Neutral Citation Number: [2021] EWCA Civ 997

Case No: A3/2020/0761

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES, PROPERTY TRUST & PROBATE LIST (ChD)
Claim No. PT-2019-000706
His Honour Judge Rawlings
12th March 2020

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/07/2021

Before :

LORD JUSTICE HENDERSON
LORD JUSTICE ARNOLD
and
LORD JUSTICE BIRSS

- -

Between :

JALAL ABDULKADER ALGEILANI	**Appellant**
- and -	
WAFAA MUSTAPHA AHMED EL SAMAWI	**Respondent**

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- -

Alper Riza QC for the **Appellant**
John McKendrick QC for the **Respondent**

Hearing dates: Thursday 17th June 2021

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Judgment Approved by the court for handing down (subject to editorial corrections)

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on 5 July 2021.

Lord Justice Birss :

1. This is an appeal about costs only. In the end it is a short point, but it bears some explanation. The point arises from an order made on 12th March 2020 by HHJ Rawlings sitting in the High Court in the Property Trusts and Probate List (ChD) of the Business and Property Courts of England and Wales. The order was made in proceedings concerning the burial of Dr Abdulkader Al Geilani who died in Charing Cross Hospital in London on 18th August 2019. The claimant was the only son of the deceased and the defendant was the third wife of the deceased. The claimant wished for the burial to take place in the Kingdom of Saudi Arabia and the defendant wanted the burial to take place in London.

2. The deceased had been a doctor. He was born in Yemen. He worked in the UK from 1963 to 1981 and thereafter returned to Saudi Arabia and remained there until January 2019, shortly before his death. He had a number of children, now living in various places. In 2004 he married the defendant and they had two children together. They moved to London in January 2019. When he died the deceased had a Saudi Arabian passport.

3. Proceedings began with a pre-action application dated 27th August 2019 by the claimant for an injunction preventing the defendant from giving any direction as to the disposal of the body. On that day Norris J made an interim order by consent of both parties. The effect of the order was that neither side would give such directions pending trial.

4. The Claim Form and Particulars of Claim put the claimant's case on two bases: first the claimant asked the court for an order appointing him as administrator under s116 of the Senior Courts Act 1981, such grant being limited to dealing with the disposal of the body; and second the claimant sought an order under the inherent jurisdiction that he should be responsible for the burial. The defendant's Defence denied that there were proper grounds for making the claim on either basis and contended that the deceased should be buried in London as soon as possible. The pleadings contain a number of other allegations including claims of fraud and forgery.

5. Both the Particulars of Claim and Defence were settled by counsel. Inexplicably there was no reference in the pleadings to the domicile of the deceased when he died. In a case like this, that was an obvious matter which could and should have been addressed from the outset.

6. Cases of this sort are sensitive in nature and are urgent. As Hale J noted in ***Buchanan v Milton*** [1999] EWHC B9 (Fam) [1999] 2 FLR 844, these disputes delay the proper disposal of the body and the normal processes of grieving, while bringing further grief in themselves. The extended process of this dispute has clearly caused real distress to both the claimant and the defendant and to other members of the family of the deceased.

7. Unsurprisingly an expedited trial was ordered. This order was made by Falk J on 25th October with the trial to be on the first open date after 25th November 2019.

8. There were various procedural disputes which do not now matter. The case came before HHJ Rawlings on 12th December 2019. It is clear that the judge was trying his best to have the matter resolved as speedily and sensitively as he could. His order of 12th December makes provision for certain late filed witness statements to be admitted but

not certain other material. It records the parties' agreement, no doubt instigated by the judge, that the matter would be resolved on paper and without cross-examination of witnesses. As the judge recorded in his later judgment (paragraph 20-23), he did not feel he had had sufficient assistance on the law in the skeleton arguments filed for the hearing and so gave directions for further written submissions. In that order the court sensibly requested (but did not require) submissions on certain aspects of the case under s116 of the 1981 Act and its interaction with the inherent jurisdiction. One submission by counsel for the appellant before us was that in doing this the judge was railroading the parties. To the contrary, the order does no such thing.

9. Written submissions and submissions in reply were filed and served starting on 20th December 2019 and into January 2020. The last submission was provided on the 8th or 9th January 2020. Within the written submissions and amongst other things, there was a dispute about the domicile of the deceased. The claimant contended the deceased was domiciled in Saudi Arabia when he died and the defendant contended he was domiciled in the UK. However the submissions did not link the outcome of that dispute to the question of the court's powers.

10. Aspects of the law relating to the court's powers to resolve disputes about burial are not as clear as they could be, but for reasons explained below, I believe it is neither necessary nor desirable for this judgment to attempt to resolve those issues. Nevertheless it is relevant to see how the matter developed before the judge. One way in which the case was presented was to start from Rule 22 of the Non-Contentious Probate Rules 1987. That rule specifies the order of priority for grant in case of intestacy. By that rule, a surviving spouse has a higher priority than the children of the deceased (r22(1)(a) and (b)). Thus on the face of it the defendant had a higher priority than the claimant. Section 116 of the 1981 Act provides:

> (1) If by reason of any special circumstances it appears to the High Court to be necessary or expedient to appoint as administrator some person other than the person who but for this section would in accordance with probate rules have been entitled to the grant the court may in its discretion appoint as administrator such person as it thinks expedient.
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> (2) Any grant of administration under this section may be limited in any way the court thinks fit.

11. Thus the section gives the High Court power to appoint the claimant as administrator despite the higher priority of the defendant, however to do so would on the face of the section require special circumstances. The claimant submitted there were special circumstances in the present case but also contended that there was no such limit on the court's powers under the inherent jurisdiction. Thus as presented to the judge there was a crucial difference between the s116 approach and the inherent jurisdiction.

12. On 27th January 2020 the judge sent his draft reserved judgment to the parties. The judgment is lengthy and detailed. Amongst other things the judge resolved the dispute about domicile, finding that the deceased was domiciled in Saudi Arabia when he died. Corrections and comments were provided and a second version of the judgment was sent to the parties on 7th February 2020. The judgment addresses Rule 22, s116 and the inherent jurisdiction and concludes that the inherent jurisdiction has no application in

the case because it is one involving competing priorities under Rule 22. Then, having considered the evidence in depth, the judge held that there were no such special circumstances under s116 and no reason to alter the priority. Thus the conclusion was in favour of the defendant.

13. On 14th February 2020 the claimant's new counsel Mr Riza QC, who had not appeared before 20th December 2019, sent draft grounds of appeal to the judge in support of the claimant's application for permission to appeal. These grounds raised a new point. The new point was that Rule 28(2) of the Non-Contentious Probate Rules disapplies Rule 22 in a case when the deceased is domiciled outside England and Wales.

14. Exercising the jurisdiction which was recognised in the Supreme Court in ***Re L and B*** [2013] UKSC 8, the judge decided to reconsider his judgment. He gave the defendant the opportunity to respond to the Rule 28 point. Counsel for the defendant's submission was to point out that by Rule 28(2) on its face the disapplication of Rule 22 does not apply if Rule 30(3) applies, and to submit that Rule 30(3) does apply on the facts of this case. These rules provide as follows:

> "28. — Exceptions to rules as to priority
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> (1) Any person to whom a grant may or is required to be made under any enactment shall not be prevented from obtaining such a grant notwithstanding the operation of rules 20, 22, 25 or 27.
>
> (2) Where the deceased died domiciled outside England and Wales rules 20, 22, 25 or 27 shall not apply except in a case to which paragraph (3) of rule 30 applies.
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> 30. — Grants where deceased died domiciled outside England and Wales
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> (1) Subject to paragraph (3) below, where the deceased died domiciled outside England and Wales, a district judge or registrar may order that a grant, limited in such way as the district judge or registrar may direct, do issue to any of the following persons–
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> (a) to the person entrusted with the administration of the estate by the court having jurisdiction at the place where the deceased died domiciled; or
>
> (b) where there is no person so entrusted, to the person beneficially entitled to the estate by the law of the place where the deceased died domiciled or, if there is more than one person so entitled, to such of them as the district judge or registrar may direct; or
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> (c) if in the opinion of the district judge or registrar the circumstances so require, to such person as the district judge or registrar may direct.

> (2) A grant made under paragraph (1)(a) or (b) above may be issued jointly with such person as the district judge or registrar may direct if the grant is required to be made to not less than two administrators.
>
> (3) Without any order made under paragraph (1) above–
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> (a) probate of any will which is admissible to proof may be granted–
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> (i) if the will is in the English or Welsh language, to the executor named therein; or
>
> (ii) if the will describes the duties of a named person in terms sufficient to constitute him executor according to the tenor of the will, to that person; and
>
> (b) where the whole or substantially the whole of the estate in England and Wales consists of immovable property, a grant in respect of the whole estate may be made in accordance with the law which would have been applicable if the deceased had died domiciled in England and Wales."
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> [*Rule 30(1) is included here because it is mentioned further below.*]

15. The judge handed down a third and final version of his judgment on 12th March 2020. In the judgment the judge rejects the submission that Rule 30(3) applies on the facts, concludes that Rule 28(2) takes effect because the deceased was not domiciled in England and Wales when he died, and concludes that in the circumstances in fact s116 does not apply and the relevant power is the inherent jurisdiction (which does not involve any question of special circumstances). The judgment then considers the matter under the inherent jurisdiction and rules in favour of the claimant.

16. On costs the judge recognised that the claimant was the successful party but decided it was appropriate to make a different order from the general rule of awarding the successful party their costs. The judge ordered that the claimant should only recover his costs from after the date the new point was raised (14th February 2020). For the period before that date the claimant should bear the defendant's costs.

17. The claimant made the arrangements for his father's body to be transported to Saudi Arabia and deceased's body was duly buried there.

18. There is no appeal by either side on the merits of the judge's decision. The only issue is costs. The claimant sought permission to appeal the costs order. The judge refused permission. The N460 form contains what the parties agree is a summary of the judge's reasons on costs. They are as follows. Up to the 14th February 2020 the defendant had succeeded in defending the claim being put against her. Until that time the claimant had not referred to Rule 28 or submitted that it took effect to disapply Rule 22 due to domicile. It was only after the s116 jurisdiction was found not to be available as a result of Rule 28's effect on Rule 22 that the judge decided the case under the inherent

jurisdiction. Having done that the factors came down in favour of the claimant. The fact the claimant was the successful party in the end merely established the starting point, that in general the losing party should pay the winner's costs. However, but for the claimant introducing the rule 28 point, the defendant would have succeeded and had her costs paid by the claimant. The introduction of this new point, which was not dealt with in the Particulars of Claim, skeleton argument or closing written arguments, did not justify reversing the costs position which would have applied but for that new point of law post circulation of the draft judgment. If the Rule 28 point had been taken from the start the defendant might have taken a different view of defending the matter given that the claimant's prospects were much greater under the inherent jurisdiction and time would likely not have been spent on s116.

19. The appellant's case on appeal is that the judge erred in principle and has gone beyond the wide discretion afforded under CPR Part 44. Permission to appeal was granted by Henderson LJ on 16th November 2020.

20. The appellant's submissions start with the general rule that the unsuccessful party will pay the costs of the successful party (CPR Part 44 r44.2(2)) but that the court may make another order. However, it is submitted, none of the normal exceptions apply. This is said not to be a case in which the successful party unreasonably pursued an allegation (citing ***Straker v Tudor Rose*** [2007] EWCA 368 (Waller LJ) at paragraphs 11 and 12). Nor, it is argued, does the fact that the successful party pursued alternative arguments, on which they may not have succeeded necessarily mean that the order should be anything other than an order that all of the winner's (assessed) costs be paid by the loser (***F&C Investments v Barthelemey*** [2011] EWHC 2807 per Sales J at paragraphs 16, 19, 20 and 21). The appellant points to Sales J's observation that parties should be afforded a reasonable degree of latitude in formulating claims, including pleading alternative bases for the same basic claim.

21. The appellant submits that the fact the knockout argument based on Rule 28 was delivered late did not deprive the claimant of his status as the successful party or of the full benefit of the usual rule about costs. It was reasonable for the appellant to plead the alternative claim under s116. The claimant would still argue that in fact there were special circumstances within the section. It would be wrong to deprive the party of their costs where as part of their duty to the court they draw the court's attention to a relevant legislative provision. The fact, as the judge held, that the respondent would have had an unassailable claim to have her costs paid up to 12th February 2020 had Rule 28 not been drawn to the court's attention was not a relevant circumstance under CPR r44.2 and redefines hypothetically the point where success is evaluated. Also as part of the oral submissions counsel for the appellant submitted that a new argument (such as the Rule 28 point) was not "conduct" within CPR r44.2 (4)(a).

22. A few weeks before the appeal was due to be heard Mr McKendrick QC was instructed to appear for the respondent. He had not appeared for her before. The respondent's primary case before this court was that there was no basis for this court to intervene in the exercise of the judge's discretion. The judge correctly acknowledged the starting point and the decision to award the respondent her costs up to 14th February 2020 was within his discretion in the light of the manner in which the appellant had litigated the claim and notwithstanding the fact that the appellant had succeeded in having the deceased buried in Saudi Arabia. The judge was said to have provided ample reasons in the unusual circumstances of this case.

23. A Respondent's Notice was also filed seeking to uphold the order the judge had made on further grounds. They amounted to a submission that the correct analysis of the courts powers should have been that s116 did indeed apply, because it covers all the cases falling within Rule 22 and also within Rule 30(1), as held by Sales J in ***Gudavdze v Kay*** [2012] EWHC 1683 (Ch) at paragraphs 43-46. So the claimant's submission to the judge that the fact the deceased had been domiciled in Saudi Arabia meant that s116 did not apply, was wrong.

24. The respondent applied for relief against sanction and an extension of time for filing the Respondent's Notice (which would have been due 14 days after the Order of Henderson LJ by r52.13 (4) and 53.13(5)(b)) and permission to rely on a late filed skeleton argument. That application was adjourned to the hearing of this appeal. The appellant contended that permission should be refused because the Respondent's Notice was too late and also because it was not really a Respondent's Notice since in truth it was seeking to challenge the substantive conclusion. That ought to have been done by appeal and it was far too late to do that now. In reply to the argument in the Respondent's Notice, the appellant contended that ***Gudavdze*** was not relevant to a case about the responsibility for burial and noted that the point decided by Sales J had not been the subject of adversarial argument.

25. At the hearing we decided to hear argument on the various issues without deciding to rule anything in or out at that stage. The appeal and the various applications would be resolved in the judgment. In the light of that indication, counsel for the appellant submitted that if we were going to allow the Respondent's Notice to be admitted to resolve this appeal, he would also wish to contend that the appellant ought to have succeeded on other grounds before the judge. Counsel did so briefly, referring to the argument on human rights which the judge had rejected.

26. As mentioned above already, I am quite sure that this is not a suitable case in which to embark on a resolution of the law about the court's powers to direct who should be responsible for a burial. It is not necessary to do so because neither side has appealed the judge's substantive ruling. The respondent did not ask the court to do so, and both sides' primary cases on this costs appeal take the judge's approach as it stands and argue from that. Nor have we been provided with the materials or the full submissions necessary to embark on such an exercise. Neither ***University Hospital Lewisham NHS Trust v Hamuth*** [2006] EWHC 1609 (Hart J) nor ***Hartshorne v Gardner*** [2008] EWHC 3675 (Ch) (Sonia Proudman QC sitting as a Deputy High Court judge) were in the bundles. In both cases the court exercised the inherent jurisdiction and not, it seems, any s116 jurisdiction, as Mr Jonathan Klein (sitting as a deputy judge) noted in ***Anstey v Mundle*** [2016] EWHC 1073 (Ch) (which is in our authorities bundle). However ***Gudavdze*** was not drawn to the court's attention in ***Anstey*** even though one can see scope for an argument that on the basis of ***Gudavdze*** that there may be no room for an inherent jurisdiction to apply in a dispute which could be resolved by the application of the s116 power. Nor was ***Oldham MBC v Makin*** [2017] EWHC 2543 (Ch) (Chancellor of the High Court, Sir Geoffrey Vos) in the bundles either, in which the court addressed both the jurisdiction under s116 and the inherent jurisdiction, but again it appears ***Gudavdze*** was not cited.

27. Therefore it seems to me that it makes no practical difference whether the Respondent's Notice is permitted to be served or not. Nevertheless I would give permission for it on the basis that it is a true Respondent's Notice and not an attempt to appeal the

substantive order. The point being raised is a pure argument of law. In this case the delay since late 2020 when the Respondent's Notice was due did not prejudice the appellant.

28. Turning to the costs appeal itself, the starting point is the summary of the law in ***Islam v Ali*** [2003] EWCA Civ 612 given by Auld LJ at paragraphs 18-20:

> "18. The general rule is that an unsuccessful party should pay the successful party's costs; see Civil Procedure Rules Part 44.3(2)(a) . The trial judge, however, has a wide discretion in furtherance of the overriding objective of justice and fairness to make a different order; see CPR Part 44.3(2)(b) . In exercise of that discretion the judge should have regard to all the circumstances, including the conduct of the parties, for example, how they have respectively pitched and pursued their cases and whether a party has succeeded on part, if not all, of his case and to any payment in or offer made. I take that, with the examples I have added, from CPR Part 44.3(5).
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> 19. It is, as both counsel have acknowledged, a wide discretion, and the Court of Appeal should only interfere with the judge's exercise of it if he has "exceeded the generous ambit within which reasonable disagreement is possible", a familiar passage taken now from the judgment of Brooke LJ in *Tanfern v Cameron McDonald (Practice Note)*, [2000] 1 WLR 1311, at paragraph 32, citing Lord Fraser in *G v G (Minors)* CA [1985] 1 WLR 647 , 652."
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> 20. Another way of putting it, with a more direct focus on costs, is that the Court should only intervene where
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> '… the judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that [the exercise of] his discretion is wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale.'
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> That is taken from the judgment of Stuart Smith LJ in *Roache v News Group Newspapers Ltd* [1998] EMLR 161 , at 172, and adopted by him, then as Sir Murray Stuart Smith, in *Adamson v Halifax plc* [2003] 1 WLR 60 at 65 E–F, as equally applicable since the coming into force of the CPR."

29. The appellant criticised the judge's statement that if the point had been raised sooner, the defendant may have taken a different view of defending the case. I agree that that is speculation and I do not believe it was useful. However in the end it is not central to the judge's reasoning.

30. Another point made on appeal was a suggestion that the respondent had refused to engage in settlement discussions. Having seen the correspondence I am not satisfied

that is a fair summary of the position. All that happened was that at a very early stage, before the claimant had served Particulars of Claim, the claimant suggested a meeting to negotiate. The defendant's solicitor replied asking the claimant to set out his case first, before they could progress to negotiation. The Particulars of Claim was served 2 days later.

31. The judge correctly identified the starting point. He was also entitled to think about whether there were grounds in this case for departing from the general rule, given what had happened with his first draft judgment being provided in which the respondent was the winner and then, only after that, a new argument having been raised by the appellant. The appellant's submission that raising a new argument of law is not "conduct" within the provisions of the CPR or is not relevant to the exercise of the discretion is simply wrong. Of course it is.

32. In the end the point is simply this. The judge was entitled to approach the decision in the substantive case as he did in the first and second draft judgments on the basis of the arguments put to him. At that stage there was no trace of the Rule 28 argument. Looking at it this way, the winning submission was an entirely new point which could and should have been raised much earlier but which only emerged in an application for permission to appeal after the (second) draft judgment was provided. In those circumstances the judge was plainly entitled to make a different order from the general rule. The fact that the appellant had always advanced an alternative case based on the inherent jurisdiction does not make any difference, given the way the case was being put.

33. Once it has been shown that the judge was entitled to make a different order from the general rule, an appellate court will be slow to interfere with the course the judge chose to adopt in departing from it. If I had been in that position I might have marked the appellant's conduct in a different way by making no order as to the costs up to 14th February 2020 but that is not the right question on appeal. The decision the judge reached was within the wide ambit of the discretion afforded to a judge in such a case. I would therefore dismiss the appeal.

Lord Justice Arnold:

34. I agree.

Lord Justice Henderson:

35. I also agree.