Neutral Citation Number: [1997] EWCA Civ 2179

CHANI 97/0720/B

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CHANCERY DIVISION
(Mr Justice Lloyd)

Royal Courts of Justice
Strand
London WC2

Thursday 24th July, 1997

B e f o r e:

LORD JUSTICE MILLETT
LORD JUSTICE POTTER

- -

ABRAHAM & another
Appellant

- v -

THOMPSON & another
Respondent

- -

(Handed Down Transcript of
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MR S BURTON QC and MR K MacLEAN (Instructed by Clifford Chance, London EC1A 4JJ)
appeared on behalf of the Appellant
MR BLOCH and MISS C BINGHAM (Instructed by Messrs DJ Freeman, London EC4A 1NA)
appeared on behalf of the Respondent

- -

J U D G M E N T (As approved by the Court)

LORD JUSTICE POTTER:

INTRODUCTION.

This is an appeal by the plaintiffs against an order of Mr. Justice Lloyd made on 12th May 1997 that the first plaintiff disclose to the 5th and 6th defendants on affidavit whether any, and if so what, third party or parties had provided all or any substantial part or parts of the money used to fund this action as regards costs incurred by him from the date when they were added as parties. When the matter came before us on 22nd May 1997, it was one of some urgency because the trial was fixed for 3rd June 1997 with a hearing estimated to last four weeks. On 22nd May 1997 we indicated to the parties our decision to allow the appeal, stating that we would give our reasons later. We do so now.

The first plaintiff is a former stockbroker and retired businessman who has lived in Portugal since 1988. The second plaintiff is a company incorporated in Panama, the formation of British Virgin Islands trust of which the plaintiff is a discretionary beneficiary.

They sue a number of defendants for wide ranging relief including very substantial sums alleged to be due pursuant to, and as damages for breach of, various agreements arising out of a joint venture between the first plaintiff and the first and second defendants in relation to development of golf and leisure complexes in Portugal.

The 5th and 6th defendants (to whom I shall refer simply as "the defendants") are both Portuguese nationals and residents and are the two executive directors (but not shareholders) of a Portuguese company known as Planal which is not a party in the action but is the subject of some of major allegations in it.

The action was started in 1995 but the defendants were not joined as parties until 1st April 1996. They were joined and served at a time when they came to England to attend a board meeting of Planal convened in order to pass resolutions for the sale of certain of its major assets which the first plaintiff says was at a substantial undervalue and therefore involved breaches of contractual obligations of which they were well aware. The second plaintiff is not concerned with the claim against the defendants. I shall therefore refer to the first plaintiff hereafter simply as "the plaintiff".

The plaintiff obtained an ex-parte injunction restraining the holding of the Planal board meeting. However, this was not continued because, at the inter partes hearing, Evans-Lombe J. took the view that damages would be an adequate remedy and that it was questionable whether the plaintiff would be good for his liability under the cross-undertaking in damages. The defendants became parties to the action upon being served with the ex-parte injunction.

The original version of the Statement of Claim served on the defendants was the subject of a striking out application which was not in fact proceeded with. In September 1996, a revised pleading was put forward claiming damages from the defendants for the tort of assisting or procuring various breaches of the contract. There was a brief hiatus after service of the claim and, in December 1996, after some prompting, the plaintiff stated his intention of proceeding against the defendants. Directions were agreed and a defence served on behalf of the defendants on 22nd January 1997. In February the defendants served a request for further and better particulars and, on 25th February 1997, a witness statement of the plaintiff was served. That statement, together with an affidavit sworn by the plaintiff in opposition to an application by other defendants in 1996 for security for costs which was unsuccessful, gave rise to concern on the defendant's part as to whether the plaintiff was paying his own costs of the action from his own resources and whether he would be good for the defendants' costs if he were ordered to pay them at trial.

THE DEFENDANTS' APPLICATION.

Because the plaintiff is resident in Portugual, the above mentioned application for security had failed on the grounds of his being resident within the European Union and hence subject to similar considerations in respect of security as a plaintiff resident in the United Kingdom: see Fitzgerald -v- Williams [1996] 2 WLR 447. The defendants were themselves the beneficiaries of an indemnity in respect of their costs by Planal which is a company of substance. However, motivated by their concern as to whether, if they were successful, an inter partes order for costs would be met by the plaintiff (as opposed to having to resort to their indemnity), the defendants' solicitors wrote to the plaintiffs' solicitors on 26th March 1997 setting out chapter and verse for their concern and asking for

disclosure of the identity of the person or persons who they assumed were providing the funds for the plaintiff's legal costs, stating that if the funder were not resident in the European Union, an application would be made against the plaintiff for security for costs. On 8th April 1997, the plaintiff's solicitors replied saying that all their costs and disbursements to date had been funded by the plaintiff. They also stated their view that the possibility of a claim for security against the plaintiff was hopeless on the basis of the modern authorities and concluded by declining to accede to the request.

On 21st April 1996 the defendants applied on motion for an order that within 7 days the plaintiff disclose on affidavit whether any third party has provided the monies or any substantial part of the monies used to fund the action and, if so, the identity of the funder. By way of evidence, the defendants relied on an affidavit from their solicitors. In that affidavit the application was put on the basis that:

> "...it [is] probable that the action [is] being funded by one or other of the offshore trusts in which Mr. Abraham seems to have an interest or expectation. Mr. Abraham maintains that, for tax purposes, these trusts are wholly separate from him and in my submission they should therefore be regarded as independent third parties who should be treated as maintainers if they were funding the action. If the action were being funded by an offshore entity it would be [the defendants'] intention to apply for security for their and Planal's costs".

It was later stated that:

> "... no direct claim is made by Eramon against the [defendants] ... Even if successful in an application against Eramon, it is unlikely that the Court would order any very significant sum. I do not believe, however, that should prevent the proper securing of the [defendants'] and Planal's costs if this action is in fact being funded by a third party on Mr. Abraham's behalf".

The plaintiff chose not to put in any evidence dealing with the substance of the matters raised, but to take his stand upon the argument that the court lacked any jurisdiction to make the order sought, alternatively that the deficiencies in the defendants' case were such that the court should, as a matter of

discretion, refuse to make such an order.

THE JUDGMENT OF LLOYD J.

The judge gave an admirably clear judgment in which he recited the arguments of counsel and the authorities to which he had been referred. He rejected the argument for the plaintiff that, since the plaintiff was not a person against whom an award of security of costs could be made subject to a stay under RSC Order 23, the Court lacked jurisdiction to do so. In reliance in particular upon the decision at first instance in Broxton -v- McClelland [unreported] 6th November 1992 and dicta of the Court of Appeal in the recent case of Condliffe -v- Hislop [1996] 1 WLR 753 and by analogy with previous decisions relating to champerty, he rested his decision upon the inherent jurisdiction of the court. In the key passage of his judgment he stated as follows:

> "In my judgment the court does have power to stay proceedings on grounds concerned with the way in which they are being brought or prosecuted. This is clearly the case if the plaintiff is being funded in circumstances which amount to champerty which is illegal as a matter of public policy (see Grovewood Holdings Ltd -v- James Capel & Co Ltd [1995] Ch. 80). But I do not think it is necessarily limited to a case where the support is champertous. There are of course cases where the court has recognised that it is legitimate for a third party to support one party to the litigation without incurring liability for the other's costs if the supported party is ordered to pay those costs: Condliffe -v- Hislop is one, where the supporter was the Plaintiff's mother, and another is Murphy -v- Young [1997] 1 All ER 518, where the supporter was a company paying under a legal expenses insurance policy with limited cover. However, it seems to me that there are circumstances, including but not limited to champerty, in which the court might stay the Plaintiff's action because of the way it is being financed. I therefore reject Mr. MacLean's submission that the court has no power, before trial, to make an order staying the action if it were apparent that the Plaintiff was being funded by a third party who would not or could not accept (in a satisfactory manner) liability to pay the costs of the Fifth and Sixth Defendants if they were successful at trial. If there is power to make such an order, as was made, so it seems, in Broxton and approved as

> being at least possible in Condliffe, there must be power in aid of that to make the order sought by the Fifth and Sixth Defendants in the present case, so that the Defendants can consider whether it is a case in which a stay might be ordered and, if they take that view, apply accordingly".

In relation to the question of whether he should exercise his discretion on the basis that such jurisdiction existed, he referred to the fact that it appeared that the plaintiff had sought in the past to divest himself of income and capital assets in order to avoid liabilities to UK tax, using offshore trusts and companies for that purpose, including three trusts which he had himself set up, but that, from a personal point of view, he had apparently been for some years in a position of financial difficulty. He referred also to the paucity of the plaintiff's disclosure as to his assets and his failure to put in evidence to show that he would be good for a cross-undertaking in damages in respect of the interlocutory injunction earlier sought. The judge inferred that it was likely that the plaintiff was paying for the conduct of the litigation not out of his own personal funds but from funds obtained from a third party which might well be one or more of the offshore trusts. He went on:

> "It seems to me that there is reason to suspect that it may be a case in which, if the plaintiff were to lose and an order was made against him, an order for costs would be difficult to enforce against the maintainer, if that turns out to be the trustees of one or more of the offshore trusts. Even if their identity is known, there may be practical and legal difficulties, including limits on the powers of the trustees, in the way of such enforcement.
>
> Accordingly, it seems to me that, on the facts, the Fifth and Sixth Defendants have shown a sufficient prospect that it might be a case where the court's jurisdiction might be exercised, as envisaged by Kennedy LJ in Condliffe -v- Hislop, to stay the proceedings in advance of judgment unless a sufficiently solid undertaking to answer for the defendants' costs were given by the maintainer. It is therefore appropriate to consider the exercise of the ancillary jurisdiction to order disclosure of the information".

He then dealt with the question of whether or not he should order disclosure in relation to questions of lateness and the relative position of the parties in the litigation. He stated that he regarded

as "material but not decisive" that the defendant had the benefit of an indemnity from Planal. So far as the lateness of the application was concerned, he did not regard the defendants in fault in that respect, but said:

> "..although it is by no means certain that the time remaining before trial will be sufficient to allow the Defendants to make an effective application for the further relief they want once provided with the information they seek, I do not regard it as being so unlikely that they could do so as to justify withholding from them the relief which, having regard to all other circumstances, I consider they should be granted ..."

JURISDICTION.

It has not been in issue before us that, if the 5th and 6th defendants succeed at trial and get an order for costs against the plaintiff and, if the plaintiff's own costs have been funded by a third party, the court would have jurisdiction on the defendants' application (should proper grounds be shown) to make an order for costs against that third party under S.51(1) of the Supreme Court Act 1981. That being so, the defendants have contended that the court also has ancillary jurisdiction to make an order against the plaintiff requiring him to disclose whether there is such a third party funder. They rely upon the decision of McPherson J. in Singh -v- Observer Limited [1989] 2 All ER 751 and an order of the Court of Appeal mentioned by Longmore J as having been made in McFarlane -v- E.E. Caledonia Ltd (No 2) [1995] 1 WLR 366 at 373C, coupled with the principle stated by Ackner LJ in A.J. Bekhor & Co Ltd -v- Bilton [1981] 1 QB 923 at 942 that "where the power exists to grant the remedy, there must also be inherent in that power the power to make ancillary orders to make that remedy effective".

It is clear that a similar argument was advanced before the judge. However, it finds no mention in the part of his judgment setting out the reasons for his decision, which would seem to indicate that he did not accept the argument, at any rate in those simple terms. I consider he was right not to do so.

S.51(1) of the 1981 Act accords to the court:

> "Subject to ... Rules of Court, .. full power to determine by whom and to what extent the costs are

to be paid .."

That power arises at the stage when the costs of and incidental to the relevant proceedings have been incurred and the question arises as to who should be ordered to pay them. The case of Singh does no more than demonstrate that, once the occasion for the exercise of that power has arisen, the court, in order to enable it to be fully and appropriately exercised, will investigate so as to establish the identity of a third party maintainer of the unsuccessful party, and the liability of that maintainer in respect of the successful party's costs. The same appears to be true of the case of McFarlane -v- Caledonia.

That is not the position in this case. Here, the defendants are not applying on the basis that they have been successful in the litigation and seek payment of an established entitlement to costs, but on the basis that they seek security against an entitlement which may never arise. Nor can resort to the case of Bekhor -v- Bilton assist them in such circumstances. In that case, the court was concerned with its inherent jurisdiction to make an ancillary order for the purpose of ensuring that an order of the court previously made should not be rendered nugatory or ineffective. The defendants' application in this case is in aid of security against an order for future costs which may never be made and not of any established right to such costs.

In that regard, Mr. Burnton QC for the plaintiffs submits (and Mr. Bloch for the defendants has not disputed) that the sole purpose of the defendant's application is to obtain a stay of proceedings unless security or at least some undertaking as to costs is provided by the third party funder. Yet, as the judge recognised, it is not open to the defendants to apply for security for costs against a third party funder, because RSC Order 23 (taken with the statutory provisions of S.726 of the Companies Act 1985) provides a complete regime in relation to orders for security; see C.T. Bowring & Co (Insurance Limited) -v- Corsi Partners Limited [1994] 2 Lloyd's Rep. 567. That being so, Mr. Burnton submits that it would be wrong for the court to seek, by reference to its inherent jurisdiction, to make good the omission of the RSC to provide for security in such a case by granting the defendants' application to stay the proceedings unless or until security is provided or the third party agrees to accept liability for the defendants' costs in a "satisfactory manner". A fortiori, he submits that there can be no necessity

or justification for an order of disclosure in aid of an exercise in respect of which the court lacks jurisdiction.

As to the provision of security under Order 23, in Bowring -v- Corsi, the plaintiff had obtained a Mareva injunction which was later discharged by agreement. The defendant applied for an inquiry as to damages on the cross-undertaking given when the injunction was granted, alleging that it had suffered substantial loss. The hearing of that application was expected to last some 5 days and the plaintiff applied under S. 726 of the Companies Act for an order for security on the grounds that the defendant would be unable to pay any costs awarded against him. The Court of Appeal held that Order 23 (together with S. 726) provided a complete and exhaustive code as regards the award of security and excluded the possibility of relying on inherent jurisdiction to award security against a defendant. It stated also that, if another category of case emerged in which it was felt that security should be available, it had to be provided for by legislation: see per Dillon LJ at 570, 571 and 574 and per Millett LJ at 577 and 580.

On the question whether there might be some wider discretion to achieve the same effect by a different route, the Court stated that, because the ordering of an inquiry was a matter of discretion, if the plaintiff could show that the application amounted to an abuse of process the court might either refuse to order an enquiry, or order it only on terms. In the latter case, Millett LJ observed (at p.581) that the court might be persuaded to impose a term requiring the giving of security as an earnest of good faith if it were in real doubt as to the genuineness of the defendant's claim, but that this possibility would only be available in an extreme case and should not be regarded as letting in by the back door a general inherent jurisdiction to order security which does not exist. Sir Michael Kerr agreed explicitly with those views (p.582).

Those observations are in my view no more than a recognition that the court will, in appropriate cases, grant a stay of proceedings which are in substance, or by reason of the manner of their conduct, an abuse of process. That is not a proposition with which Mr. Burnton takes issue. However, he submits that the prevention of "abuse of process" marks both the area and the limit of the court's

inherent jurisdiction to order security in a case of this kind, and that the nature and circumstances of the defendants' application are such that to grant it would indeed be to let in by the backdoor an inherent jurisdiction to order security which does not exist.

It was on the ground of "abuse of process" that, in Grovewood Holding Limited -v- James Capel & Co Limited [1995] Ch. 80, Lightman J granted a stay in an action being funded pursuant to a champertous arrangement by the liquidator. He held that that, whether or not the expressions of opinion in Martell -v Consett Iron Co Ltd [1955] Ch.363 that, in a case of maintenance, a stay should not be ordered remained good law (see further below), there was no doubt that the court was free, in the case of a champertous agreement, to grant a stay on the basis that it constituted a continuing abuse of process which the court, as well as the defendants, had an interest in bringing to an end.

In Condliffe -v- Hislop [1996] 1 WLR 753 at 761 upon which Lloyd J relied, Kennedy LJ, in obiter dicta with which the remainder of the court agreed, appeared to put the matter on a wider basis than "abuse of process".

In that case, the plaintiff, who was a bankrupt, was pursuing libel proceedings in which he was being financed by his mother who had limited resources. She gave an undertaking that she would pay any court order in respect of the defendants' costs, but the Master ordered a stay under the inherent jurisdiction of the court to prevent abuse of process unless the plaintiff provided security. The plaintiff appealed and the mother withdrew her undertaking. The judge reversed the order, holding that, even if there were jurisdiction, he would have exercised it in the plaintiff's favour. The Court disposed of the case shortly on the facts on the basis that the mother's position was one long since recognised as a lawful justification to maintain, sharing as she did a common interest with the plaintiff on the grounds of kinship. However, in deference to the arguments of counsel, Kennedy LJ dealt with the question of the Court's discretion.

He considered the decision in Bowring -v- Corsi and expressly proceeded on the basis that Order 23 constituted an exclusive code in relation to orders for security.

In the section of his judgment headed "Is this maintenance?", Kennedy LJ referred to a number of modern cases starting with Hill -v- Archbold [1968] 1 QB 686 and finishing with McFarlane -v- E.E. Caledonia Ltd [No. 2] [1995] 1 WLR 366. In the former case, heard prior to the abolition of criminal and tortious liability for maintenance by Sections 13(1) and 14(1) of the Criminal Law Act 1967, Lord Denning said:

> "Much maintenance is considered justifiable today which would in 1914 have been considered obnoxious. Most of the actions in our courts are supported by some association or other, or by the State itself. Comparatively a few litigants bring suits, or defend them at their own expense. Most claims by workmen against their employers are paid for by a trade union. Most defences of motorists are paid for by insurance companies. This is perfectly justifiable and is accepted by everyone as lawful, provided always that the one who supports the litigation, if it fails, pays the costs of the other side".

After abolition, Lord Denning developed this theme in Trendtex Trading Corporation -v- Credit Suisse [1980] QB 629 at 653. That was a case in which a stay was sought against a bank which had financed a contract and was supporting litigation arising out of it. Lord Denning observed that, although the liability in crime and tort had been abolished, Section 14(2) of the 1967 Act preserved the law:

> "as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal".

In that connection he observed:

> "It is perfectly legitimate today for one person to support another in bringing or resisting an action - as by paying the costs of it - provided that he has a legitimate and genuine interest in the result of it and the circumstances are such as reasonably to warrant his giving support."

In that respect he repeated the quotation from his judgment in Hill -v- Archbold above.

In MacFarlane's case, Longmore J at [1995] 1 WLR 373, said:

" ..It may well be that it is not necessary to every case of lawful maintenance that the maintainer should accept a liability for a successful adverse party's costs; for example, a member of a family or a religious fraternity may well have a sufficient interest in maintaining an action to save such maintenance from contractual illegality, even without any acceptance of liability for such costs. But in what one may call a business context (e.g. insurance, a trade union activity, or commercial litigation support for remuneration) the acceptance of such liability will always, in my view, be a highly relevant consideration."

In Condliffe -v- Hislop, Kennedy LJ said of that passage of Longmore J's judgment:

"That seems to me to be the correct approach. The existence of a business relationship will not always lead the Court to expect acceptance for liability for costs (e.g. if the financial backer is a bank lending money to a plaintiff, or in some cases an insurer: see Tharros Shipping Co Ltd and Den Norske Bank Plc -v- Bias Shipping Ltd [No.3] [1995] 1 Lloyd's Rep 541) but it will be a highly relevant consideration."

In the section of his judgment headed "Security for costs or what?" Kennedy LJ went on to put the power of the court to grant a stay thus:

"I am satisfied that there is at present no power to require a party who is maintained but who does not satisfy the requirements of Ord. 23, r.1 to give security for costs. That is something which it might be appropriate for the Rule Committee to consider, but until it does so it seems to me that whatever may have been the position 90 years ago ... an order for security for costs is not a weapon which the court can now invoke outside the ambit of Order 23. Nevertheless, the court is entitled to protect its own procedures, and as Sir Thomas Bingham M.R. said in Roache -v- News Group Newspapers Ltd (unreported) 19th November 1992 ... the principle that in the ordinary way costs follow the event "is of fundamental importance in deterring plaintiffs from bringing and defendants from defending actions which they are likely to lose".

"If that principle is threatened, as for example if an insurer or trade union were known to be giving financial support to a party without accepting

> liability for the costs of the other side if the supported party were to lose, then, as it seems to me, the court might, at least in some case, be prepared to order that the action be stayed .... Normally the better course would be to let the action proceed to trial then, if need be, consider the power of the court under S.51 of the Supreme Court Act 1981 ... But if the circumstances suggest that the litigating party or the maintainer may not be bona fide, or if that party were to lose, an order for costs would be difficult to enforce against the maintainer, then, as it seems to me, a stay could be imposed".

Turning to the argument of the defendants in this case, it is pertinent to observe that the defendants' application was originally made on the basis that, if disclosure were ordered which revealed that there had been third-party funding the defendants would be entitled to apply for an order for security for costs against the third party. That contention has not been persisted in. The judge rightly held that he was bound by the observations of this Court in Bowring -v- Corsi. However, as I have already indicated, the defendants cannot and do not seek to justify the order for disclosure which the judge made simply as one preliminary or ancillary to any proposed application for security. Nor do they put the case on the traditional basis of the inherent jurisdiction of the court to prevent abuse of process. That is because Mr. Bloch accepted that no such abuse can be demonstrated in the conventional sense anticipated by Millett LJ in Bowring -v- Corsi at 580 when he observed:

> "It is an abuse of the process of the Court to bring a claim with no genuine belief in its merits but in bad faith and for an ulterior purpose ... A party who makes an exorbitant claim with no genuine belief in its merits, rejecting all reasonable offers of settlement, and exploiting his own inability to satisfy an order for costs in order to bring pressure on the other party to settle for an excessive sum, is abusing the process of the court".

See also Lightman J in Grovewood Holdings, when he referred to "a collateral (improper) purpose". It has not been suggested, nor did the judge hold, that the plaintiffs' claims against the defendants are not bona fide or that they are brought for any collateral or improper purpose. As stated by Millett LJ in the recent case of Metalloy Supplies Ltd (in liq.) -v- M.A. (U.K) Ltd [1997] 1 All ER 418 (in which a non-party costs order was sought against the liquidator of an insolvent company):

> "It is not an abuse of the process of the court or in any way improper or unreasonable for an impecunious plaintiff to bring proceedings which are otherwise proper and bona fide while lacking the means to pay the defendant's costs if they should fail. Litigants do it every day, with or without legal aid. If the plaintiff is an individual, the defendant's only recourse is to threaten the plaintiff with bankruptcy. If the plaintiff is a limited company the defendant may apply for security for costs ...."

Finally in that connection, it is not suggested that the plaintiff's limited assets or financial difficulties are the result of arrangements deliberately made with the litigation in mind or in order to put his assets beyond the reach of his creditors. All that is suggested is that it is likely that he will continue to be advanced sums to assist him in respect of his own costs of the action from a trust or trusts prepared to assist him in relation to his own costs, but which may be unready to make money available to meet a costs order in favour of the defendants if they are eventually successful. The stay sought is put firmly on the basis of the final words of the dicta of Kennedy LJ last quoted, namely that, if the defendants were to lose, an order for costs would be difficult to enforce against the maintainer.

When invited by this court to elaborate the aspect of the inherent jurisdiction relied on, the defendants put it in this way, namely that:

"The Court has jurisdiction to order a stay where the plaintiff's affairs are so arranged as to threaten to defeat or frustrate the procedures of the Court or the fundamental principles on which litigation is conducted before the courts."

Mr.Bloch identified the procedure concerned in this case as the procedure under S.51(1) by which the Court may make an order against a maintainer once the other party's right to costs has been established, and that the fundamental principle concerned is the principle that, ordinarily, costs follow the event and that a plaintiff pursues his action under the sanction of his risk as to costs.

In terms of fundamental principles, as a matter of approach it is of some assistance to refer to an authority on maintenance which bears upon the question of jurisdiction. In Martell -v- Consett Iron Co Limited (supra) Danckwerts J at first instance, laid the foundation to what may be called the

"modern approach" to what was the offence of maintenance before its criminality was abolished (see the observations of Winn LJ. in Hill -v- Archbold at 700A - C and of Oliver LJ on the Trendtex case at p. 664D - E). In that case it was held that members of a fishing association with a common interest in the subject matter of the plaintiffs' action in respect of the pollution of their fishery were not guilty of unlawfully maintaining the plaintiffs by supporting them in the form of indemnities for their costs in the action. In stating that it was not necessary to deal with the question of whether an application for the stay of the proceedings was an appropriate remedy on the assumption that it was a case of unlawful maintenance, Danckwerts J said:

> "I will observe, however, that if it is a proper procedure, it is strange that no previous exercise of the jurisdiction of the court to stay proceedings in such a case can be produced ... I am not satisfied either that such jurisdiction exists in this kind of case or that it would be proper to stop proceedings at an early stage when, in the result, the applicant may turn out, by reason of the absence of damage, to have no cause of action for maintenance". In the Court of Appeal, on the same assumption, Jenkins LJ observed:

> "We have been referred to many cases in which actions have been held to have been illegally maintained, but to no case in which an order has been made for a stay of proceedings in a maintained action on the grounds that it was being illegally maintained.
>
> The question whether it might not be proper to order a stay on this ground was touched on, but left entirely open, by Atkin LJ in Wild -v- Simpson where he said: "to set the procedure of the court in motion for a particular object may be unlawful; but the proceedings remain themselves valid ... though I reserve my opinion as to whether the court, on being satisfied that pending proceedings are being unlawfully maintained, has not power to stay them as being vexatious and oppressive and an abuse of the process of the court, and to continue such stay until the court is satisfied that the proceedings are purged of the taint of illegality".
>
> It is well settled that the illegal maintenance of the plaintiff in an action is no defence to the action ..

> I find difficulty in reconciling this with the theory that it affords proper ground for a stay of proceedings. It is not, to my mind, a satisfactory answer to this difficulty to say that the stay would be of a temporary character only, operating until such time as the proceedings are purged of the taint of illegality. Once there has been illegal maintenance, the crime by which the proceedings are said to be tainted has been irretrievably committed and I do not see how the taint could be purged otherwise than by discontinuing those proceedings and starting a fresh action. That, would in effect, make maintenance a defence to the action in which it clearly is not .. Moreover it seems to me undesirable that the question whether an action is being illegally maintained should be adjudicated upon on an application to stay proceedings in that action, for this procedure involves, in effect, trial of the question whether the alleged maintainer is guilty of what is still, theoretically at all events, a crime, in the absence of the person accused."

The weight of that expression of opinion was discounted by Lightman J in the Grovewood Holdings case on the ground that it was squarely based on the then criminality of maintenance and that:

> "This ground ceases to have any force with the abolition of the crime of maintenance, and the recognition of so many grounds for a stay which do not constitute defences, e.g. absence of authority of the plaintiff's solicitors, forum non conveniens or the fact that the action is brought for a collateral (improper) purpose." (per Lightman J ibid at p.88)

However, it seems to me that the logic of the reasoning of Jenkins LJ retains its force in this general sense. It assumes and recognises the general principle that a plaintiff is entitled to proceed to trial without a stay in a case where the action is brought bona fide and the ground on which the stay is sought is one which would involve a pre-trial investigation of facts which, even if established, would afford no defence to the persons sued. While plainly such principle requires qualification where the action is not bona fide or otherwise amounts to an abuse of process, it does not seem to me that further qualification is necessary; nor, indeed, is it desirable in this context in a time when "satellite litigation" is to be discouraged. The reference by Lightman J to the development of the remedy of stay in the field of forum non conveniens and absence of the plaintiff's solicitors' authority do not seem to me to

carry the matter further on this aspect of the court's inherent jurisdiction.

In my view, the starting point in any case where a stay is sought in circumstances which are not provided for by Statute or Rules of Court, should be the fundamental principle that in this country an individual (who is not under a disability, a bankrupt or a vexatious litigant) is entitled to untrammelled access to a court of first instance in respect of a bona fide claim based on a properly pleaded cause of action, subject only to the sanction or consideration that he is in peril of an adverse costs order if he is unsuccessful, in respect of which the opposing party may resort to the usual remedies of execution and/or bankruptcy if such order is not complied with. This principle is of course subject to the further proviso that, if the court is satisfied that the action is not properly constituted or pleaded, or is not brought bona fide in the sense of being vexatious oppressive or otherwise an abuse of process then the court may dismiss the action or impose a stay whether under the specific provisions of the RSC or the inherent jurisdiction of the court.

Imposition of a requirement that security for costs be provided subject to the sanction of a stay is a plain fetter upon the exercise of such right of access. That is a principle underlying and recognised by Order 23 which excludes from its regime as to the provision of security any individual who does not fall within the categories specifically provided for.

In those circumstances, it seems to me that, when, in the course of an action which is properly constituted and pleaded and which is conceded to be brought bona fide, the defendant applies for a stay unless security is provided in respect of his costs, for the court to grant a stay on the grounds of its inherent jurisdiction is in principle to act in opposition, rather than as a supplement, to the provisions and underlying policy of the RSC.

There are two conflicting considerations involved in such a case. One is the <u>right</u> of an individual plaintiff freely to pursue a bona fide action lawfully brought. The other is the <u>interest</u> which the defendant has in being protected as to his costs in the event he is successful. In my view, the former has hitherto been recognised, and rightly recognised, as paramount, subject to such protection from its consequences as (a) the legislature or rule-making authority has seen fit to provide

to the defendant by way of enforcement or provision for security and (b) the court has provided under its inherent jurisdiction to prevent abuse of its process. In this case, the defendant seeks to achieve under (b) a wider basis of protection than it has hitherto been prepared to grant.

I consider that, if such extension is to be effected, it should be by way of an addition to the Rules of Court and not in the guise of a condition attached to an application for a stay in circumstances where no abuse of process is alleged or has been demonstrated.

So far as the order apparently made for security for costs in Broxton -v- McClelland is concerned, it is not apparent on what grounds the order was made: see the report of a later stage in the proceedings at [1995] EMLR 385 in which the making of the earlier order for security is mentioned. While it appears that it may have been made on the grounds that the plaintiff's action was being maintained by a third party, it is not clear what points were taken in the course of those proceedings, in particular in relation to abuse of process. What is clear is that Drake J., at a later stage, struck out the action as an abuse of process on the grounds of the ulterior motive of the maintainer, only to be reversed by the Court of Appeal in the decision reported under the reference above.

It seems to me likely that, when Kennedy LJ referred in Condliffe's case to the entitlement (by which he plainly meant inherent jurisdiction) of the court "to protect its own procedures", the principle upon which Lloyd J also founded his judgment, he was intending to refer to the inherent powers of the court to prevent abuse of its process, i.e. those powers which

> "A court must enjoy ... in order to enforce
> its rules of practice and to suppress any abuses of
> its process and to defeat any attempted thwarting of
> its process".

per Lord Morris in Connelly -v- DPP [1964] AC 1254at 1301;

Certainly the foundation of the submissions of Mr. Eady QC as counsel for the defendants in the Condliffe case, was his assertion that maintenance is still an abuse of process: see p.758.

The "procedures" to which Kennedy LJ referred as requiring protection, were not in fact provisions of the rules of court said to be ignored or abused by misuse or circumvention. They were,

as he went on to make clear, a reference to the principle that in the ordinary way costs follow the event, which, quoting Sir Thomas Bingham MR,

> ".. is of fundamental importance in deterring plaintiffs from bringing and defendants from defending actions which they are likely to lose".

However, the context in which that observation was made in Roache was quite unrelated to the problem in this case. It was quoted by way of introduction to a discussion of the court's discretion to award costs, in the context of a payment-in. It was equated in "fundamental importance" to a second principle namely that, where a plaintiff claimed a financial remedy in debt or damages and the defendant paid into court a sum not accepted by the plaintiff which was equal to or greater than the sum recovered by the plaintiff, the plaintiff ordinarily is ordered to pay the defendant's costs from the date of payment in. The case was concerned with entitlement to an order for costs and not with questions of security or enforcement. Whilst accepting entirely the observations of Kennedy LJ. that the court should be willing to exercise its inherent jurisdiction:

> "if the circumstances suggest that the litigating
> party or the maintainer may not be bona fide"

I venture to disagree with his observation (in the disjunctive rather than the conjunctive) that it should be prepared to intervene simply on the ground:

> "that, if that party were to lose, an order for costs
> would be difficult to enforce against the maintainer".

Presumably that ground was intended to reflect the observations of Lord Denning concerning the need for the maintainer who lacks a familial connection or other common or "legitimate" interest to accept liability for the successful adverse party's costs. However, two reservations need to be stated in that respect. Since those observations were made, the court by subsequent enactment of S.51(1) of the Supreme Court Act has been provided with the power in appropriate cases to order maintainers to pay the costs of a maintained action. To that extent any argument that the court should grant a stay in respect of maintained proceedings has been much weakened. Further, to put the power of the court to

grant a stay simply upon the possible difficulties of enforcement against a maintainer, seems to me to go further than anything which Lord Denning was contemplating when making his observations. The test of "legitimate" interest according to which the acceptability of the maintenance has hitherto fallen to be judged has depended upon examination of the interest and motives of the maintainer rather than upon mere questions of enforceability.

CONCLUSION.

I would limit the jurisdiction to grant a stay in advance of a determination under S.51(1) to cases where it can clearly be demonstrated that there exists a situation amounting to abuse of process.

Whether or not that is correct, as a matter of procedure I have no doubt, that, as stated by Kennedy LJ:

> "Normally, the better course will be to let the action proceed to trial and then, if need be, consider the powers of the court under Section 51 of the Supreme Court Act 1981 (as in MacFarlane's case [1995] 1 WLR 366".

That, as it seems to me, would have been the appropriate course in this case.

I say that for the following reasons.

There was a lack of evidence placed before the Judge to demonstrate (i) that, if (as suggested) the plaintiff was receiving assistance from family or other trusts interested in his welfare they were unwilling or unable to support him in respect of any costs order made against him; (ii) that in any event, the interest of such trust or trusts to assist was not of a "legitimate" kind, given the whole basis of defendants' case that the trusts were closely connected with the plaintiff and able and willing to act in his interests.

Thus the application of the defendants was not an application for information to confirm what appeared to be a strong prima facie case of abuse. It was rather a fishing expedition to see if a case of abuse could be made out when, even if the defendants could establish their suspicion as to the facts, it would remain highly arguable whether the position of the plaintiff or his putative maintainer was one

of abuse at all. Further, the granting of the application was plainly likely to give rise to issues of fact and arguments of law which would have to be tried before the action in a position where (a) trial of the action was imminent and might well have to be adjourned if trial of the issues raised was to be accommodated; (b) the application was in support of no more than a speculative right of the defendants to an order for costs following trial; (c) restoration of the application would in any event not be determinative of whether or not, following a trial in which the defendants were successful, an order would necessarily be made against the maintainer.

Finally, in relation to questions of possible oppression, this was not a case where the defendants making the application would themselves suffer financial hardship if for any reason they obtained an order for costs which could not be enforced, because they enjoyed the benefit of an indemnity from Planal. It seems to me that all those considerations militated in favour of the Judge declining to make the order sought and leaving the matter to be dealt with, by means of an application under S.51(1) of the 1981 Act, if and when the defendants' right to costs was determined following the hearing of the action.

For these reasons, I would allow the appeal.

LORD JUSTICE MILLETT:

I agree.

It is not an abuse of the process of the court for an impecunious plaintiff to bring proceedings for a proper purpose and in good faith while being unable to pay the defendant's costs if the proceedings fail. If the plaintiff is an individual the court has no jurisdiction to order him to provide security for the defendant's costs and to stay the proceedings if he does not do so. It may be unjust to a successful defendant to be left with unrecovered costs, but the plaintiff's freedom of access to the courts has priority. The risk of an adverse order for costs and consequent bankruptcy has always been regarded as the appropriate deterrent to the bringing of proceedings which are likely to

fail. Where there is no risk of personal bankruptcy, as in the case of a plaintiff which is a limited company, the court has a statutory jurisdiction to award security for costs; but even in this case it will frequently not do so if this will have the effect of stifling bona fide proceedings. It is preferable that a successful defendant should suffer the injustice of irrecoverable costs than that a plaintiff with a genuine claim should be prevented from pursuing it.

Before 1967 maintenance was not only contrary to public policy but also both tortious and criminal. Even so, it was not an abuse of the process of the court for a plaintiff without the means to pay his own costs let alone to meet those of the defendant to bring proceedings with financial assistance provided by a third party, and the court would not stay such proceedings on this ground: Martell v Consett Iron Co. Ltd. [1955] Ch. 363 CA.

In that case Jenkins LJ gave three reasons for this. First, it was well settled that the fact that an action was being illegally maintained was no defence to the action, and it was impossible to reconcile this with the proposition that it afforded a proper ground for a stay of the proceedings. Secondly, once there had been illegal maintenance the proceedings were irretrievably tainted; the taint could not be purged except by discontinuing the proceedings and bringing a fresh action. But this would effectively make maintenance a defence to the action, which it was not. Thirdly, it was undesirable that the question whether the action was being illegally maintained should be adjudicated upon in interlocutory proceedings in the action, for this procedure involved the trial of what was, at least theoretically, still a crime, in the absence of the accused. At first instance Danckwerts J gave another reason. Damage was the gist of the tort of maintenance, and it was undesirable to stay proceedings at a stage when it was uncertain that any damage would be suffered.

In Grovewood Holding Ltd. v James Capel & Co. Ltd [1995] Ch. 80 Lightman J expressed the view that the decision in Martell v Consett Iron Co. Ltd. had ceased to have any force now that the crime of maintenance has been abolished and other grounds for a stay are recognised which do not constitute defences. I do not find this reasoning persuasive. The examples which he gave of cases where the court grants a stay on grounds which do not constitute defences were: absence of

authority of the plaintiff's solicitors, forum non conveniens, and the fact that the action is brought for a collateral purpose. The first and third can be dismissed at once, since they are both examples of an abuse of the process of the court. The second is a special case; for the plaintiff is not denied his right to bring proceedings, but rather told to bring them elsewhere, either before a foreign court or an arbitrator. The stay is merely the procedural mechanism by which the court declines jurisdiction. But in any case the examples are hardly new; all of them existed in 1955; none of them weakens the force of the reasoning in Martell v Consett Iron Co. Ltd. Moreover, I find it difficult to see how the decriminalisation of maintenance can form any rational basis for distinguishing the decision. It is, to say the least, counterintuitive to reason that conduct which was not regarded as an abuse of the process of the court even when it constituted a crime and a tort should be regarded as an abuse of its process when it is neither.

Unlike the defendants in Martell v Consett Iron Co. Ltd., however, the Defendants in the present case do not seek a permanent stay of the proceedings. They seek disclosure of the identity of the party providing the finance with a view to obtaining an undertaking from him to pay their costs if the proceedings are unsuccessful, and ultimately security for those costs, with a stay of the proceedings if these are not provided.

In a number of cases starting with Hill v Archbold [1968] 1 QB 686 Lord Denning MR suggested that a stranger who funded litigation should be required to undertake to pay the costs of the other side, and that the proceedings could be struck out if such an undertaking was not forthcoming. Lord Denning did not, however, suggest that the court should require the undertaking to be fortified or order the third party to provide security for costs. Thus the mischief which he identified was not the risk that the successful party might be left with unrecovered costs, but that proceedings might be financed by a party who was immune from personal liability for an adverse order for costs. This mischief has now been remedied by Section 51 of the Supreme Court Act 1981.

The jurisdiction conferred by Section 51, however, is normally exercised after trial, and then with caution and only after proper consideration of all the circumstances. It is

inappropriate to preempt the decision by exacting an undertaking from the third party at an interlocutory hearing before the outcome of the proceedings is known. It was submitted that the undertaking could be expressed as an undertaking to pay the costs of the successful defendant if ordered to do so, and that this would facilitate recovery from a party who was resident outside the jurisdiction. But such an undertaking would add nothing unless it was accompanied by security, and the Judge recognised that the court could not order security in these circumstances. No provision for such a case is made by RSC Order 23, which the court has no jurisdiction to supplement: see C.T.Bowring & Co. (Insurance Ltd.) v Corsi Partners Ltd. [1994] 2 Lloyd's Rep. 567. Even if it were thought desirable to make security available in such circumstances, it would not be open to Parliament or the Rules Committee to distinguish between the case where the finance was provided by a party resident within the jurisdiction (where there would be no need to facilitate enforcement) and one where it was provided by a resident of the European Union.

In making the order for disclosure in the present case the Judge was adopting the approach foreshadowed by Kennedy LJ in Condliffe v Hislop [1996] 1 WLR 753 at p. 761. In my judgment such an approach would not be justified unless there was clear evidence of an abuse of the process of the court and, for the reasons I have given, the presence of unlawful maintenance is not by itself such an abuse.

ORDER: Appeal allowed. No order for costs.

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