

Civil Appeals Office
Royal Courts of Justice
Strand
London WC2A 2LL

Attn: Mr D Fallon

Your ref. A2/2008/0038

Our ref. PS/MRG-1

Also by fax. 020 7947 6740 (6 pages)

10 March 2009

Dear Sirs

Morgan & Baker v Hinton Organics (Wessex) Ltd, case no. A2/2008/0038

We act for the Appellants in the above matter and have been sent a copy of the Environment Agency's letter to the Court of 5 March 2009 requesting an amendment to the Order of 2 March 2009.

The Appellants oppose the amendment to the order. We would be grateful if this response could be considered alongside the Agency's request to amend.

Our view is that paragraph 3 of the Order of 2 March 2009 is correct as it stands and that the interim costs order of 21 December 2007 is set aside and replaced by an order that costs be reserved to the trial judge. We say this for a number of reasons.

- 1) The Claimants do not dispute that the costs of the Agency and BANES are to be paid and that the Court of Appeal was right in this regard. However, it is critical in these proceedings who ultimately pays those costs, either the Appellants or the Respondents. The correct approach is that this should be determined at the close of trial and paragraph 3 of the order properly reflects this.
- 2) The Agency and BANES are well aware that this was the intention as the appeal proceeded and they expressly agreed to this. See, for example, pages 261/29-33 of the trial bundle (copies enclosed).
- 3) To amend the Order as now proposed by the Agency would be contrary to the agreement between the Appellants and the Agency prior to the appeal. It would also mean that the burden of these costs fall upon the Appellants in circumstances where the Court of Appeal has allowed their appeal and further that that appeal was allowed because the Appellants had been reasonable in trying to secure a solution in the manner proposed by the Agency and BANES in November/December 2007.

- 4) The Appellants have applied to Bristol District Registry to restore the nuisance proceedings and have the trial date fixed. It is hoped that this is listed for trial within the next few months. Thus, the question of who pays the Agency and BANES costs will be settled relatively shortly.

In conclusion, we are surprised to receive the Agency's letter to the Court. We cannot see what purpose it can achieve other than to favour the Respondent in circumstances where the costs incurred by the Agency and BANES were because the Respondent resisted a resolution to the problem (see paragraph 55 of the judgment). For the Respondent to benefit from this, by the Appellants suffering the costs of the Agency and BANES is unfair.

The Appellants have reassured the Agency and BANES that funds have been made available and interest is accruing on this. The Agency and BANES agreed that this was acceptable. To now go back on that agreement is unreasonable and unfair to the Appellants. Finally, the Agency notes in its letter of 16 January 2009 (261-30) that it had no interest in the outcome of the proceedings now its purpose of recovering its costs had been achieved, yet it now wishes to re-assert that interest to the detriment of the Appellants and causing yet further costs to be incurred by the Appellants and the court in responding to this.

If we are wrong in our understanding of the Court of Appeal in this regard and it did intend the Appellants to pay the costs of the Agency and BANES then we would ask that, in all the circumstances of this appeal, that the order of 2 March 2009 remain as it stands and that all the costs of the interim hearing of 21st December 2007 be determined at the close of trial; the financial position of the Agency and BANES being preserved in any event.

In the circumstances, we ask that the request by the Agency and BANES to amend the order of 2 March 2009 be declined. It serves no useful purpose other than to unfairly favour one party over the other, without justification.

Yours faithfully

Richard Buxton

cc Environment Agency (Nick Hayden)
 BANES (Shaine Lewis)
 Bond Pearce (Dale Collins)

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Attn: Mr D Fallon

Your ref. A2/2008/0038

Our ref. PS/MRG-1

Also by fax. 020 7947 6740 (1 page)

13 March 2009

Dear Sirs

Morgan & Baker v Hinton Organics (Wessex) Ltd, case no. A2/2008/0038

We have received the Environment Agency's letter to the Court of 12 March 2009.

We are unsure what point the Agency is making. The costs of the Agency and BANES are covered and we have provided assurance of this. The purpose of that assurance was to provide comfort to the Agency/BANES and that they need not attend an appeal. This aspect of the appeal on costs was in the Appellant's skeleton argument e.g.

62. ... the Claimants contend that having regard to the Aarhus obligation, the Judge was plainly wrong to order that they pay the Defendants and the added parties' costs, and instead should have made an order reserving the question of who paid the added parties costs to the trial judge,

Agreement was reached between the Agency/BANES of the costs position and contained in the documents before the Court. Further, the Agency advised the court of the position.

The Agency has stated that it is simply seeking to reflect the intention of the transcript. But that creates the inconsistency that the Appellants, on the one hand are successful in reserving the interim costs order to trial but on the other, have to pay the Agency/BANES costs, through more fault of the Respondent than their own.

We repeat the conclusion in our earlier letter and ask that the Agency's request to amend the order of 2 March 2009 be declined. It serves no useful purpose other than to unfairly favour one party over the other.

Yours faithfully

Richard Buxton

cc Environment Agency (Nick Hayden) / BANES (Shaine Lewis)
Bond Pearce (Dale Collins)



COURT 71
Application No.

A2/2008/0038
A2/2008/0951

Amendment as
underlined in red this
19th day of March 2009
by order of Lord Justice
Carnwath



MONDAY 2ND MARCH 2009

Order No. 010946

IN THE COURT OF APPEAL

ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
HQ06X02114

BEFORE LORD JUSTICE LAWS
LORD JUSTICE CARNWATH
And LORD JUSTICE MAURICE KAY

Under case reference: A2/2008/0038

B E T W E E N

- 1) FRANCIS ROY MORGAN
- 2) CATHERINE MARGARET BAKER

- and -

Appellants

- 1) HINTON ORGANICS (WESSEX) LIMITED
- 2) ENVIRONMENT AGENCY
- 3) BATH & NORTH EAST SOMERSET COUNCIL

- and -

Respondents

COALITION FOR ACCESS TO JUSTICE FOR THE ENVIRONMENT

Intervener

Under case reference: A2/2008/0951

B E T W E E N

HINTON ORGANICS (WESSEX) LIMITED

- and -

Appellant

- 1) FRANCIS ROY MORGAN
- 2) CATHERINE MARGARET BAKER

Respondents

ON READING the Appellant's Notice sealed on the 7th January 2008 filed under case reference A2/2008/0038 on behalf of the Appellants applying for permission to appeal with appeal to follow if granted from the order of His Honour Judge Seymour dated 21st December 2007

AND ON READING the Appellant's Notice sealed on the 29th April 2008 filed under case reference A2/2008/0951 on behalf of the Appellant on appeal from the order of His Honour Judge Bursell QC dated 8th April 2008

1.63/14

AND ON HEARING David Hart QC and Jeremy Hyam counsel for the Appellants Francis Morgan and Catherine Baker; Stephen Tromans and Richard Wald counsel for the Appellant Hinton Organics; and David Wolfe counsel for the Intervener

IT IS ORDERED that

A. In respect of the appeal on the “interim costs issue” (A2/2008/0038):

1. Permission to appeal be granted
2. The appeal be allowed.
3. ~~The~~ Paragraph 3 of the interim costs order made by His Honour Judge Seymour QC on 21st December 2007 is set aside and replaced by an order that the costs of the Defendant be reserved to the trial judge.
4. There be no order as to the costs of the appeal.

B. In respect of the appeal on the “expert witness issue” (A2/2008/0951):

5. The appeal be allowed.
6. The ruling of His Honour Judge Bursell QC made on 8th May 2008, as to inadmissibility of expert evidence by the Appellant’s odour expert, Mr Branchflower, is set aside.
7. The consequential order of His Honour Judge Bursell QC made on 8th May 2008, that the defendant pay the claimants’ costs thrown away, is set aside.
8. The Respondents do pay the Appellant’s costs of the appeal and costs thrown away below in respect of the adjournment of the hearing below, such costs to be subject to detailed assessment if not agreed



By the Court

Note from the Court

We have read the letter of the Environment Agency dated 5th March, 2009, inviting us to amend paragraph 3 of the Order made by us on 2nd March, 2009. We have also considered the letter from Richard Buxton dated 10th March, 2009, and the response of the Environment Agency of 12th March, 2009. The Order was based on a draft agreed between the parties, but apparently without reference to the Agency or the Council. We agree that paragraph 3 does not reflect the view expressed in the Judgment at paragraph 53 as to the merits of the order made in favour of the two authorities. Although in the event that there was no detailed argument on this point, we agree that the order should be amended to reflect our view. There will therefore be substituted for paragraph 3 of the Order the following:-

“Paragraph 3 of the interim cost Order made by His Honour Judge Seymour QC on 21st December, 2007 is set aside and replaced by an Order that the costs of the defendant be reserved to the trial judge”

Carnwath LJ on behalf of the Court
19.3.09