

What a Waste: Costs Against an Advocate

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The recent Court of Appeal case of **Mubarak v. Mubarak** [2009] JCA 016 has highlighted, for perhaps the first time in recent years, that where a party considers that the opposition's advocate has inadequately prepared for trial, and has been generally sloppy in his approach to the litigation, then it is entitled to make an application for a wasted costs order personally against that advocate.

The case of **Mubarak** has an unhappy history and relates to the acrimonious divorce proceedings between the parties. In this instance, Mrs Mubarak made an application firstly, for indemnity costs against Mr Mubarak's unsuccessful appeal, and secondly for an order that Mr Mubarak's advocate should bear part of those costs personally upon an indemnity basis.

DISCRETION OF THE COURT

It is trite law that the question of costs lies at the discretion of the court, and that the overriding objective in considering costs is to do justice

between the parties (**Watkins v. Egglisshaw** [2002] JLR 1). Historically, in Jersey, costs have only been awarded on an indemnity basis in exceptional circumstances (**Muir v. Ann Street Brewery** [1993] JLR 395), if there are special and unusual features in the particular circumstances of the case (**Jones v. Jones** [1985-86] JLR 40) or if the suit is deemed to be an abuse of the process of the court. The Court of Appeal referred to the judgment of Millet, J. in the case of **Macmillan v. Bishopsgate** (Unreported 1994):

"The power to order taxation on an indemnity basis is not confined to cases which have been brought with an ulterior motive or for an improper purpose. Litigants who conduct their cases in bad faith, or as a personal vendetta, or in an improper or oppressive manner, or who cause costs to be incurred irrationally or out of all proportion to what is at stake, may also expect to be ordered to pay costs on an indemnity basis if they lose, and to have part of their costs disallowed if they win. Nor are these necessarily the only situations where the jurisdiction may be exercised; the discretion is not to be fended or

circumscribed beyond the requirement that taxation on an indemnity basis must be 'appropriate'."

The situations in which the court will make an order of costs against an advocate vary and in many cases the misconduct is often linked with hopeless defences or doomed claims or indeed where the advocate has failed to take reasonable measures to ensure that the litigant has adequately complied with orders of the court.

FAILED TO TAKE REASONABLE MEASURES

In this case however, Mrs Mubarak sought a wasted costs order on the grounds that the advocate concerned had not been properly rehearsed in his arguments or knowledge of the law, and that he had sought to seek instructions from his instructing solicitor or from English counsel on a "wholly unacceptable number of occasions".

Under Article 2(1) of the **Civil Procedure (Jersey) Law 1956**, the court may hold liable any non-party it considers ought to pay costs.

The court in **Mubarik** made reference to the case of **Ridehalgh v Horsefield** [1994] Ch 205, which states that:

"the court will make a wasted costs order against a solicitor or barrister in civil proceedings if it can be shown that: the legal representative has acted improperly, unreasonably or negligently; his conduct has caused a party to incur unnecessary costs; or it is just in all the circumstances to order him to compensate the party for the whole or part of those costs".

JUSTIFY WASTED COSTS

It is for the applicant to make out that an order for wasted costs is justified in the circumstances. Ultimately, the court in this case did not agree with Mrs Mubarik's submissions but what is clear, as the court said, "whilst an award against Counsel will be exceptional, there is no doubt that it can be made" and an aspect of the Royal Court's power is to "discipline its officers for behaviour which tends to defeat the course of justice" (**Skinner v Myles** [1990] JLR 98).

It should obviously also be kept in mind that any finding by the court that a wasted costs order should be properly levied against an advocate may give rise to allegations of professional misconduct. Further, it may also result in the client bringing a claim for professional negligence against the advocate concerned.

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