the first defendant had a significant interest appeared to have been effectively wound up and their assets distributed without any winding up or liquidation order under the Companies (Jersey) Law 1991 ; and (iv) The apparent ability of the defendants to rent a valuable and prestigious property during the year 2009/2010. 18. Accordingly it was asserted by the plaintiff that there was a risk of the assets being dissipated in highly suspicious circumstances, and in particular where the plaintiff had an obligation as executor to gather in the assets of the deceased Mrs Benest. 19. The defendants challenged the interim orders which had been obtained. On 6 th September, the Court rejected the challenge and the full reasons for that decision were given in the judgment handed down on 18 th October. I have regard to the conclusions of the Court contained in that judgment and do not need to repeat those matters now. 20. The first defendant has served a number of affidavits in this case. The first affidavit is dated 1 st September and the second affidavit is a response to the orders of the Royal Court and is dated 10 th September. In the first of those affidavits, the first defendant asserted that the Norwich Union bond was not an asset of Mrs Benest's estate, and accrued to him on his mother's death, and that the payment of £250,000 was not a loan to the defendants but instead was a loan to them in their capacity as directors of SGBSL. The first defendant denied that he had ever personally used his mother's assets in any of his businesses, whether before or after her death. He agreed that his mother had made gifts to him which he had used for the purposes of

investment in his businesses. He denied there was anything improper in the way in which the companies had been administered. He agreed that he had sold the property Tamale for £1.695 million but there were, he claimed, secured charges of £1.801 million. He concluded his first affidavit by asserting that the plaintiff should be ordered to pay the costs of the proceedings personally and on the indemnity basis, and that these costs should not be charged against the estate of Mrs Benest. 21. As a result of the disclosures which were made by the defendants, the plaintiff had further information which he claimed gave rise to other legitimate enquiries and he applied for and obtained further disclosure orders from the Court. In this respect, the Court delivered a judgment on 29 th March, 2011. I have had regard to the contents of that judgment, and again it is otiose to repeat what is in it, but it is worth making the following points:- (i) The plaintiff has indicated on more than one occasion that if he were satisfied that the defendants genuinely had no further assets, he would seek leave to discontinue the proceedings. It was only, he asserted, because there was legitimate reason for doubt as to the accuracy of the answers which had been given by the defendants that it was appropriate to press for further information. (ii) The Court accepted that there was reasonable doubt over the use by the defendants of the late Mrs Benest's money and other assets, and that was one of the bases upon which the orders for disclosure were made. The Court considered that the information which the defendants were obliged to produce pursuant to the orders contained in the judgment of 29 th March should be sufficient to enable the plaintiff to form a view as to the current financial status of the defendants, and whether it was appropriate to proceed against them any further. 22. That then is the broad background to the summons which was issued by the plaintiff with a return date of 17 th June, 2011, seeking an order that the actions against the defendants be withdrawn and discontinued, the injunctions cancelled and all outstanding summonses withdrawn and discontinued, with the plaintiff and the defendants bearing their own costs. The defendants did not object to the discontinuance but did seek an order for the costs which they had incurred in and about the proceedings. The primary basis for doing so was that the plaintiff had brought the proceedings and now sought to withdraw them without having them adjudicated upon by the Court. The usual approach therefore would be for an order for costs to be made against the plaintiff, as the costs had been wasted by the proceedings. 23. Although in earlier hearings, the defendants had sought indemnity costs against the plaintiff personally, Advocate Jones sought on this occasion indemnity costs to be taxed if not agreed and submitted that the right course was to make that order against the plaintiff as the executor. He considered that if an individual wanted to pursue the executor for the full amount of the debt personally, as opposed to pursuing the estate, he would be entitled to do so as a matter of logic and principle because the estate does not have legal personality in the same way as a trust. I have some difficulty in accepting that submission. There is no doubt that the assets of the estate are not the assets of the executor. They are impressed with the executor's obligations to administer the estate in accordance with the law, which may mean the same thing, although not necessarily, as administering the estate in accordance with the Will. For my part, I can see no reason why if the assets of the estate are not those of the executor personally, which clearly they are not, the liabilities of the estate should be liabilities of the executor personally. If that were so, it would be in many circumstances difficult to find anyone prepared to execute the Will. It was no doubt such considerations that led to the

development of the remedy of seeking a *benefice d'inventaire*, which is available to the heir to enable that person to decide whether or not to renounce his claims in the estate. I note also that Advocate Jones' submission that the estate does not have the same legal personality as a trust for these purposes is inconsistent with the decision of this Court in *MacKinnon-v-MacKinnon*

[2009] JLR 387 where Bailhache, Commissioner said this at paragraph 14:- "What then is the test? In my judgement, no material distinction is to be drawn in the context of the costs of an administrative action between the position of an executor and the position of a trustee. Both owe fiduciary duties, either to the legatees or to the beneficiaries as the case may be. The question being discretionary, it is not possible to lay down any hard or fast rules. Nonetheless, one can state that the executor or trustee has what might be termed a margin of discretion. He must be free to conduct himself, and to take decisions, within the parameters of a reasonable framework as he sees fit. It may be, although this must be left for decision on another day, that the margin of discretion for a professional executor or trustee who is being remunerated should be more narrowly circumscribed. But that is not the case here. An unremunerated executor or trustee will not lightly be ordered to pay the costs of litigation if he has made an innocent mistake or acted in a manner which has *ex post facto* been shown to be misguided or even careless. At the same time, a legatee or beneficiary is entitled to expect a reasonable level of competence, proportionality and good sense from the person entrusted with protecting his interests. In short, an element of intransigence or unreasonableness is in my judgement required before an executor can be held liable to pay the costs of a legatee in an administrative action. It is not necessary to show fraud or dishonesty, but the executor's conduct must have crossed the threshold of reasonably justifiable behaviour." In that case the Commissioner was dealing with contested administration proceedings between a beneficiary of the estate and the executor. In such a case the Court may well feel able to make a costs order that affects the executor personally or the estate. In the present case, the proceedings self evidently concern the estate because they are brought by the plaintiff as executor; but they do not fall into the same category. I do not think that I should try to resolve today an issue which arises, if at all, between the executor and the estate beneficiaries who are not a party. At all events, I have not been asked to make a costs order against the plaintiff personally and as I have not heard full argument of the matter and in the light of the limited nature of the defendant's application, I therefore take it no further at this stage. 24. It does seem to me to be appropriate, however, to refer to Article 24 of the Probate (Jersey) Law 1998 which is in these terms:- "The Court may, on the application of any person interested in the movable estate of a deceased person, order the executor or the administrator, as the case may be, to exhibit on oath in Court a true and perfect inventory and account of the movable estate of the deceased person." 25. In order to perform his duties under the Will, the executor must know the extent of the estate. In a case such as the instant case, it was the plaintiff's duty to ascertain what the assets of the estate were and to gather them in for division in accordance with the terms of the Will. An executor is in my view entitled to seek the assistance of the Court in a proper case for such orders as may be requisite to

enable him to identify what the assets of the estate might be. To suggest that he is personally at risk as to costs for performing his duty as executor is a proposition which is inimical to this statement of principle. 26. Advocate Jones submitted that on receipt of the proceedings, the defendants had a choice - they could either fold and acquiesce in judgment even though they did not agree with the basis of the claim, or they could fight the proceedings. He said that his clients had chosen to fight the proceedings and had been successful - the measure of success was that no judgment had been taken against them. The common practice of ordering a party to pay the costs of the proceedings when he withdrew was well settled and reference was made to Jersey Financial Services Commission-v-Black

[2007] JLR 1 , Dick-v-Dick

[1990] JLR N2 and Watkins-v- Egglshaw

[2002] JLR 1 . 27. I asked Mr Jones as to the basis of his retainer because in previous proceedings I had been told that he was acting on legal aid. He submitted that the issue of legal aid was irrelevant, but he advised me that under the contractual arrangements between his firm and the defendants his firm could raise the fee of 75% of their usual charges. In essence the defendants were bankrupt and almost certainly his firm would discount the bills as a matter of commercial good sense. The present legal aid rates would provide for a fee in the order of £118,000 based on factor A. It was, he claimed, a hugely onerous legal aid certificate. If one applied a factor B 30% uplift, the bill would be in the region of £150,000. On the basis that standard costs were usually two thirds of the indemnity figure, that would give a figure of £100,000 and on the premise that his firm would reduce the fees by 25%, it was open to the Court to make a summary order of £75,000. 28. It was unclear how much was in the estate. The defendants submitted that the Court should order a cap on the amount that the plaintiff had to pay by way of costs, the cap equal to the net value of the estate. Although Advocate Jones conceded that his submission was unattractive, he asserted that it could not be said that the first defendant had plundered his mother's estate. The value of most of the Norwich Union bond was returned to the daughters following the action which they took after their mother's death. 29. The fact remained that his clients had incurred costs in dealing with a very unpleasant Court process. 30. In response the plaintiff said that given the past apparent misdeeds, even dishonesty of the defendants, he required proof that there were not in fact assets in their hands. He had had difficulty in accepting what a huge amount had been lost by the defendants in the companies SGBSL and SPSL. It was only as a result of the information which had been obtained that he had appreciated that not only had Mrs Benest's estate been decimated, but that the defendants no longer had the benefits of that decimation. He submitted that if one needed prima facie evidence of criminality, it lay in the use of the redemption proceeds of the Norwich Union bonds by the first defendant in his own business notwithstanding that the money subscribing for the bonds was clearly that of his mother. Although Mrs Benest might have obtained a better rate of interest as a result of her son

being put on the policy, it was perfectly apparent that her money had been used to fund the acquisition of a joint investment which accrued to the survivor, in circumstances where she was in her mid 80's and her son very considerably younger. 31. The plaintiff contended that he had conducted the litigation himself, at the lowest possible cost. He had tried to be fair and open with the other side. He asserted he had had two meetings with Advocate Jones but the advocate refused to countenance providing any proof of impecuniosity. This was therefore to be contrasted with the statements which the plaintiff had made on a number of occasions namely that if satisfied that the defendants really did not have the assets to meet any judgment debt, he would wish to withdraw the proceedings notwithstanding that in his view they were well founded. 32. As to the legal aid obligation, he referred to the accounting details provided by Advocate Kelleher on behalf of Carey Olsen. These showed that on the sale of Tamale, the legal firm had received some £20,000 in terms of fees; and in the period 2008/2009, the firm had received approximately £143,000 in fees in addition. Indeed he was concerned that the legal firm had distributed monies to creditors but did not treat all creditors including the unsecured creditors alike. 33. The plaintiff also referred to a copy of a draft settlement agreement which was under discussion with the defendants. This particular draft had emerged from Advocate Jones. The plaintiff made a number of criticisms of the draft which I did not find to be relevant for the purposes of the decision which falls now to be made. 34. In reply, Advocate Jones said that the plaintiff had failed to engage in negotiation on the settlement agreement, indicating the parts with which he did not agree. As a result he should now pay the penalty in terms of costs incurred since then, notwithstanding the open offer he made to discontinue prior to the document being generated. The opportunity to settle was lost as a result of the plaintiff's failure to engage. The open offer which he made did not give the defendants the assurances they needed that no further claims would be brought. Decision 35. It is clear both from the Civil Proceedings (Jersey) Law 1956 and from the authorities that the Court has a discretion as to whether or not to award costs, both as to identifying the person by whom they should be paid and to what extent they should be paid. That is a discretion which must be exercised in accordance with principle. 36. Very frequently in cases where proceedings have been commenced and are then withdrawn, the Court visits the costs of those proceedings on the withdrawing party on an indemnity basis. *Dick-v-Dick*

[1990] JLR N2 is an example of such a case. 37. But this is not the invariable result. The relevant principles in relation to awards of costs are set out in detail in the case of *Maçon-v-Quérée*

[2001] JLR 187 where the English Court of Appeal decision in *Re Elgindata Limited* (No. 2)

[1992] 1WR 1207 was applied. I agree with the summary of those principles and apply them today. More specifically in the case of the withdrawal of proceedings, the issue of costs was considered in the *Jersey Financial Services Commission-v-A P Black*

- [2007] JLR 1 . In that case the Royal Court determined that it would not be in the interests of justice for the respondents to be awarded their costs notwithstanding the fact that the Commission was granted leave to discontinue the proceedings, because the Commission had acted wholly properly in instigating, pursuing and seeking to discontinue. Furthermore the conduct of the respondents in that case counted heavily against them. Considerable weight was given by the Court to the need to encourage public authorities to make and stand by honest, reasonable and apparently sound administrative decisions made in the public interest without fear of exposure to undue financial prejudice if the decision were successfully challenged. I respectfully accept and adopt those principles and in my view their application can properly be extended to cases where an executor reasonably and in good faith takes steps to ascertain the assets of the estate which he is charged to administer, and does not receive candid, full and unambiguous replies from those of whom he makes proper enquiry. 38. I refer also to the case of Pell Frischmann Engineering Limited-v-Bow Valley Iran Limited and Others
- [2007] JLR 479 . In that case the Court noted that in the exercise of its wide discretion as to costs, it should be ready to depart from the general rule that costs should follow the event by making separate orders which reflected the outcome of different issues. The classification of the parties as "winner" and "loser" would not always be appropriate. Again, I respectfully agree with that conclusion and I adopt it in this case for the reasons which are set out below. I have also noted that in the case of Ani-v-Barclays Bank Plc
- [2004] JLR 165 the Court reached a similar conclusion that there should in fact be no costs order in that case where it was not easily possible to identify a winner or a loser. 39. Finally I note the case of Ani-v-Barclays Bank Plc
- [2004] JLR 165 when the Royal Court held that when considering the award of costs against the husband for his misconduct in the litigation, the Deputy Registrar had been entitled to have regard to the fact that he was legally aided. The relevance of legal aid to a costs decision would depend on the circumstances of each case but the note makes it plain that it would be relevant if, for example, a costs order would deplete the assets of the paying party and only benefit the receiving party's advocate. Once again, I adopt that principle and apply it as set out below. 40. In this case, I decline to make any order of costs and I order that the costs should fall where they lie. This exercise of discretion has been made for each of the following reasons, any one of which leads me to that

conclusion.

41. The first reason is that in my judgment it would be unfair to the estate which the plaintiff represents to require him to pay the costs of the proceedings. An executor owes a duty to gather in the estate of the deceased and administer it in accordance with the law. Normally, for the reasons which I have alluded to above, I would expect any costs order made against an executor in hostile third party litigation to be a debt payable by the estate. It would seem to follow from that proposition that where the residuary beneficiaries are of age, the

executor can of course protect himself from any claims as to negligence or otherwise in relation to the administration of the estate by a satisfactory agreement with those beneficiaries, and it might be thought there is no reason why the estate should not bear the ordinary risks of litigation. However, in this case, there appears to be no dispute that the defendants have in one form or another had the benefit of the lion's share of the assets which Mr and Mrs Benest had. The fact that these assets have been lost because of the defendant's unsuccessful business ventures is neither here nor there for this purpose. It would be unjust to penalise the daughters by making a costs order against the estate which they might ultimately have to bear, whether by extinguishing or reducing their claims to the estate of their late mother. Furthermore it is not really possible to say that the plaintiff has lost the litigation. This is a case where the Court has reached no final conclusions on the merits of the respective claims. 42. Secondly, in my judgment the first defendant has brought these proceedings upon himself by his conduct. The estate of Mrs Benest is not as extensive as it should have been, as a result of various actions taken by the defendants and by Mrs Benest, an old lady in her declining years, between 2003 and her death. It is unnecessary to set out an exhaustive list of these actions, but they include the sale of Tamale, which was to have been devised to the two daughters, to the defendants at a price considerably less than valuation; the subsequent dealing with the sale proceeds, which were intended to benefit the daughters, in such a way that £250,000 was immediately made available to the first and/or second defendants; the investment of a further £240,000 or so in a joint bond held in the names of Mrs Benest and the first defendant in circumstances where it was perfectly obvious given their respective ages that her money would vest in the first defendant on her death; the unsatisfactory interest arrangements for the period until her death; and the giving of a bank guarantee to HSBC Plc of the debts of SPSL in the sum of £300,000 which was paid from the proceeds of sale of real estate which the daughters were due to inherit. It appears to me to be wholly unsurprising that the executor, coming afresh to these arrangements, should look at them askance, and should want to investigate. It appears to me to be wholly unsurprising that he should wish to issue proceedings to recover monies lost to the estate through these arrangements, and in no way improper to recognise that it might not be in the interests of the family to put the defendants through the rigours of litigation if in fact the estate would not benefit at the end of the day even if successful. 43. Thirdly, I take the view that the defendants have by their conduct of this litigation not shown themselves worthy of a costs order. They have challenged the disclosure orders which were made when it must have been obvious to them their challenge was based on technical grounds which had no substantive merit - hence the Court's lifting of the injunctions but immediately re-imposing them. As to the actual defences which were asserted, there may or may not have been technical merit in them, but the running of such defences in circumstances where they must have known that they would not be in a position to make repayments to the estate given their impecuniosity does not reflect well upon them. 44. Fourthly, I take account of the fact that the defendants are represented on legal aid. It does seem to me that this is a case where if an order were to be made the assets of the estate will be depleted and the only benefit is to the receiving parties' advocate. Advocate Jones accepted that in essence the

defendants were bankrupt. He accepted that the bills to the defendants would be discounted as a matter of commerciality. If they are bankrupt, the extent of that discount would appear to me to be necessarily very great. Furthermore, I have no doubt that the law firm will take into account the very significant fees generated by the defendants' business difficulties over the last few years. I would not expect an advocate to take significant fees from a client during the good times and then abandon him when times become rough and I am pleased to note that Messrs Carey Olsen have followed precisely that course in continuing to act for the defendants on legal aid notwithstanding their financial difficulties. I am entitled, following R-v-G to take into account the effect of legal aid and I do so in concluding that this is another reason why it would be inappropriate to make a costs order against the estate in this case. Settlement Negotiations 45. Shortly before the hearing in June, the plaintiff sought to include in the Court bundle a copy of a draft settlement agreement. Although it had not been signed and had been sent to him by the defendants' advocate on a without prejudice basis

- and not a "without prejudice save as to costs" basis
- the plaintiff wanted to contend that it was an admissible document because it fell within the unambiguous impropriety exception to the without prejudice doctrine and he relied on Fincken Savings & Investment Bank Ltd (In Liquidation) (2003) EWCA Civ 1630. The defendants asserted that the argument as to admissibility should be heard by another judge but, in the event, did not object to the document being considered by the Court. It became apparent that all the without prejudice correspondence should also go into evidence and both parties agreed that this should be done. 46. Rather surprisingly, the defendants also submitted an affidavit from Advocate Marcus Pallot , describing his part in the dealings of the defendants and to some extent the Plaintiff. I am still uncertain as to why this course was followed. I had expected merely a short affidavit exhibiting the without prejudice correspondence. At all events, I have read the document and the exhibits but I have not found it or them particular helpful. 47. I must add, however, that one of the exhibits is an email from the plaintiff to Advocate Pallot sent on 12 August, 2008. In that email, the plaintiff said that immediately before Probate was granted - I assume of Mrs Benest's Will - he wrote to the Attorney General regarding certain transactions in connection with the estate. I was Attorney General at that time. I wish to make it quite clear that if I ever saw such a letter, I have no recollection of it, nor of any dealings whatsoever in the Law Officers Department regarding either the estate or the defendants. This is perhaps unsurprising given the volume of business undertaken there. At all events, the matter was not raised in advance of the hearing and no-one suggested I ought not to preside over the case on this account. 48. The correspondence provided shows that the plaintiff made an open offer of settlement on 13 th October, 2010. Thereafter there were some without prejudice negotiations which failed. Advocate Jones contended that the responsibility for their failure lies at the plaintiff's door. Having reviewed the correspondence I do not accept that submission. In any view the first set of negotiations failed because the defendants did not offer the independent evidence which would corroborate their account of their financial position; which had been a requirement of the plaintiff's open offer. The second set of

negotiations failed because the draft settlement agreement, which was sent to the plaintiff on 23 rd November, 2010, at 16:13 hours contained provisions which were plainly unacceptable and by his email of 23 rd November at 18:02 hours, Advocate Jones responded to a quite reasonable suggestion of the plaintiff that some alterations would be required with an opening sentence of "I will not be making any alterations". Furthermore he rejected unreasonably any amendment to his proposed timetable for the completion of the agreements. 49. In oral submissions Advocate Jones said that the plaintiff ignored the draft settlement agreement after he had been sent it and made no response. The plaintiff immediately objected to that statement and the correspondence supports his objection. Advocate Jones then said the plaintiff made no effort to negotiate the document. Not only does the correspondence show that to be wrong, but it also demonstrates no negotiation was invited. I reject the defendants' submissions that as the plaintiff failed to engage in negotiation of the document, he must now pay the penalty in terms of costs incurred since. In my view, the handling of the negotiations on behalf of the defendants was firm, perhaps as it turned out, too firm. It was unsuccessful and the lack of success may even be down to the way it was handled. 50. The plaintiff's submissions in relation to the unambiguous impropriety of the approach of the defendants or their lawyers were somewhat guarded. While I found some of the provisions of the draft settlement agreement to be on the face of it surprising and indeed inappropriate, it is not necessary to reach a conclusion on this part of the plaintiff's case as I have found for him on other grounds. 51. For all these reasons the application by the defendants for an order for costs against the plaintiff as executor of Mrs Benest's estate is rejected, and I make no order for costs as the plaintiff requested. Authorities Companies (Jersey) Law 1991. MacKinnon-v-MacKinnon

[2009] JLR 387 . Probate (Jersey) Law 1998. Watkins-v- Egglshaw

[2002] JLR 1 . Civil Proceedings (Jersey) Law 1956. Dick-v-Dick

[1990] JLR N2. Maçon -v- Quérée

[2001] JLR 187 . Re Elgindata Limited (No. 2) [1992] 1WR 1207. Jersey Financial Services Commission-v-A P Black

[2007] JLR 1 . Pell Frischmann Engineering Limited-v-Bow Valley Iran Limited and Others

[2007] JLR 479 . Ani-v-Barclays Bank Plc

[2004] JLR 165 . Fincken Savings & Investment Bank Ltd (In Liquidation) (2003) EWCA Civ 1630.
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