Serial No. CP 2008/94

Serial No. CP 2009/42

IN THE HIGH COURT OF JUSTICE OF THE ISLE OF MAN

CHANCERY DIVISION

IN THE MATTER OF KAUPTHING SINGER & FRIEDLANDER (ISLE OF MAN) LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT 1931

SKELETON ARGUMENT ON BEHALF OF THE TREASURY

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1. This skeleton argument is on behalf of the Treasury of the Government of the Isle of Man ("**the Treasury**"). It responds to the skeleton argument on behalf of the Depositors' Action Group ("**DAG**") dated 26 May 2009.

2. In that skeleton argument, DAG seeks various costs orders in relation to the joint petition of Kaupthing Singer & Friedlander (Isle of Man) Limited ("**the Company**") and the Financial Supervision Commission dated 9 October 2008 for the winding-up of the Company ("**the Winding Up Petition**") and the joint petition of the Company and the Treasury dated 2 April 2009 under Section 152(1) of the Companies Act 1931 ("**the SoA Petition**").

3. The costs orders sought include orders that:

   (1) the Treasury should pay DAG's costs of the SoA Petition;

   (2) the Treasury should pay the Company's costs of the SoA Petition;

   (3) the Treasury should pay DAG's costs of the Winding Up Petition.

4. The costs orders sought are extremely unusual in the context of winding up petitions and schemes of arrangements and are in some cases unprecedented even in England, where there has been a greater incidence of schemes of arrangement.

5. The Treasury submits that these costs orders are be unjustified and no costs orders of this nature should be made in the present case.

Background

6. It is trite that the Treasury is part of the Government of the Isle of Man. In participating in the present proceedings, the Treasury has not sought to advance any commercial interest of its own; rather it has been concerned to investigate whether there was any viable proposal which offer an improvement on the position of depositors in the Company over their position on a winding-up of the Company and to put any such proposal to depositors so that they could have the opportunity of considering if for themselves. At the same time the Treasury has also sought to bear in mind the interests of the Isle of Man generally as a commercial and financial centre.

7. In conjunction with the Company and the Liquidators Provisional, the proposal for a scheme of arrangement under Section 152 of the Companies Act 1931 ("**the Scheme**") was developed. By its order of 9 April 2009 the Court directed that meetings of Scheme Creditors be convened for the purposes of considering and

voting on the Scheme. By so doing the Court determined that the Scheme was a proper one to be put to creditors.

8. In the event the Scheme was not approved by the requisite statutory majorities of Scheme Creditors. However, it would be a non sequitur to suggest that this means that the promoters of the Scheme somehow acted in a culpable or blameworthy manner so that they should be punished in costs. As noted above, the Scheme was a proper one to put to creditors and it was right that the creditors should have had the opportunity to express their views on the Scheme.

9. It should also be noted that, although the statutory majorities for approval of the Scheme were not satisfied in each class, significant numbers of creditors voted in favour of the Scheme (see the affidavit of Michael Simpson dated 22 May 2009). In particular:

   (1) in the Small Depositors' Class the Scheme was approved by heavy majorities of creditors both by number (83.64%) and value (85.17%);

   (2) in the Non-Protected Creditors' Class the Scheme was approved by a heavy majority of creditors by number (92.86%) but was not approved by a majority of the creditors by value due to the vote against of a single creditor who had the largest claim (representing by itself 90.64% of the claims by value);

   (3) in the Large Depositors' Class, the Scheme was not approved by the requisite majorities by either number or value, but even in this class significant numbers of creditors (825 with over 65% of the claims by value – amounting to over £400 million) voted in favour.

10. The Treasury regrets that the Scheme was not approved by the requisite majorities of Scheme Creditors as it considers that the Scheme offered significant advantages to

depositors (as those Scheme Creditors who voted in favour of Scheme would have appreciated). However, the Treasury is also entirely satisfied that it was appropriate to give depositors the opportunity of the Scheme as an alternative to liquidation. The Treasury obviously respects the wishes of the Scheme Creditors as expressed through the votes at the three meetings.

11. The Treasury therefore emphatically rejects the central thesis of DAG's argument as summarised in paragraphs 6 and 7 of its skeleton argument. The Scheme was a proper one to be put to creditors and the creditors have now spoken (with significant numbers of creditors have spoken in favour). It is simply illogical and a non sequitur to assert that in these circumstances "*the Treasury should suffer the consequences*" as if it somehow follows from the failure of the Scheme that the Court should cast around to identify persons who it can be said are to be "*blamed*" for the failure. Also it appears to be accepted by DAG in paragraph 6 of its Skeleton that:-

    (a) DAG opposed the Scheme on 9th April 2009 but that

    (b) throughout the process the DAG urged the Treasury to improve the terms of the SoA.

    DAG did not come out against the Scheme until 9th April 2009. DAG has never been against the Scheme in principle but rather engaged in a commercial bargaining exercise along the way to see how much they could get out of any Scheme.

12. Further, although for its own purposes, DAG now seeks to characterise the Treasury as "*Petitioner and active promoter of the SOA*" (DAG skeleton para. 16), this fails to recognise that the SoA Petition was the joint petition of the Company and the Treasury, that the Scheme proposal involved the joint efforts and co-operation of the Treasury and the Company itself through the Liquidators Provisional and, indeed, that the Scheme could not have been promoted without the consent of the Company (see **Re Savoy Hotel** [1981] 1 Ch. 351).

13. Finally, it should be noted that the Treasury has itself incurred significant legal and other costs in connection with the proposed Scheme. The Treasury does not seek any order in relation to these costs and will bear them itself. The consequence of this is that to the extent work on the proposed Scheme was undertaken by the Treasury then the costs of this will not in any event fall on the Company. This is an important point which needs to be borne in mind in any debate about the incidence of costs.

14. With these remarks in mind, it is appropriate to turn to consider the relevant principles of law. In doing so, it is useful to consider first the position in relation to winding up petitions and then to consider the position in relation to schemes of arrangements.

The Winding Up Petition

Costs of Petitioners and Supporting Creditors

15. The usual order on a successful winding up petition is for the costs of the petitioner to be paid from the assets of the company: **Re Humber Ironworks Co** (1866) L.R. 2 Eq. 15. Lord Romilly MR stated (at p.18):

> "Where the Court grants the prayer of the Petition, of course it will give no costs to persons who appear to oppose the Petition; because in that case the Court makes an order against them: it gives the costs of the Petitioner and those of the company of the estate; and if a number of persons, whether shareholders or creditors, appear to ask for an order to wind up the company, in that case I am of opinion that the Court ought to allow, out of the estate, one set of costs amongst them all, and they must arrange between themselves in what manner they are entitled to such costs. I will not allow a series of costs to them."

16. Likewise, the usual orders would be for one set of costs for any supporting creditors who pressed for an order to be paid from the assets of the company: **Ibid** and **Re European Banking Co** (1866) L.R. 2 Eq. 521 per Sir R T Kindersley V.C. at p.523.

17. Applying the usual rule, the Petitioners together with DAG, as the supporting creditor, would be entitled to their costs from the assets of the Company. The Treasury would not oppose such an order being made in the present case.

18. However, DAG seeks an order that its costs be paid by the Treasury apparently on the basis that the Treasury was one of the promoters of the Scheme and the promotion of the Scheme caused adjournments of the Winding Up Petition.

19. This would be an extremely unusual costs order, which is, so far as we are aware, without precedent. Even in the case of **Re Esal Commodities Ltd** [1985] BCLC 450 which is relied on heavily by DAG, the banks who had proposed the scheme and opposed the winding up were not ordered to pay the costs of the supporting creditors who had opposed the scheme and supported the winding up. Harman J in fact said (at p.462h) that it would be "*quite wrong*" to order the lead bank (Punjab National Bank) to pay such costs:

> "In my judgment it would be quite wrong to order PNB to pay the costs of any of those creditors who pressed for and obtained a winding-up order. I have already given by reasons why I do not think that PNB should be punished, or the lead banks generally should be punished, for the course of action which they took by inflicting on them other creditors' costs."

20. Likewise, there is no reason why the Treasury should be "*punished*" in the present case.

Costs of the Company

21. The usual rule is that the company's costs of preparing for and appearing at the hearing of a successful winding-up petition are ordered to be paid as an expense of the liquidation: **Re Humber Ironworks Co** (1866) L.R. 2 Eq. 15.

22. In certain cases in the past in England the Court has made what has been referred to as a "*Bathampton*" order (see **Re Bathampton Properties Ltd** [1976] 1 WLR 168) under which the company's costs are not recoverable until the unsecured creditors are paid in full. The effect of such an order is in effect to punish the company's advisers who may not be able to recover their costs from the company.

23. DAG seeks an order that the Company's costs of the Winding Up Petition be subject to a *Bathampton* order.

24. This is primarily a matter which affects the advisers to the Company whose costs may be irrecoverable if such an order were to be made. However, the Treasury would note that it is an extremely unusual and draconian order for the company's costs relating to a successful petition to be ordered to be paid, whether directly or indirectly, by a third party. In cases in England where such an order has been made, there has typically been fraud on the part of the third party who stands as the protagonist behind the company: see e.g. **Re Aurum Marketing Ltd** [2000] 2 BCLC 645.

25. As to the making of a *Bathampton* order, the first point is that the making of a *Bathampton* order is no longer considered appropriate in England. As Hoffmann J pointed out in **Re a Company (No 004055 of 1991)** [1991] 1 WLR 1003 the effect of such an order is to deprive the company's solicitors of their costs (1006C):

> "Prima facie however the solicitors are retained by the company and must look to the company alone for their costs. If the company is insolvent, the effect of an order in Bathampton form is to deprive them of their costs. It seems to me unfair to make such an order on grounds which have no necessary connection with the conduct of the solicitors themselves."

26. Hoffmann J noted that there is power in the court to make an order that a third party bear the costs (in England the existence of this jurisdiction was established in **Aiden Shipping Co. Ltd v Interbulk Ltd** [1986] A.C. 965 although, as noted above, this power is sparingly exercised). Hoffmann J said (1006G):

> "The court therefore now has power to do directly what Brightman J tried to do indirectly in Bathampton. In these circumstances, I find it difficult to imagine a case in which it would be proper in future to make an order in the Bathampton form."

27. It is surprising that the comments of Hoffmann J in this case where not drawn to the Court's attention by DAG in its skeleton argument in the context of its attempts to persuade the Court to make a *Bathampton* order in the present case.

28. It is also important to note that the order in **Bathampton** was made in the particular context of an insolvent company incurring costs in unsuccessfully opposing a winding up petition on the ground that the debt was disputed, when the result of the delay was in the interests of the beneficial owner of the company (a Mr Harrison) by giving the company more time to realise assets which could result in a more advantageous price and thus a surplus payable to the beneficial owner. The Court regarded that the company as being the alter ego of Mr Harrison (p.174G). Brightman J stated (p.174F-G):

> "I do not charge Mr. Harrison with lack of good faith but why, I ask myself, should the beneficial owner of the company's capital be entitled to finance such litigation at the expense of the creditors? In the instant case Mr. Harrison had little or nothing to lose and everything to gain by causing the company to dispute the debt. If he failed in that litigation, which he has promoted, no hardship is caused if the solicitors' bill falls to be paid by him personally rather than by the general body of creditors."

29. The position is very different in the present case where there is no beneficial owner standing behind the Company for whose personal benefit the Winding Up Petition was adjourned.

Overall

30. There is no reason to depart from the usual rules that the costs of the Petitioners, the Supporting Creditors and the Company be paid from the assets of the Company.

The SoA Petition

31. Similar principles to those outlined above also apply in relation to the costs of the scheme of arrangement. For these purposes, it is not disputed that it is appropriate to consider that the costs of the Winding Up Petition and the costs of the SoA Petition together (cf. DAG skeleton argument para. 8) since they are in effect two sides of the same coin.

Costs of DAG

32. The usual rule is that DAG's costs, as creditors who opposed the Scheme and supported the Winding Up Petition, should be paid from the Company's assets. However, DAG seeks an order that its costs of the SoA Petition should be paid by the Treasury. This would be a very unusual order, for which there is no obvious precedent.

33. Even in the **Esal** case (the authority heavily relied on by DAG), the judge expressly refused to order that the banks who had proposed and supported the scheme in that case should themselves bear the costs incurred by opposing creditors (461i):

> "Thus, although I concur that criticisms advanced by the body of opposers, if I may so characterise them, were sound criticisms which were likely to have considerable effect on the court on considering approval of the scheme, yet they do not in my judgment come to such as to make the banks guilty of such frivolous and careless conduct in presenting the scheme as to make it right that the costs of opponents of the scheme should fall upon the banks. I cannot see that as between creditors who take different views it is right, save in the most exceptional cases, to say that one set of creditors should bear another set of creditors' costs of a proposed scheme of arrangement."

34. Indeed, one of the surprising features of the arguments put forward by DAG in its skeleton argument is that, although it relies very heavily on the **Esal** case, it does not anywhere face up to the fact that the judge in the **Esal** case expressly rejected the

making of the very orders which DAG is seeking to invite the Court to make in this case.

35. Applying the same test as was set out by Harman J in **Esal** in the present case, it cannot be said that the Treasury has been guilty of "*such frivolous and careless conduct*" to make it right that it should itself pay the costs of DAG. On the contrary, the Treasury has acted in a conscientious and responsible manner. The fact that the Scheme Creditors exercised their democratic right to reject the proposed Scheme does not make the Treasury's conduct frivolous and careless: it plainly was not.

Costs of the Company

36. The notion that the costs of the Company, which through the Liquidators Provisional was a joint petitioner, should be borne by the Treasury as the other joint petitioner is an outlandish and startling proposition for which there is no authority. There is no warrant for this Court going out on a limb in this way. Such costs should be borne by the Company in the usual way as an expense of the liquidation.

Conclusion

37. The Court is invited to make the usual orders for the costs as indicated above.

4th June 2009

GOUGH Advocates

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SKELETON ARGUMENT

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Court of Appeal before the case could go to the House of Lords. Lord Field said, at p. 216:

> "It seems to me that if your Lordships were to say now 'We will give leave' and the Court of Appeal must enforce that, it would be imposing upon them the duty of giving a leave, as their leave, which they in their own judgment think ought not to be given."

In our opinion the reasoning in that case applies mutatis mutandis to an appeal to the Court of Appeal against a refusal of the High Court to extend time. Although the present position is governed by R.S.C., Ord. 59, r. 3 (5), we do not think, in the way in which the time limit is today imposed by the Rules of the Supreme Court and the power to extend the time is now worded, that there is any material difference for the purpose of the present case between the relevant Rules of the Supreme Court with which we are concerned and Ord. 58, r. 15.

When the time for appeal expires, there is an obstacle to the right of appeal which must be decisive unless the court orders its removal by extending the time. An extension of time involves a positive order of the court. It is not surprising, therefore, that the legislature should regard it as necessary to make specific reference to it when it decided that there should be no appeal against such an order. The fact that no mention is made of a decision to refuse an extension of time is explicable upon the basis that such a refusal is not considered to be an order, and consequently does not come within section 27 at all.

Appeal dismissed with costs.
Order for costs not to be enforced without leave of the court.
Legal aid taxation of applicant's costs.

Solicitors: *Darby & Son, Oxford*; *Bower & Bowerman, Bicester.*

L. G. S.

In re SAVOY HOTEL LTD

1981 April 9, 10, 14, 15 — Nourse J.

Company—Scheme of arrangement—Class meetings—Board of company opposing scheme—Application to convene separate meetings of A and B shareholders—Whether scheme "between" company and members—Whether court having jurisdiction to sanction scheme and direct separate meetings to be convened—Companies Act 1948 (11 & 12 *Geo.* 6, *c.* 38), *s.* 206 (1) (2)

A company's share capital consisted of A and B shares, ranking pari passu in all respects in proportion to amounts paid up thereon, except that on a poll the B shares carried 40 times as many votes as A shares of an equivalent nominal

value. The effect of that was that the holders of the A shares, who together owned 97·7 per cent. of the equity, were only entitled to 51·45 per cent. of the votes, while the holders of the B shares, who owned 2·3 per cent. of the equity, were entitled to 48·55 per cent. of the votes. Moreover 65·26 per cent. of the B shares, with 31·68 per cent. of the votes, were held either beneficially or as trustees by members of the board, so that control of the company by the A shareholders existed only in theory, and in practice the B shareholders could control the company, and could block any general offer from outside. The applicant, which was the beneficial holder of 88,000 A shares, of which 44,000 were registered in its name, wished to gain control of the company by means of a scheme of arrangement under section 206 of the Companies Act 1948 [1] but the board of the company regarded the proposals as unacceptable. The applicant, therefore, issued an originating summons seeking liberty to convene separate meetings of the A and B shareholders, and consequential directions for convening such meetings.

On the questions whether the court had jurisdiction to sanction the scheme without the company's approval and whether separate meetings should be convened:—

Held, (1) that the rights and obligations existing between the company and its members would be sufficiently affected by the proposed scheme for it to constitute an arrangement "between" the company and its members for the purposes of section 206 of the Companies Act 1948 (post, pp. 361E—362A).

In re Guardian Assurance Co. [1917] 1 Ch. 431, C.A. and *Singer Manufacturing Co.* v. *Robinow*, 1971 S.C. 11 applied.

(2) That the approval of the company to the scheme of arrangement was essential and, therefore, the court would have no jurisdiction to sanction the proposed scheme without such approval (post, pp. 364A–D, G—365B, H—366A).

In re International Contract Co. (*Hankey's Case*) (1872) 26 L.T. 358 and *In re Oceanic Steam Navigation Co. Ltd.* [1939] Ch. 41 applied.

(3) That, although the court had power to convene separate meetings of the A and B shareholders, it ought not to do so in the exercise of its discretion, since the board of the company had withheld its approval, and the scheme contained no provision for obtaining approval from the company in general meeting; that, although it was possible for the board to change its mind before the stage at which the scheme would normally come back to be sanctioned by the court, it was most improbable that that would happen and, in those circumstances, the meetings would serve no useful purpose (post, p. 366A–E).

The following cases are referred to in the judgment:

Alabama, New Orleans, Texas & Pacific Junction Railway Co., In re [1891] 1 Ch. 213, C.A.

Calgary and Edmonton Land Co. Ltd. (*In Liquidation*), *In re* [1975] 1 W.L.R. 355; [1975] 1 All E.R. 1046.

Dailuaine-Talisker Distilleries Ltd. v. *Mackenzie*, 1910 S.C. 913.

Dominion of Canada Freehold Estate & Timber Co. Ltd., In re (1886) 55 L.T. 347.

Dorman Long & Co. Ltd., In re [1934] Ch. 635.

[1] Companies Act 1948, s. 206 (1) and (2): post, p. 357C–E.

East of England Banking Co., In re (1872) L.R. 7 Ch. App. 309.
English, Scottish and Australian Chartered Bank, In re [1893] 3 Ch. 385, C.A.
Guardian Assurance Co., In re [1917] 1 Ch. 431, C.A.
Hartland, In re [1911] 1 Ch. 459.
Hector (R.L.) & Sons Ltd., In re, 1947 S.C. 641.
International Contract Co., In re (Hankey's Case) (1872) 26 L.T. 358; 20 W.R. 506.
N. F. U. Development Trust Ltd., In re [1972] 1 W.L.R. 1548; [1973] 1 All E.R. 135.
National Bank Ltd., In re [1966] 1 W.L.R. 819; [1966] 1 All E.R. 1006.
Oceanic Steam Navigation Co. Ltd., In re [1939] Ch. 41; [1938] 3 All E.R. 740.
Peebles (Bruce) & Co. Ltd. v. *William Bain & Co. Ltd.*, 1918 S.C. 781.
Singer Manufacturing Co. v. *Robinow*, 1971 S.C. 11.

The following additional cases cited in argument were supplied by courtesy of counsel:

Albert Life Assurance Co., In re (1871) L.R. 6 Ch.App. 381.
Anglo-Continental Supply Co. Ltd., In re [1922] 2 Ch. 723.
Calgary and Edmonton Land Co. Ltd. (In Liquidation), In re [1975] 1 W.L.R. 355; [1975] 1 All E.R. 1046.
Dynevor, Dyffryn, and Neath Abbey Collieries Co., In re (1879) 11 Ch.D. 605, C.A.
Garner's Motors Ltd., In re [1937] Ch. 594; [1937] 1 All E.R. 671.
Odhams Press Ltd., In re [1925] W.N. 10.
Shaw v. *Royce Ltd.* [1911] 1 Ch. 138.

ORIGINATING SUMMONS

The applicant, Trust House Forte Ltd. ("T.H.F.") held 88,000 A shares in the respondent company, the Savoy Hotel Ltd. ("Savoy"), and wished to gain control of the Savoy by means of a scheme of arrangement under section 206 of the Companies Act 1948. Although the holders of the A shares held 97·7 per cent. of the equity, they were only entitled to 51·45 per cent. of the votes, whilst the holders of the B shares, who owned only 2·3 per cent. of the equity, were entitled to 48·55 per cent. of the votes. Moreover, 65·26 per cent. of the B shares with 31·68 per cent. of the votes, were held either beneficially or as trustees by members of the board of the Savoy, who opposed the take-over bid. Accordingly by an originating summons dated March 27, 1981, T.H.F. sought an order that it be at liberty to convene separate meetings of the holders (i) of the A ordinary shares of 10p each of Savoy (other than those already beneficially owned by T.H.F.) and (ii) of the B ordinary shares of 5p each of Savoy, for the purpose of considering and, if thought fit, approving with or without modification a scheme of arrangement between the Savoy and the holders of its classes of shares. The summons further asked that directions might be given as to the method of convening such meetings and as to the place where the same were to be held and that a chairman of each of such meetings might be appointed and ordered to report the results thereof to the court, and for such other directions as the court might think fit and expedient.

The summons was heard in chambers but judgment was given in open court on April 15. A

The facts are stated in the judgment.

Andrew Morritt Q.C., *Richard Sykes* and *David Unwin* for the applicant.

Donald Nicholls Q.C. and *Mary Arden* for the respondent. B

NOURSE J. This application is the first step in an attempt by Trust House Forte Ltd. ("T.H.F.") to acquire control of the Savoy Hotel Ltd. ("the Savoy") by means of a scheme of arrangement sanctioned by the court under section 206 of the Companies Act 1948.

T.H.F. seeks an order under section 206 (1) that it be at liberty to convene separate meetings of the holders of the A and B ordinary shares C in the Savoy for the purpose of approving the proposed scheme. The application is opposed by the Savoy. It is very unusual, if not unknown, for an application under subsection (1) to be opposed, but that is because the application is usually made by the company itself. Shortly stated, the Savoy's contention in this case is that there is no jurisdiction to sanction the scheme, at all events without its approval. That approval has been withheld by the board and the scheme does not provide for it to be D obtained from the company in general meeting. Therefore, says the Savoy, and whatever the outcome of the meetings, the court can see now that the scheme will not be sanctioned under subsection (2) and it ought not to convene meetings which will not serve any useful purpose.

In 1953 and 1954 there were two unsuccessful attempts to take over the Savoy. In April 1955, in order to protect itself against future attempts E of the same kind and in recognition of the support which it had received during the struggle of 1953 to 1954, the company reorganised its ordinary share capital in such a way as to give to all its shareholders at that time a means of possessing substantially increased voting rights in the long term. Its present issued ordinary share capital, which is fully paid up, consists of 27,687,825 A shares of 10p each and 1,306,267 B shares of 5p each. F Voting rights apart, the A and B shares rank pari passu in all respects in proportion to the amounts paid up thereon respectively. But on a poll the B shares carry 40 times as many votes as A shares of an equivalent nominal value. That means that the holders of the A shares, who together own 97·7 per cent. of the equity, are entitled to only 51·45 per cent. of the votes, while the holders of the B shares, who together own 2·3 per cent. of the equity, are entitled to no less than 48·55 per cent. of the votes. G Moreover, about 65·26 per cent. of the B shares, with about 31·68 per cent. of the votes, are held, either beneficially or as trustees, by members of the board. The result is that the control of the Savoy by the A shareholders exists only in theory. In practice the B shareholders can control the company in general meeting and can, if they choose, block any general offer from outside. H

All this has been well recognised for many years, and until recently it allowed the Savoy to wear the appearance of impregnability. But if the route which T.H.F. now proposes to take is open, and if a three-fourths

majority of the A shareholders voting at the separate meeting of that class approves a scheme which is later sanctioned by the court, T.H.F. will have been able to acquire 51·45 per cent. of the voting rights on what could well be a considerably smaller percentage of the votes. For example, even if all the A shareholders voted at the class meeting it would only need a three-fourths majority, or about 38·6 per cent. of the votes as a whole, for the scheme to be approved. That has led T.H.F.'s proposals to be variously described on the Savoy side as a take-over by sleight of hand or by the back door. Assertions of that sort, although no doubt valuable in the forum of public debate as a justification for the stance which has been adopted by the Savoy, play no part in legal argument. Indeed they have not been put forward as such. If the door is there you will not close it by papering it over with coloured labels. On the other hand, the Savoy is perfectly entitled to contend in this court that the door is an illusion in the first place, and that course is not something which needs to be justified. All this is familiar ground. An emphasis of it is desirable when a case which has aroused public and financial interest passes, at least temporarily, into the courtroom. It is especially desirable when the outcome of the case depends on questions of jurisdiction whose resolution may affect other cases long after the echoes of this have ceased to sound.

T.H.F.'s proposals were publicly announced on March 12, 1981. I will refer to them in greater detail shortly. T.H.F.'s stated intention was that the separate proposals for each class would be effected by means of a scheme of arrangement under section 206, but it reserved the right to make general offers to acquire the whole of the share capital of the Savoy on the same financial terms, within overall time limits imposed by the City Code on Take-overs and Mergers. On the same day Sir Charles Forte, the executive chairman of T.H.F., wrote to Sir Hugh Wontner, the chairman of the Savoy, informing him of the proposals and the intended method of their implementation. He asked him to confirm that he was prepared to take appropriate steps to convene the statutory meetings and, if appropriate, thereafter to take the necessary steps to obtain the sanction of the court. Sir Charles ended by saying that T.H.F. would be prepared to call the meetings to implement its offers in the event of the Savoy's indicating its unwillingness to do so. That letter was answered on March 18, 1981, when Sir Hugh informed Sir Charles that the board of the Savoy regarded T.H.F.'s proposal as unacceptable. He added that the board further believed that it would be inappropriate to try to put the proposal into effect by way of a section 206 scheme of arrangement. Sir Hugh has confirmed in evidence that, other considerations apart, the board of the Savoy does not approve of the terms of the proposed scheme.

The result of Sir Hugh's letter was that on March 27 T.H.F. issued the summons which is now before the court. In addition to seeking liberty to convene separate meetings of the A and B shareholders it asks for consequential directions as to the method of convening them and so forth. Argument was heard in chambers on Thursday and Friday of last week and yesterday, when I said that I would give judgment in open court today on the question whether the meetings should be convened or not. I will try to state the arguments as fully as is reasonably possible.

T.H.F. is the beneficial owner of 88,000 A shares in the Savoy, of which 44,000 are registered in its name. It does not own and does not hold any B shares. The scheme proposed by T.H.F. is what is sometimes known as a transfer scheme. Shortly stated, it provides for the acquisition by T.H.F. of the whole of the issued share capital of the Savoy, other than the shares already beneficially owned by it, on terms that the holder of every 100 A shares should receive a specified number of T.H.F. ordinary shares or at his election £165 in cash, and that the holder of each B share should receive a specified number of T.H.F. ordinary shares or (at the like election) £9·75 in cash, and so in proportion for any greater or lesser number of A shares or B shares as the case may be, with provisions for adjustment.

The only provision of the scheme which in terms involves the participation of the Savoy is clause 1. Sub-clause (a) provides for the acquisition by T.H.F. of the A and B shares and confers power on it to appoint any person to transfer any of the shares in the place of the existing holders. Sub-clause (b) reads:

> "Savoy shall, subject to being satisfied that T.H.F. has made delivery, pursuant to sub-clause (b) of clause 7 of this scheme, of the documents of title and cheques required to be delivered by T.H.F. pursuant to sub-clause (a) of such clause 7 forthwith upon receipt thereof register any transfer of any scheme shares in favour of T.H.F. or its nominees which is executed in manner provided by sub-clause (a) of this clause and is duly stamped and issue to the transferee a certificate in respect of the scheme shares comprised in such transfer and Savoy shall effect such registration notwithstanding that the transfer is not accompanied by the certificate for the scheme shares comprised therein. Savoy shall not suspend the registration of transfers or close its register of members at any time in the period of 42 days after the effective date."

Clause 9 provides that the existing share certificates shall cease to be of value and shall at the request of T.H.F. be surrendered to it. The only other provision of the scheme to which I need refer is clause 13 which is headed "Partial operation of this scheme." That is in these terms:

> "Notwithstanding anything hereinbefore contained, if this scheme shall not have been agreed to by the statutory majority required by section 206 of the Companies Act 1948 at the meeting of the holders of the scheme A shares or the scheme B shares, summoned in accordance with such section and to consider and, if thought fit, to approve this scheme, or if this scheme shall not be sanctioned by the court in respect of either such class this scheme shall be capable of being modified, at the option of T.H.F., by the exclusion from the operation of this scheme of that class of shares in respect of which this scheme shall not have been so approved or sanctioned and by making such modifications to this scheme as may be approved by the court as necessary or desirable having regard to such exclusion."

That clause is of crucial importance to T.H.F. since, in the event of the scheme being approved by the A shareholders but not by the B share-

holders, it would enable T.H.F. to proceed with the further stages of the scheme in relation to the A shares alone.

I should say at this stage that many transfer schemes have in the past been approved by the court under section 206. There is another variant which is sometimes known as the cancellation and reduction scheme. Shortly stated, that type of scheme operates by way, first, of the cancellation of existing shares in exchange for a consideration, often in cash, received by the shareholders and, secondly, a consequential reduction of the company's capital. The court has not only to sanction the scheme but also to confirm the reduction. That type of scheme is generally more popular, because the cancellation of shares for a consideration in cash does not, like many transfer schemes, attract stamp duty. However, it cannot be carried out without the approval of the company, because a reduction of a company's capital can only be effected by special resolution.

I must now refer to the material provisions of section 206:

> "(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them, the court may, on the application in a summary way of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the court directs. (2) If a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company."

Subsection (3) provides, inter alia, that an order made under subsection (2) shall have no effect until an office copy has been delivered to the registrar of companies. Subsection (4) provides for the imposition of a fine on the company and every officer of the company in a case where it makes default in complying with subsection (3). I need not refer to subsection (5). Subsection (6) provides, inter alia, that the expression "arrangement" includes a reorganisation of the share capital of the company by the consolidation of the shares of different classes or by the division of shares into shares of different classes or by both those methods.

The arguments of Mr. Nicholls, who appears for the Savoy, were to the following effect. First, while accepting that T.H.F. as a member of the company can propose an arrangement under section 206, he submitted that the scheme proposed in this case falls outside the section altogether, on the ground that it is not one "between" the Savoy and its members or any class of them. He said that the court has no jurisdiction to sanction an arrangement of this kind and that that is an end of the case.

Secondly, and in the alternative, he said that even if the scheme is properly to be regarded as one "between" the Savoy and its members or any class of them, the court has no jurisdiction to sanction an arrangement which does not have the approval of the company. He then submitted that, if that be right, the court either has no power, or if it has ought not, to convene the proposed meetings in the circumstances of the present case. Thirdly, and in the further alternative, he submitted that the court has no jurisdiction to sanction a scheme affecting the B shares on the application of a member who holds only A shares.

Before dealing with these arguments in turn, it will be convenient for me to refer to the statutory predecessors of section 206, of which Mr. Nicholls conducted a helpful and comprehensive review.

The Companies Act 1862 did not provide for compromises or arrangements to be sanctioned by the court on behalf of either creditors or members of a company. Section 136 provided for an arrangement entered into between a company about to be, or in the course of being, wound up voluntarily and its creditors to be binding on the company if sanctioned by an extraordinary resolution, and on its creditors if acceded to by three-fourths of their number and value. Section 137 gave any creditor or contributory a right of appeal to the court against any such arrangement and the court had power to amend, vary or confirm it. Sections 159 and 160 empowered a liquidator, with the sanction of the court, where a company was being wound up compulsorily or subject to supervision, and with the sanction of an extraordinary resolution of the company where it was being wound up voluntarily, to enter into compromises with creditors and contributories respectively. That was as far as the Act of 1862 went. But section 2 of the Joint Stock Companies Arrangement Act 1870 introduced for the first time a rudimentary ancestor of section 206, limited to compromises or arrangements proposed between a company which was in the course of being wound up, either voluntarily or compulsorily or under supervision, and its creditors or any class of them. The compromise or arrangement had to be approved by a three-fourths majority in value, but not in number, of the creditors, and the section provided that if that happened the arrangement or compromise should

> ". . . if sanctioned by an order of the court, be binding on all such creditors or class of creditors, as the case may be, and also on the liquidator and contributories of the said company."

The power was expressed to be in addition to any other power of the court.

That remained the position until 1900, when section 24 of the Companies Act 1900 applied the provisions of section 2 of the Act of 1870:

> ". . . not only as between the company and the creditors, or any class thereof, but as between the company and the members, or any class thereof."

It was still necessary at that stage that the company should be in the course of being wound up, but section 38 of the Companies Act 1907 provided that the Act of 1870 should apply in like manner to a company

which was not in the course of being wound up. Section 39 of the Act of 1907 gave a company power by special resolution confirmed by an order of the court to modify its memorandum of association so as to reorganise its capital ". . . whether by the consolidation of shares of different classes, or by the division of its shares into shares of different classes . . ." In the following year the Companies (Consolidation) Act 1908 was passed and in section 120 there appeared for the first time a readily recognisable predecessor of section 206 (1) and (2), the only difference being that the words " and voting " did not at that stage appear in subsection (2) after the word " present." In other words, as I understand it, at that stage an abstention was still effectively a vote against. However, that and other amendments were made by section 53 of the Companies Act 1928. Of the other amendments, I should mention that section 45 of the Act of 1908, which had re-enacted section 39 of the Act of 1907, ceased to have effect. It was in effect replaced by the extension of the definition of " arrangement " which is now found in section 206 (6). That brings me to section 153 of the Companies Act 1929, another consolidating Act, which was in a form identical to that of section 206, except that subsection (5)—which is immaterial to this case—had not yet been included.

I now consider Mr. Nicholls' first argument. He accepts that the proposed scheme constitutes an arrangement, but he says that it is not one " between " the Savoy and its members or any class of them. Although this does not seem to have been the view universally held during the period immediately following the enactment of section 38 of the Act of 1907—see, for example, *In re Guardian Assurance Co.* [1917] 1 Ch. 431, *per* Younger J.—there can be no doubt that the word " arrangement " in section 206 has for many years been treated as being one of very wide import. Statements to that effect can be found in the judgments of Plowman J. in *In re National Bank Ltd.* [1966] 1 W.L.R. 819, 829, and of Megarry J. in *In re Calgary and Edmonton Land Co. Ltd. (In Liquidation)* [1975] 1 W.L.R. 355, 363. That is indeed a proposition for which any judge who has sat in this court in recent years would not require authority, and its validity is by no means diminished by what was said by Brightman J. in *In re N.F.U. Development Trust Ltd.* [1972] 1 W.L.R. 1548. All that that case shows is that there must be some element of give and take. Beyond that it is neither necessary nor desirable to attempt a definition of " arrangement."

Mr. Nicholls professes not to quarrel with that proposition. He says that in order for an arrangement to be one " between " the company and its members it must materially affect the rights and obligations existing between the two. Both he and Mr. Morritt, who appears for T.H.F., subjected certain provisions of the scheme to a close scrutiny, in particular clause 1 (b). Mr. Nicholls said that that was the only provision which involved the participation of the Savoy and he said that it would not and could not materially affect the rights and obligations existing between it and the members. Mr. Morritt, on the other hand, said that not only clause 1 (b), but also the power in sub-clause (a) of that clause for T.H.F. to appoint a third party to transfer the shares, and clause 9, would affect the contractual relationship subsisting between the Savoy and its members

under its memorandum and articles. In this connection he referred in particular to articles 30, 31 and 34. He also said, amongst other things, that the artificiality of Mr. Nicholls' argument on this point was demonstrated by the latter's acceptance that a cancellation and reduction scheme having exactly the same result for the shareholders would be an arrangement between the company and its members.

I was referred to a number of authorities on this question, but the only one which is directly in point is the Scottish case of *Singer Manufacturing Co.* v. *Robinow*, 1971 S.C. 11, where the same point was taken on another transfer scheme of the same general nature as the present. In that case the scheme was proposed by the company. It was argued on behalf of an opposing shareholder that the scheme was not one between the company and its members, but a sale between two members in which the company had no interest. With regard to that argument the Lord President, Lord Clyde, in delivering the opinion of the court said, at pp. 13–14:

> "This contention, however, is unwarranted. The petitioning company is in fact the first party to the scheme of arrangement. Moreover, the company had a very direct interest in the arrangement. If the arrangement was sanctioned by the court, they came under obligation (see clause 5 of the arrangement), on being satisfied that the consideration of 85s. per share had been paid by the Morgan Guaranty Trust Co. of New York to the 145,670 shareholders, forthwith to register, in place of the existing holders, the Singer Co. of New York as holder of the shares in respect of which the consideration had been so paid. The courts have always interpreted section 206 and its statutory predecessors broadly, so as to enable a wide variety of different types of arrangements to be put forward, and it seems to us clear that the present scheme falls within what is competent to achieve under that section. The arrangement is an arrangement between the petitioning company and 'its members or any class of them' within the meaning of section 206."

That shows, I think, that there were three grounds for the decision. It also appears that clause 5 of the arrangement in that case was to much the same effect as clause 1 (b) of the present scheme. Mr. Morritt did not seek to support the first ground of the decision, but he relied strongly on the second and third. He said that the case was not only strong persuasive authority in this court but one which I should follow without expressing a view of my own. For that he relied on the judgment of Swinfen Eady J. in *In re Hartland* [1911] 1 Ch. 459. That was a case on the Finance Act 1894, another enactment which, like the Companies Acts, applies to Scotland as well as to England. There had been an earlier decision of the Court of Session on precisely the same point. Swinfen Eady J. said, at p. 466:

> "Where the exact point has been raised by a special case, and fully argued, and decided by an unanimous judgment of the Court of Session, and where the question is simply one that turns upon the construction of a statute which extends to Scotland as well as to

A England, I think my duty as a judge of first instance is to follow that decision, leaving the parties, if so advised, to have it reviewed elsewhere."

Mr. Morritt also relied on the judgments in the Court of Appeal in *In re Guardian Assurance Co.* [1917] 1 Ch. 431 and in particular on a passage in the judgment of Warrington L.J. at p. 449. The same passage appears to have been referred to in the argument for the opposing share-
B holder in the *Singer* case, 1971 S.C. 11. The part of the transaction in the *Guardian* case [1917] 1 Ch. 431 which required the sanction of the court under section 120 of the Act of 1908 was the transfer of a proportionate part of the shares in the Guardian to another company with which it had entered into a conditional contract. With regard to that transfer Warrington L.J. said, at pp. 449–450:

C "Now if it were possible in a large undertaking to obtain the consent to each shareholder to such a proposal there is no doubt that it could be carried out, because there would be nothing to prevent any shareholder, if he pleased, transferring his shares, or a certain number of his shares, to anybody to whom he chooses to transfer them; but of course it is difficult to obtain in a large undertaking like this the
D actual consent of the individual shareholders. But, assume that such an agreement has been made between all the shareholders and the company, it seems to me to be quite obvious that that would be an arrangement made between the shareholders and the company. I fail to see how it could be otherwise; and that is exactly what is done, because, although the arrangement is not made with the individual shareholders, the arrangement is one which, when sanctioned by the
E court under section 120, will bind all the shareholders concerned. In my view this is an arrangement between the members of the company and the company, and as such is capable of being sanctioned under the 120th section."

I think that, although the particular point was not argued and did not
F need to be argued (it not having been taken by Younger J. at first instance), that passage does support Mr. Morritt's argument on this question and I infer that the Court of Session may well have taken the same view.

I do not think that it would be right for me to decide this question without expressing a view of my own. I can do so quite shortly. In my judgment the arguments of Mr. Morritt, supported by the two authorities
G on which he has relied, are correct. In spite of Mr. Nicholls' professions to the contrary, it seems to me that his argument could well have a restrictive effect on the meaning of "arrangement." I do not think that it is necessary that the rights and obligations existing between the company and its members should be materially affected, if by that it is meant that there should be something more material or more substantial than there
H is in the present case. In my judgment the decision of the Court of Session in the *Singer* case, 1971 S.C. 11 was correct and there is therefore no question but that I should follow and apply it. That means that Mr. Nicholls' first argument fails.

I now turn to Mr. Nicholls' second argument. It was divided into two parts, of which the first raises the question whether the court has jurisdiction to sanction an arrangement which does not have the approval of the company. That is an interesting and difficult question on which there is not much authority.

The case which comes nearest to deciding the point is almost the earliest. That is *In re International Contract Co. (Hankey's Case)* (1872) 26 L.T. 358; 20 W.R. 506. I was told that there are also shorter reports in the Weekly Notes and the Law Journal. That was a case where it was sought to obtain the sanction of the court to certain compromises with two creditors of a company which was in the course of being wound up. However, the liquidator opposed the petition on the ground that the proposed compromises were not beneficial to the company. He also argued that as they were not supported by him they could not be sanctioned by the court under the Acts of 1862 and 1870. In dismissing the application, Sir John Wickens V.-C. expressed himself to be of the opinion that the case was "virtually"—the report in the Weekly Notes says "completely," but that is in a minority of two to one, the Law Journal being silent on the point—governed by that of *In re East of England Banking Co.* (1872) L.R. 7 Ch.App. 309, which had been decided in the Court of Appeal some three weeks earlier. He went on to say that, independently of that authority, he considered that he ought not to make any order upon the petition, on the ground that the evidence showed that it was for the personal benefit of the principal petitioner. Mr. Morritt submitted that it is not clear that the statutory meeting required by section 2 of the Act of 1870 had been held, but after a consideration of the two longer reports and on grounds of common sense I reject that argument. There was further debate as to what was the real ground of the decision, but for my part I think it clear that the primary ground at any rate was that the court had no jurisdiction, under section 2 of the Act of 1870, to sanction an arrangement which did not have the approval of the liquidator. That could not have been based entirely on *In re East of England Banking Co.* because that case proceeded only on section 160 of the Act of 1862. However, if—as I think he must—Sir John Wickens V.-C. is taken to have been correctly reported in the Law Times and the Weekly Reporter as saying that the case before him was "virtually" governed by the earlier one, that would suggest that he had made an independent consideration of section 2 of the Act of 1870. And I think that I must assume that the arguments of the distinguished leading counsel who appeared before him would have made it necessary for him to do so.

The importance to Mr. Nicholls' argument of this view of *In re International Contract Co. (Hankey's Case)*, 26 L.T. 358, is this. Mr. Morritt relied most strongly on that part of section 206 (2) which provides that the arrangement shall be binding on the members "and also on the company" as showing that the section embraced an arrangement which did not have the approval of the company. Mr. Morritt said that those words are entirely unnecessary if the company's consent is a prerequisite to the sanctioning of an arrangement. However, Mr. Nicholls pointed to

A the original wording of section 2 of the Act of 1870 which expressly provided that the arrangement or compromise should be binding on the creditors " and also on the liquidator and contributories of the said company." Mr. Nicholls said that the decision in *In re International Contract Co.* (*Hankey's Case*) was arrived at in the face of those words and that neither they nor their successors can have, or for that matter need have, the significance for which Mr. Morritt contends. Mr. Morritt replied by
B relying on section 136 of the Act of 1862. He said that that section clearly provided for the approval of the company to be obtained. He said that there, if it had been intended that section 2 should operate in the same way, was a precedent readily to hand.

Mr. Nicholls then examined a large body of authority on section 2 and its successors, with the object of showing that their purpose was to prevent
C a dissentient minority of a class of first creditors and then members from holding the majority to ransom and, conversely, that the court had never concerned itself with the interests of the company. That shows, argued Mr. Nicholls, that the status of the company on an application under section 206 is that of an independent party whose approval is necessary and whose interests cannot be overridden.

As to the purpose of section 2, Mr. Nicholls referred me to a number
D of statements made by eminent judges of the late Victorian period all of which, as they appeared to me, were to very much the same effect. A representative example can be taken from the judgment of Chitty J. in *In re Dominion of Canada Freehold Estate and Timber Co. Ltd.* (1886) 55 L.T. 347, where having referred to the difficulty, which often arose when a company got into trouble, of dealing with debenture-holders as a class,
E he said, at p. 351:

> " That is a difficulty which the legislature itself felt when it passed the Act of 1870, allowing a majority, and a sufficient majority—that is to say, not a mere absolute majority, but a majority much larger than that—to bind the minority. Then it was known that, before the legislation of 1870, any particular individual could hold out against a
> F scheme, however meritorious and however beneficial it might be, in order that he might get, generally speaking, some special advantage for himself, or because he was a person who did not even take a fair view of the advantages to be gained. It was for the purpose of preventing that obstruction that the legislature passed the Joint Stock Companies Arrangement Act 1870; . . ."

G Mr. Nicholls says that the way in which section 206 and its predecessors evolved requires an assumption that when the original provisions were extended to members the legislature had the same purpose in mind, that is to say that a dissentient minority of members should not be allowed to hold the majority to ransom.

H As to the converse, that is to say that the court has never concerned itself with the interests of the company, Mr. Nicholls was in the position of having to prove a negative. For that purpose he referred me to a number of authorities, including the well-known decisions of the Court of

Appeal in *In re Alabama, New Orleans, Texas and Pacific Junction Railway Co.* [1891] 1 Ch. 213 and *In re English, Scottish and Australian Chartered Bank* [1893] 3 Ch. 385, and also of Maugham J. in *In re Dorman Long & Co. Ltd.* [1934] Ch. 635. Those cases are usually cited for the purpose of demonstrating what is the function of the court on an application under section 206. And I think that Mr. Morritt was right in saying that neither they, nor most of the other cases on which Mr. Nicholls relied, are really of value on a question which did not have to be decided in any of them. I should add that I think that in all of them the petition was presented either by the company or by the liquidator.

There is a small residue of cases which show that it has sometimes been assumed that there is no jurisdiction to sanction an arrangement which does not have the approval of the company. There is certainly one dictum in England which comes from a source which I cannot lightly disregard. In *In re Oceanic Steam Navigation Co. Ltd.* [1939] Ch. 41, which decided that there is no jurisdiction to sanction a scheme which is ultra vires the company, Simonds J. said, at p. 46:

> "It is indeed rightly pointed out that without the assistance of the company the creditors alone could not avail themselves of section 153; they could at any moment put the company into liquidation, but since they have chosen the path of section 153 without a previous liquidation, it is to be assumed that they would pay something to be allowed to take that path, and accordingly the directors should not have assisted them without exacting a price."

In that case the petition was again presented by the company. Mr. Morritt argued that when Simonds J. referred to section 153 of the Act of 1929 he meant section 154, or at least sections 153 and 154 together. I do not think that that can be right. Mr. Nicholls relied strongly on that passage. He also relied on three other cases in the Court of Session: *Dailuaine-Talisker Distilleries Ltd.* v. *MacKenzie*, 1910 S.C. 913; *Bruce Peebles & Co. Ltd.* v. *William Bain & Co. Ltd.*, 1918 S.C. 781 and *R. L. Hector & Sons Ltd.*, 1947 S.C. 641. In each of those cases the petition was presented by the company and in none of them did the particular point arise for decision. In the first two the question was whether the company could present the petition on the authority of the board or only with the approval of the members in general meeting. In the third it was held that the company's approval had been validly given by means of a special resolution, which, although normally inappropriate to the approval of a scheme of arrangement, was in the circumstances unobjectionable because it had been passed unanimously. Nevertheless, it does seem to me that in all three cases it was to a greater or lesser extent assumed by one or more of the judges that there was no jurisdiction to sanction an arrangement which did not have the approval of the company.

The position on this question can, as it seems to me, be summarised as follows. There is one decision, *In re International Contract Co. (Hankey's Case)*, 26 L.T. 358 which is in point. That decision is in favour of the view that there is no jurisdiction to sanction any arrangement with creditors of a company in the course of being wound up which does not

have the approval of the liquidator. The decision is one which I ought normally to follow. The legislative history is such that there is no ground for saying that a different view is to be taken of the position of a going company in relation to a members' scheme. There has sometimes been an assumption to the same effect, that having been most clearly expressed by Simonds J. in the *Oceanic Steam Navigation* case [1939] Ch. 41.

In my judgment both the decision and the assumption are correct. The question turns in the end on the true construction of section 2 of the Act of 1870. Everything else follows from that. If you were to find an Act of Parliament which referred to an arrangement "proposed between" a person who was adult and sui juris and his creditors, you would assume, first, that that person would have to be a party to the arrangement and, secondly, that he would have to consent to it. And you would not think that there was any the less need to obtain his consent if you found that it was expressly provided that the arrangement should be binding on the creditors "and also on that person." You might think that the last words had been inserted to make the position clear on both sides or you might think that they were not really necessary. But, whatever you thought, you would not think that they could disturb the assumptions which had been forced upon you by the words "proposed between" and the fact that the person concerned was adult and sui juris. Nor would you think that those assumptions were any the less valid because there was no express provision for the consent to be obtained. Next, one of the essential features of the Act of 1862, without which its cardinal objective of limited liability could not have been achieved, was that a company should have a legal personality distinct from that of its members and for most purposes capable of acting on its own. I therefore start from the position that the rights of a company cannot be overridden in the absence of a provision, express or implied, to that effect. The undoubted purpose of section 2 of the Act of 1870 having been that which eminent judges of the time consistently said that it was, I cannot read that section or its successors as having been a provision to that wider effect. To do so would, I think, offend the general principle in our law that the rights of a person whom it regards as having the status to deal with them on his own behalf will not (save in special circumstances, such as those for which provision is made by R.S.C., Ord. 15, r. 13) be overridden.

There remains Mr. Morritt's argument based on section 136 of the Act of 1862. In my judgment that is not enough to carry him home. The effect of that section, so far as material, was that the arrangement could not be entered into by the directors, but required the sanction of an extraordinary resolution. It must be remembered that that section, unlike section 2 of the Act of 1870, applied also to companies about to be wound up. The correct view may well be that section 2, by omitting a requirement which was inappropriate, intended to emphasise, rather than to dispense with, the need for the liquidator's consent. In any event, it is notorious that the legislation of that period was not drafted with the insight and exactitude which we expect today. I think that I must do the best I can with section 2 as I find it.

In the result I conclude that the court has no jurisdiction to sanction

an arrangement under section 206 which does not have the approval of the company either through the board or, if appropriate, by means of a simple majority of the members in general meeting.

The second part of Mr. Nicholls' second argument was that the court either has no power, or, if it has, ought not, to convene meetings in the circumstances of the present case. I reject the argument that there is no power to do so. As to whether I ought or ought not to do so in exercise of the court's discretion, I have no doubt that I ought not to do so in the circumstances of the present case. I say that for these reasons. The board have withheld their approval and the scheme does not provide for approval to be obtained from the company in general meeting. It is possible, in theory at any rate, that the board might have second thoughts before the stage is reached at which the scheme would normally come back to be sanctioned by the court. However, it is most improbable that that will happen. Mr. Morritt said that it might if a sufficient majority of the B shareholders approved the scheme. But since over 65 per cent. of the B shares are held by members of the board I cannot see that happening without the board themselves changing their minds. And if they did that, it is clear that there would be other, much more satisfactory, methods of putting the proposals into effect. Mr. Morritt also suggested the possibility of their being sufficient aggregate votes in favour at the A and B meetings to constitute more than 50 per cent. of the whole. But that would still not amount to the approval of the company in general meeting and that is something which T.H.F. has made it abundantly clear that it will not seek. In all the circumstances, there being no reasonable probability that the meetings would serve any useful purpose, it would in my judgment be quite wrong to convene them, particularly when the attendant expense of money, time and spirit, all of which would probably be wasted, is borne in mind.

That makes it, strictly speaking, unnecessary for me to consider Mr. Nicholls' third argument, which was that the court has no jurisdiction to sanction a scheme affecting the B shares on the application of a member who holds only A shares. That argument was dealt with very shortly by both sides and I propose to do the same. In my judgment it could not succeed.

The application must be dismissed.

Application dismissed with costs.
Leave to appeal.

Solicitors: *Linklaters & Paines, Slaughter & May.*

T. C. C. B.

In re HUMBER IRONWORKS COMPANY.

M. R.
1866
March 10, 13.

Practice—Company—Winding-up—Costs—Companies Act, 1862.

Where a Petition to wind up a company is dismissed, the Petitioner will, as a general rule, be ordered to pay the costs of the company opposing the Petition, and of every person against whom a personal charge is made by the Petition and who appears and disproves such charge and is otherwise free from blame; but no other person appearing either to support or oppose the Petition will be allowed any costs.

Where the winding-up order is made, the Petitioner and the company will have their costs out of the estate, and shareholders and creditors, who appear to support the Petition, will have out of the estate one set of costs between them.

THIS was a Petition for the winding-up of the *Humber Iron Works & Ship Building Company, Limited*, a company incorporated and registered under the *Companies Act*, 1862. At an extraordinary general meeting of the shareholders, on the 3rd of February, 1866, it was resolved that the company should be wound up voluntarily, that a Mr. *Child* should be appointed liquidator, and be paid at the rate of £3 per cent. on all realized assets (exclusive of new calls), and £1000 for office expenses, the total payment not to exceed £3000, and that five shareholders, named in the resolution, should be appointed a committee, for the purpose of supervision. These resolutions were confirmed at an extraordinary general meeting on the 20th of February.

On the 27th of February, this Petition was presented by Messrs. *Latham & Smith*, simple contract creditors of the company to the amount of £106 16s. 11*d.*, praying that the company might be wound up by, or under the supervision of, the Court, and that *Child* might be appointed or continued liquidator. The Petitioners employed the same solicitors as the company.

The Petition having been advertised, *James Whitham*, a judgment creditor of the company to the amount of over £2000, presented another Petition, in which he alleged that *Latham & Smith's* Petition had been presented at the instance of the com-

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pany and *Child*, in order to retain in their hands the management and control of the winding up, and that he and the majority of the creditors objected to the voluntary winding up and the appointment of *Child* and the powers and emoluments given to him by the resolution, and prayed for the compulsory winding up of the company. This Petition had been advertised and was answered for the 17th of March.

Mr. *Selwyn*, Q.C., and Mr. *Marten*, for *Latham & Smith*, now asked for the usual order for a compulsory winding up.

Mr. *Baggallay*, Q.C., and Mr. *Druce*, for the Company, did not oppose.

Mr. *Roxburgh*, for *Whitham*, asked leave to withdraw his Petition, and submitted that he ought to be allowed out of the estate the costs of presenting and advertising his Petition, and the costs of advertising its withdrawal, which was necessary in consequence of the decision in *Re Marlborough Club Company* (1), on the ground that the other Petition, having been presented by persons who employed the company's solicitors, and praying for the continuation of the voluntary winding up and the appointment of *Child*, was evidently collusive and was virtually the Petition of the company. He also asked for his costs of appearing on this Petition to oppose the continuation of the voluntary winding up and the appointment of *Child*.

Mr. *Southgate*, Q.C., Mr. *Jessel*, Q.C., Mr. *F. Harrison*, and Mr. *Bagshawe*, for three different creditors of large amount who appeared to insist on a compulsory winding up and to oppose the appointment of *Child*, asked for their costs.

LORD ROMILLY, M.R.:—

The only order I shall make at present is the usual winding-up order. I will consider the question of costs. I think that under the circumstances, Mr. *Whitham* is entitled to the costs of his Petition and the affidavit in support of it, and the costs of adver-

(1) Law Rep. 1 Eq. 216.

tising its withdrawal; but as to the others, I do not think I ought to give costs to an indefinite number of persons.

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March 13. LORD ROMILLY, M.R.:—

I have considered this case with respect to the costs as carefully as I can. The rule which I shall adopt, and which I mean to express upon the present occasion, is that which I shall endeavour to follow generally in these matters. The costs of the Petition by Mr. *Whitham* I do not consider to come within the ordinary rule. I stated yesterday, that I thought he was entitled to the costs of his Petition, and I retain that opinion now: I think that, under the peculiar circumstances under which this Petition was presented, and it appearing to be really a Petition by the company itself, and asking for a continuation of the liquidator, he was justified in presenting his Petition. It appears to me to be a proper Petition, and therefore, I shall allow him his costs out of the estate, which will include the costs of advertising the Petition and its withdrawal.

The rule that I shall adopt with respect to the other costs, as the proper rule, is this. There are two cases to be considered; one, where the Court refuses to make the order prayed for, and the other where the Court makes the order prayed for. In my opinion, the rules as to costs are separate and distinct in those two cases. I will take, first, the case where the Court refuses to make the order. In that case, as a general rule (of course there may be exceptions to it), the company opposing the order will have their costs from the Petitioner; of course any shareholders, or creditors, or any other persons who appear and support the Petition, will not have their costs. To parties who appear to oppose the Petition I shall give no costs, with this single exception, that where a personal charge is made against any one of the shareholders, or directors, of such a character as, in my opinion, justifies him in appearing to oppose the Petition; in that case, if he is perfectly free from blame in the matter, and the charge against him is disproved, I shall give him his costs, to be paid personally by the

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Petitioner. That is how I shall deal with the costs where the Court dismisses the Petition.

Where the Court grants the prayer of the Petition, of course it will give no costs to persons who appear to oppose the Petition; because in that case the Court makes an order against them: it gives the costs of the Petitioner and those of the company out of the estate; and if a number of persons, whether shareholders or creditors, appear to ask for an order to wind up the company, in that case I am of opinion that the Court ought to allow, out of the estate, one set of costs amongst them all, and they must arrange between themselves in what manner they are entitled to such costs. I will not allow a series of costs to them.

I have written down the rule as to the costs of persons other than the Petitioner and the company thus:—Where the Court refuses to make any order, the shareholders supporting the Petition get no costs, and the shareholders resisting the Petition get no costs, unless personally assailed. Where the Court makes the order to wind up, and the shareholders and creditors, together or separately, appear to support the Petition, one set of costs is to be given amongst them, and only one. In this case there are four or five parties who appear for that purpose, and they must arrange between them how the costs are to be distributed. I shall allow only one set of costs between them.

Solicitors for the Petitioners and the Company: Messrs. *Thomas & Hollams.*

Solicitors for the Creditors: Messrs. *Few & Co.*; Messrs. *Harrison, Beale, & Harrison;* Messrs. *Flux & Argles.*

In re EUROPEAN BANKING COMPANY.
Ex parte BAYLIS.

V.-C. K.
1866
July 3.

Winding-up Order—Several Petitions—Costs—Shareholders and Creditors.

Where several Petitions are presented for winding-up a company, the Court will consider the circumstances of each Petition as if it were a separate one.

Where a Petitioner was a creditor of a banking company for only £65, and the debt was attached in the Lord Mayor's Court, the Petition was, under the circumstances, dismissed with costs.

Where a Petition is dismissed, shareholders who oppose will have one set of costs, and creditors who oppose, another set of costs.

In re Humber Ironworks Company (1) not followed.

THIS was one of six Petitions presented for the winding-up of the *European Banking Company, Limited.* The Petition was transferred from Vice-Chancellor *Stuart's* Court, in consequence of an order having been made here on other and earlier Petitions.

The Petitioner, *Charles Baylis,* was a customer of the bank, and at the date of the Petition there was a balance of £65 standing to his account; but this debt had been attached in the Lord Mayor's Court by a creditor of the Petitioner.

Mr. *Haddan,* for the Petition, asked that the costs of the Petitioner might be paid out of the assets of the company.

Mr. *Glasse,* Q.C., and Mr. *Roxburgh,* for the company:—

It is submitted that this Petition ought to be dismissed with costs. A week before the presentation of the Petition, the bank was served with process issued from the Lord Mayor's Court, whereby the Petitioner's debt was attached at the suit of the *Financial Discount Company.* The object of presenting a Petition for winding-up a company, is to obtain payment of a debt; but this Petitioner cannot be entitled to receive payment since he was not the owner of the money at the time, and was, therefore, not a creditor. He knew that other Petitions had been presented, and he must have been aware of the circular issued by the company, giving notice that the affairs of the company were in process of

(1) Law Rep. 2 Eq. 15.

V.-C. K. 1866 *In re* European Banking Co. *Ex parte* Baylis.

being wound up under the direction of the Court. He was, therefore, not justified under the circumstances in presenting this Petition.

Mr. *T. A. Roberts*, for some of the shareholders:—

The creditors of this company will all be paid in full; but the shareholders are damaged by so many Petitions being presented.

Mr. *J. Napier Higgins*, for Mr. *Elvery*, who presented the first Petition, on which an order had been made for the appointment of provisional liquidators, said he was instructed to appear on this Petition in Vice-Chancellor *Stuart's* Court to inform the Court of such appointment, and to oppose any order being made which would interfere with the liquidators so appointed. He asked for his costs.

Mr. *Haddan*, in reply:—

It is only necesssary for a Petitioner to shew that he is a creditor to entitle him to present a Petition. The amount of the debt is immaterial. The attachment in the Lord Mayor's Court might be removed at any time, and the Petitioner is still the owner of the debt, subject to a claim by another person.

Sir R. T. Kindersley, V.C.:—

However desirable it is to avoid a number of Petitions being presented for the winding-up of a company, I am not aware of any rule having been established with a view to limit the number of them. But still every one of these Petitions ought to be looked at separately upon its own merits, as if it were the only Petition presented. The question then is, whether, if there were no other Petition than this of Mr. *Baylis*, an order for winding-up the company ought to be made thereon. Though Mr. *Baylis* appears as a creditor in the books of the company for £65 (a very inconsiderable sum), the fact is, that before the Petition was presented, an action had been brought against him by one of his creditors in the Lord Mayor's Court, under which this debt, which was assumed to be due to him from the *European Bank*, was attached. It is true that does not absolutely do away with the

debt, and he still remains legally a creditor of the bank. But the attachment is more efficacious than a mere stop order, for it seizes the debt into the hands of the Lord Mayor's Court. Under these circumstances, I am of opinion that if this had been the only Petition, the Court would not have made an order upon it to wind up the company, on the ground that the interest of the Petitioner as a creditor is so uncertain in its character, that the Court ought not, upon the ground of that interest, to impose upon the shareholders of the company so great a burden as a winding-up order. Dealing with the Petition as if it had been the only one presented, I shall dismiss it with costs.

Mr. *Haddan* then asked that the costs should be limited to those incurred by the company, and cited the rule laid down by the Master of the Rolls in *In re Humber Iron Works Company* (1), that where a Petition to wind up a company was dismissed, the Petitioner would be ordered to pay the costs of the company, but not of any other person appearing either to support or oppose the Petition. If, on the contrary, the winding-up order was made, then the Petitioner and the company would have their costs out of the estate, and shareholders and creditors who appeared to support the Petition would have one set of costs between them.

Mr. *Roberts* cited *In re The Marlborough Club Company* (2).

SIR R. T. KINDERSLEY, V.C.:—

A rule which tends to diminish the costs of proceedings under a Petition for a winding-up order, ought I think to be followed in principle. Where a Petition is presented, and shareholders and creditors appear to support the Petition, and an order for winding-up is made thereon, then the shareholders who support the Petition ought not to have separate sets of costs, but all are to have one set of costs only among them, and likewise all the creditors who appear to support the Petition are to have but one set of costs among them. That is what I understand to be the rule of the Master of the Rolls, and, if so, I concur in it to that extent, where the Petition succeeds. But where the Petition is dismissed with costs, I

(1) Law Rep. 2 Eq. 15. (2) Law Rep. 1 Eq. 216.

V.-C. K. 1866 *In re* European Banking Co. *Ex parte* Baylis.

confess it appears to me right, upon the same principle, that the shareholders and creditors who have appeared to oppose the Petition should respectively have one set of costs among them, that is, one set of costs to the shareholders, and one set to the creditors. I shall allow one set of costs to be paid by Petitioner to the shareholders who have appeared to oppose the Petition. In this case no creditors have appeared.

The right of the provisional liquidators to costs stands upon special grounds and I think they are justified in appearing, and must have their costs from the Petitioner.

Solicitors for the Petitioner: Messrs. *Mercer & Mercer.*

Solicitor for the Company: Mr. *Taylor.*

Solicitor for the Shareholders: Mr. *R. W. Roberts.*

Solicitors for the Provisional Liquidators: Messrs. *Harrison & Lewis.*

V.-C. K. 1866 *July* 28.

MIDLAND RAILWAY COMPANY *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

Railway Directors—Traffic Agreement as to contemplated Line—Ultra Vires—Implication.

The managing body of a railway company has no power to enter into a contract fixing and regulating the future traffic which may be carried upon a line of railway which the company may thereafter be empowered to construct, so as to give to another railway company an interest in such traffic and profits.

The Court will not by implication import conditions, not expressed, into an agreement, unless there is something in the agreement which shews that the parties must have intended such conditions.

THIS suit was instituted for the purpose of having the rights and interests of the Plaintiffs and Defendants to a large sum of money in the hands of the *Railway Clearing House Committee,* ascertained and declared by the Court; and for the construction by the Court of an agreement dated the 1st of January, 1856.

Prior to 1856, there existed two main lines or routes of railway, each composed of several distinct companies, by which

ultimate gift over to Diana and the grandchildren cannot be preserved and the resulting partial intestacy will be different from the result intended by the testatrix to benefit Michael, although Michael will receive some compensation for the loss of his reversionary interest inflicted by the inexcusable blunders of the solicitors' firm employed by the testatrix.

Having regard to the possible effects of the omissions in *Boehm* and *Morris* and to the observations of Jeune J. and Latey J. in those cases respectively, and having regard to the underlying principle that the court should not admit to probate anything which was not known and approved by the testator, it follows in my judgment that, whatever the result, the gifts in clause 10 of the will, other than the life interests of Mrs. Wightman and Miss Pedley, must be omitted. Counsel for the grandchildren did not argue the contrary.

The result is not satisfactory but will perhaps encourage a further study of the recommendations which have been made from time to time that rectification of a will should be allowed on the same terms as rectification of other instruments, with perhaps the added safeguard of written contemporaneous evidence supporting the claim to rectification. There is ample such evidence in the present case, but it does not enable the will to be rectified.

Order accordingly.

Solicitors: *Waterhouse & Co. for Ford & Warren, Leeds; Sharpe, Pritchard & Co. for Simpson, Curtis & Co., Leeds.*

T. C. C. B.

[CHANCERY DIVISION]

* *In re* BATHAMPTON PROPERTIES LTD.

[No. 003208 of 1974]

1975 Jan. 20, 27; Feb. 17; March 4, 5, 6; April 17; May 20, 21; 23

Brightman J.

Company—Winding up—Costs—Company unjustifiably opposing petition—Benefit accruing to beneficial owner if petition successfully opposed—Order for costs—Companies (Winding up) Rules 1949 (*S.I.* 1949 *No.* 330), *r.* 195

A petition to wind up a company was presented on the ground that a loan which it had guaranteed had been called in but not repaid. The petition was opposed by the company and by the beneficial owner of the company as opposing contributory and creditor. It was held that the company had no defence to the claim and it was ordered to be wound up. The company asked for its costs to be taxed and paid out of the

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[Reported by MRS. F. ALLEN MCLEAN, Barrister-at-Law]

A assets of the company under rule 195 of the Companies (Winding up Rules) 1949.[1] The successful petitioner objected to such an order on the ground that the company's costs had been increased by the opposition of a contributory and creditor in order to secure a benefit to himself as shareholder, with the consequence that the assets available for payment of the debts due to the general body of creditors had been decreased.

On the question whether the court had jurisdiction to B order that either the costs of the company be borne by the sole beneficial owner as opposing contributory and creditor or that no order be made as to the costs of the company:—

Held, (1) that, although the court had power, under section 50 (1) of the Supreme Court of Judicature (Consolidation) Act 1925, to make an order against an opposing contributory and creditor to a petition to wind up a company, the court would not exercise that discretion in the present case since the oppos- C ing contributory and creditor's representation had been merely technical and his presence in court nominal (post, p. 172D–G).

(2) That, although it would be right for the order of costs to reflect the fact that the company's costs had been increased by its unsuccessful and unjustifiable opposition to the petition, the order should also reflect the invariable practice of the court to allow as costs of the petition the costs of a company appearing to consent to a winding up order (post, p. 172B–D); that, D therefore, the costs of the company of the petition down to and including the time when it could have consented to the order, namely, the first hearing on January 20, 1975, should be taxed and paid out of the assets of the company and, thereafter, in the exercise of the court's discretion under rule 195 of the Companies (Winding up) Rules 1949, the company's costs were not to be paid out of the assets of the company in priority to the payment in full of all unsecured creditors of the company E (post, p. 175C–E).

In re Blériot Manufacturing Aircraft Co. Ltd. (1916) 32 T.L.R. 253 applied.

Per curiam. A solicitor, retained on behalf of a potentially insolvent company to oppose a winding up petition, may feel it prudent to seek an indemnity from one or more of the corporators before embarking on his task (post, p. 175F).

F

The following cases are referred to in the judgment:

Blériot Manufacturing Aircraft Co. Ltd., In re (1916) 32 T.L.R. 253.

C.B. & M. (Tailors) Ltd., In re [1932] 1 Ch. 17.

Container Engineering Co. Ltd., In re (unreported), March 23, 1950.

National Savings Bank Association, In re (1866) 1 Ch.App. 547.

Sinclair, In re, Ex parte Payne (1885) 15 Q.B.D. 616.

G *Welsh Brick Industries Ltd., In re* [1946] 2 All E.R. 197.

The following additional cases were cited in argument:

Adler (William) & Co. Ltd., In re [1935] Ch. 138.

Humber Ironworks Co., In re (1866) L.R. 2 Eq. 15.

Practice Note (Winding up Order: Rescission) (No. 2) [1971] 1 W.L.R. H 757; [1971] 2 All E.R. 700.

[1] Companies (Winding up) Rules 1949, r. 195: "(1) The assets of a company in a winding up by the court remaining after payment of the fees and expenses properly incurred in preserving, realising or getting in the assets, . . . shall, subject to any order of the court, . . . be liable to the following payments, which shall be made in the following order of priority, namely:— . . . First—The taxed costs of the petition, including the taxed costs of any person appearing on the petition whose costs are allowed by the court."

PETITION

On December 24, 1974, Air Commodore Harold John Granville Ellis (retired) presented a petition for the compulsory winding up of Bathampton Properties Ltd. on the ground that the company was indebted to him in the sum of £14,356 payable by Harrison and Proud Developments Ltd. by guarantee. On May 23, 1975, a compulsory winding up order was made.

The facts are stated in the judgment.

Mary Arden for the petitioner.

Brian Parker for the company and the opposing contributory and creditor.

Cur. adv. vult.

May 23. BRIGHTMAN J. read the following judgment. The question before me concerns the incidence of costs incurred by a company in unsuccessfully opposing a winding up petition on the ground that it is based on a disputed debt.

The company has an issued capital of £8,000. All the shares are beneficially owned by Mr. Dunstan Harrison, a chartered accountant. The directors of the company are Mr. Harrison and his wife. It is not and never has been in dispute that in 1965 the petitioner lent £10,000 to another company, Harrison and Proud Developments Ltd., and that repayment of this loan was guaranteed by the company. The loan was called in but not repaid, and the petitioner accordingly resorted to the guarantee. On November 9, 1974, the petitioner served a statutory demand on the company. On December 24 he presented a petition for the winding up of the company. The amount claimed is £10,000 plus £4,356 interest. The petitioner claims that interest is running at the rate of 7 per cent. per annum. Mr. Harrison, if I have understood his affidavit correctly, claims that no interest is accruing; or perhaps that the guarantee does not extend to interest.

The company opposed the petition on the ground that the debt was not presently payable. Mr. Harrison said that there was an arrangement with the petitioner that the loan should not be repayable until the borrowing company could afford to repay it. The return date of the petition was January 20, 1975, but it was adjourned for evidence on that and two later occasions. The hearing of the petition was finally begun on March 4 and concluded on March 6, when the company was ordered to be wound up. It was held that the company had no defence to the claim, which was not disputed on any substantial ground, and there was therefore no issue which ought to be tried.

According to a statement of affairs dated March 6, 1975, the secured debts amount to about £19,000, and the unsecured debts to about £22,000. Part of the unsecured indebtedness is owed to Mr. Harrison and companies controlled by him, but I do not think that anything turns on this.

The company owns three freehold properties in Kent and Somerset which are divided into flats of which six are vacant. The directors of the company estimate that, given time, these properties can be sold so as to realise £108,000. There are also minor assets estimated at £1,000. The company's total cash at March 6, was £260, plus £213 book debts. If the £10,000 guarantee is due, and probably even if it is not due, the company is commercially insolvent.

A The statement of affairs shows that if the directors' hopes are ultimately fulfilled, there will be a surplus for Mr. Harrison as sole beneficial owner of the shares on a liquidation of the company of some £68,000. In his evidence Mr. Harrison states categorically that the company is not yet in a position to pay the petitioning creditor, although he expects that it soon will be. The inference from his evidence is that the company's freehold properties cannot at the present moment be sold for £41,000, the B amount needed to pay off all the secured and unsecured creditors shown in the statement of affairs, but on the other hand, if realisation is delayed, a sum of £108,000 might be realised and, as I have said, £68,000 would in that event be available to Mr. Harrison as sole beneficial owner of the share capital.

The position therefore amounted to this when the petition came on C for hearing. If a winding up order were made, as was desired by the petitioner, he might receive a dividend on his debt but perhaps not the full amount. If on the other hand the petition were dismissed, as desired by Mr. Harrison, time would be gained which might enable a sum of £68,000 to become available for Mr. Harrison as shareholder. The attempt, therefore, by Mr. Harrison to defeat a winding up petition was calculated to produce for Mr. Harrison a large profit as the sole share- D holder in the company. I do not use the expression "calculated to produce" in any pejorative sense. That profit would be obtained at the expense of the petitioning creditor to the extent that he would for the time being be kept out of his money as an inevitable consequence of the dismissal of the petition, perhaps free of interest or at a low rate of interest.

E The company now asks for its costs of unsuccessfully opposing the petition to be taxed and paid out of the assets of the company under rule 195 of the Companies (Winding up) Rules 1949—subject only to the claims of the mortgagees and the costs of preserving, realising and getting in the assets. Under rule 195, and subject to any order of the court, the taxed costs of the petition are a first charge on the net assets.

F If there is a surplus of assets in the liquidation, after all costs, expenses and debts have been paid, such an order will ex hypothesi not prejudice the creditors. If, however, there is not a surplus—and no one at this stage can confidently predict a surplus—the result of the order will be to reduce the assets available for creditors. Prima facie there would seem to be a great injustice in permitting the beneficial owner of all the shares in a company to oppose a winding up petition in order to G seek to secure a benefit for himself as shareholder and then, having failed in his opposition, to charge the costs of such unsuccessful opposition to the creditors of the company.

In the present case, counsel for the company also appeared for Mr. Harrison as opposing contributory and creditor. An opposing contributory or creditor does not obtain his costs if a winding up order is made, H but this is little comfort to the general body of creditors because I understand that in practice all the costs of the opposition are treated as costs incurred by the company, unless the opposing contributory or creditor sought at the hearing to make out a special case differing from that of the company.

If I were able to do so consistently with my jurisdiction and the established practice, I would think it right to deal with the costs on the facts of this particular case in such a way that the costs of the company

so far as increased by its unsuccessful and unjustifiable opposition do not reduce the assets available for payment of the debts due to the general body of creditors.

Counsel for the petitioning creditor has submitted that I have jurisdiction to make, and should make, an order for costs on one or other of the following bases: (1) an order that the costs of the petitioning creditor should be paid out of the assets of the company as costs of the petition, and an order that the costs of the company should be borne by Mr. Harrison as opposing contributory and creditor; (2) a like order in relation to the costs of the petitioning creditor, but no order in relation to the costs of the company.

Before discussing these alternatives I should say that I have no doubt that the company should be allowed, as costs of the petition, its costs incurred down to and including the first hearing of the petition. It is the invariable practice to allow as costs of the petition the costs of the company if it appears and consents to a winding up order. It is occasionally useful to have the company represented in court, even if it does not oppose a winding up order, and I would not wish to interfere with a practice which allows the costs of that appearance. It follows, I think, that in the present case the company should be allowed its costs down to the date when the order might first have been made. The costs which merit special consideration are the costs incurred by the company after the first hearing. In discussing, therefore, alternatives (1) and (2) I direct my mind only to the company's costs incurred after the first hearing.

Alternative (1). In my judgment I have jurisdiction to make such an order. Section 50 (1) of the Supreme Court of Judicature (Consolidation) Act 1925 empowers the court to determine by whom and to what extent costs are to be paid. Although this would not entitle the court to make an order against a complete stranger to proceedings, I see no reason why it should not entitle the court to make an order for costs against a person who has the right to appear, and does appear, on a winding up petition.

However, despite the existence of the jurisdiction, I reject this submission. The appearance and representation of Mr. Harrison were purely technical and added nothing to the case. His presence in court was nominal. The proceedings would have taken exactly the same course if he had been absent. It would therefore be anomalous if his accidental appearance should result in an order for costs against him, which could not I think have been made if, with no different impact on the case, he had been absent. There is no precedent for such an order so far as I am aware.

Alternative (2). There is no doubt as to my jurisdiction to make such an order. This follows directly from the wording of rule 195 of the Companies (Winding up) Rules 1949. The effect of making no order for the company's costs would be that such costs would not rank as costs of the petition within the first paragraph of rule 195 (1).

In dealing with alternative (2), it would not be right to overlook the problem how, in such circumstances, the solicitors acting for the company would recover their costs. If the solicitors had been retained by Mr. Harrison personally in order to act for the company, the solicitors would be entitled to recover their costs from him. Similarly, if the solicitors, wisely, had obtained from Mr. Harrison an indemnity for their costs.

A Similarly, also, if Mr. Harrison, as a man of honour, voluntarily paid such costs since he is in effect the company.

Counsel for the petitioner was, I think, minded to concede that in the last resort the solicitor could prove in the liquidation for his costs pari passu with the unsecured creditors by analogy with *In re C.B. & M. (Tailors) Ltd.* [1932] 1 Ch. 17. However, I am by no means convinced that this would be the case. The point is not directly before me, has not
B been argued, and I express no view.

Counsel for the petitioner referred me to *In re Blériot Manufacturing Aircraft Co. Ltd.* (1916) 32 T.L.R. 253, a decision of Neville J. That was a contributory's petition to wind up the company, which was solvent, on the ground that the substratum had gone and also on the ground that the board was under the control of three directors who were
C misapplying the moneys of the company. The petition was opposed by the company. A winding up order was made. Counsel for the company submitted that there was no ground for departing from the usual order as to costs. Neville J., however, directed that the company should have no costs. This case is a clear authority that the court has jurisdiction to direct that the costs of the company shall not be costs of the petition, and that it should exercise such jurisdiction if the justice of the
D case so requires. In this context it would not seem to be relevant whether the petition is founded on insolvency, as in the instant case, or on just and equitable grounds as in the *Blériot* case. I may add that rule 187 of the Companies (Winding up) Rules 1909, which was in force in 1916, does not differ from rule 195 in any way material for present purposes.

Counsel for the petitioner next referred me to *In re National Savings*
E *Bank Association* (1866) 1 Ch.App. 547 and *In re Welsh Brick Industries Ltd.* [1946] 2 All E.R. 197. Each was an unsuccessful appeal from a winding up order. In each case the court directed that the costs of the petitioner, but not the costs of the company, of the appeal should be paid out of the assets of the company. As these cases were unsuccessful appeals from winding up orders which had already been made, I think
F that they raise somewhat different considerations and do not really assist me.

Lastly, counsel for the petitioner drew my attention to *In re Container Engineering Co. Ltd.* (unreported), March 23, 1950. This was a winding up petition presented by two judgment creditors. A director and the majority shareholder was a Mr. Franghia. He swore an affidavit on behalf of the company deposing that the petitioners had agreed not to
G enforce their judgment debts in return for a promise by Mr. Franghia of payment at a future date. His evidence was supported by affidavits sworn by a Miss Moss, and a Mrs. Feakes. It appears from the recitals to the order, and from the registrar's note, that after the cross-examination and re-examination of Mr. Franghia and Mrs. Feakes, counsel for the company informed the court that he did not feel justified in continuing to oppose the making of a winding up order. Thereupon leading
H counsel for the petitioners, who was the late Sir Milner Holland, submitted that the costs of the opposition ought not to be paid out of the company's assets. He referred to the well known passage in *Buckley on the Companies Acts*, 12th ed. (1949), p. 472—it is p. 474 in the current 13th ed. (1957)—which so far as material reads:

> "The practice is to give costs to the petitioner and the company if the petition succeeds, and to the company if it fails . . . If the peti-

tion succeeds, these costs are given out of the company's estate: if it fails, they are given against the petitioner. This rule has now been followed for many years. It is not an inflexible rule."

Sir Milner also referred to the *Blériot* case 32 T.L.R. 253. According to the registrar's note Roxburgh J. described the case as an abnormal one which justified an abnormal order as to costs. The order as to costs was ultimately made in the following form:

"It is ordered that the costs of the company of the said petition, down to and including the hearing of the said petition on November 28, 1949 . . ."—that was the first hearing—". . . and the costs of the petitioners of the said petition be taxed and paid out of the assets of the said company, and the costs of the company of the said petition incurred after the hearing of the said petition on November 28, 1949, are not to be paid out of the assets of the company in priority to the unsecured creditors of the company."

Mr. Parker, appearing for the company and Mr. Harrison, accepted, as he was bound to accept, the undoubted jurisdiction of the court to direct that the costs of the company of the petition are not to be paid out of the assets of the company. He submitted, however, that there was no sufficient reason in the present case for departing from the usual practice that the company receives its costs. He said, quite correctly, that in both the *Blériot* and the *Container Engineering* cases there was fraud on the part of those who controlled the company; this, he submitted, justified a departure from the normal rule. There is no fraud in the present case.

In my opinion the court ought to look critically at costs incurred by an insolvent company in unsuccessfully opposing a winding up petition on the ground that the debt is disputed, when the advantage and perhaps the purpose of delaying liquidation is a possible surplus for the beneficial owner of the company's capital. I do not charge Mr. Harrison with lack of good faith but why, I ask myself, should the beneficial owner of the company's capital be entitled to finance such litigation at the expense of the creditors? In the instant case Mr. Harrison had little or nothing to lose and everything to gain by causing the company to dispute the debt. If he failed in that litigation, which he has promoted, no hardship is caused if the solicitors' bill falls to be paid by him personally rather than by the general body of creditors.

I do not intend to make any inroad into the general practice of allowing a company its costs of appearing on and consenting to a winding up petition. All that I am seeking to do in the present case is to exercise my discretion in such a way as to produce a result which is just and fair as between Mr. Harrison and his alter ego the company on the one hand, and the general body of creditors on the other hand.

I think it is useful to glance at the bankruptcy position. It is said in *Williams on Bankruptcy*, 18th ed. (1968), p. 264:

"The debtor who has committed any act of bankruptcy of which his solicitor has notice, or has had a petition presented against him, is nevertheless entitled to put his solicitor in funds for the purpose of defraying the costs of opposing the bankruptcy proceedings, without the risk of the trustees reclaiming the money from the solicitor."

The principal authority cited is *In re Sinclair, Ex parte Payne* (1885) 15

A Q.B.D. 616. That is a very different situation. If a solicitor acting for a person against whom a bankruptcy petition has been presented is in peril for his costs, it may be impossible for the debtor to secure legal advice. That would be deplorable. It is not, however, a situation that necessarily arises in the case of a company against whom a winding up petition is presented. The corporators are not usually bankrupt and they may in fact be far wealthier than the creditor who seeks payment of his B debt. There is nothing to prevent a corporator guaranteeing the cost of opposing a creditor's winding up petition. If the petition fails, the corporator loses nothing. If the petition succeeds, and the company's costs of opposing the petition are not allowed, the assets are effectively preserved for the benefit of the creditors whose claim thereto is superior to that of the corporator's. However, these are only intended as general C observations.

I think that each case must depend on its own facts. On the facts of the case before me, I consider it just that the costs of opposing the petition for the benefit of the sole corporator should not rank in front of the claims of the unsecured creditors. I therefore order that the costs shall be dealt with as follows:

D 1. The costs of the petitioner of the petition are to be taxed and paid out of the assets of the company.

2. The costs of the company of the petition down to and including the hearing on January 20, 1975, are also to be taxed and paid out of the assets of the company.

3. The costs of the company of the petition incurred after the hearing E on January 20, 1975, are not to be paid out of the assets of the company in priority to the payment in full of all the unsecured creditors of the company.

The company, if it desires, may apply for an order for taxation of its costs of the petition incurred after the hearing on January 20, and, subject as aforesaid, for payment thereof out of the surplus assets of the company.

The result of this decision, if it is correct, is that a solicitor retained F on behalf of a company, which is potentially insolvent, for the purpose of opposing a winding up petition, may feel it prudent to seek an indemnity from one or more of the corporators before embarking on his task. I think that this would be salutary; it may help to avoid the assets of the company being wasted on hopeless opposition to a winding up order.

G *Order accordingly.*

Solicitors: *Simmons & Simmons; Victor Mishcon & Co.*

H

1 of 2 DOCUMENTS

Re **Aurum Marketing** Ltd (in liquidation)

COURT OF APPEAL (CIVIL DIVISION)

[2000] 2 BCLC 645

HEARING-DATES: 16 June, 20 July 2000

20 July 2000

CATCHWORDS:

Winding up - Costs - Sole director operating swindle through company - Director causing company to contest winding-up proceedings for own interests - Unjust for general public and creditors of company to bear costs of winding-up proceedings - Whether director personally liable for costs.

HEADNOTE:

The appellant was the sole director and shareholder of a company which placed advertisements inviting members of the public to participate in the marketing of certain health foods for which the company claimed to have the marketing rights. The Secretary of State presented a public interest petition under s 124A of the Insolvency Act 1986 for the winding up of the company in the public interest. The petition was supported by evidence, including a report from the official receiver, to the effect that the company was insolvent and unable to pay its debts, that a large amount of the money received by the company from the public had been transferred abroad and misappropriated and that the appellant had been evasive, contradictory and uncooperative when the company's affairs were investigated under s 447 of the Companies Act 1985. The petition was initially contested by the company but was unopposed at the hearing. The deputy judge held that the company was engaged in a swindle and made a winding-up order but refused a subsequent application by the Secretary of State that the appellant be ordered to pay the costs of the proceedings personally, on the grounds that the Secretary of State had failed to show that the appellant's claim that the company's business was a bona fide marketing operation was not a bona fide defence. The Secretary of State appealed against the deputy judge's refusal to make the costs order against the appellant.

Held - The correct test of whether to make a costs order against a non-party on a winding-up petition was whether it was just to make such an order, not whether there was evidence of mala fides, abuse of process, procedural manipulation or improper defence of the petition. The circumstances relevant to determining whether a costs order should be made against the appellant were that the company's business was a swindle operated by him, as the sole director and shareholder, through the company, that it was in his interest for the company to contest and thereby delay the proceedings, and that not making a costs order against him put the burden of the costs of the proceedings, which were brought in the public interest to put an end to his swindle, onto the general public and the creditors of the company. In those circumstances, justice required that the appellant be ordered to pay personally both the Secretary of State's costs and the company's costs of the winding-up proceedings and that none of the company's

costs be paid directly or indirectly out of its assets until after the unsecured creditors had been paid in full. The appeal would therefore be allowed.

Decision of Jules Sher QC [1999] 2 BCLC 498 reversed.

CASES-REF-TO:

Aiden Shipping Co Ltd v Interbulk Ltd, The Vimeira [1986] 2 All ER 409, [1986] AC 965, [1986] 2 WLR 1051.
Bathampton Properties Ltd, Re [1976] 3 All ER 200, [1976] 1 WLR 168, Ch D.
Globe Equities Ltd v Globe Legal Services Ltd (1999) BLR 232, CA.
Northwest Holdings, Re (24 September 1999, unreported) Ch D.
Robertson Research International Ltd v ABG Exploration BV (13 October 1999, unreported) Ch D.
Symphony Group plc v Hodgson [1993] 4 All ER 143, [1994] QB 179, [1993] 3 WLR 830, CA.
Taylor v Pace Developments Ltd [1991] BCC 406.

INTRODUCTION:

Appeal

The Secretary of State for Trade and Industry appealed against the judgment of Jules Sher QC, sitting as a deputy High Court judge on 18 May 1999 ([1999] 2 BCLC 498) dismissing applications by the Secretary of State for orders that (1) the Secretary of State's costs and the company's costs of the proceedings to wind up Aurum Marketing Ltd be paid personally by the respondent, Michael Richards, who was the sole director and owner of the company, and (2) that the company's costs should not be paid out of the company's assets until after the company's unsecured creditors had been paid. The facts are set out in the judgment of Mummery LJ.

COUNSEL:

Michael Green for the Secretary of State; Paul Greenwood for the respondent.

JUDGMENT-READ:

Cur adv vult 20 July 2000. The following judgments were delivered.

PANEL: SIMON BROWN, SCHIEMANN, MUMMERY LJJ

JUDGMENTBY-1: MUMMERY LJ

JUDGMENT-1:

MUMMERY LJ (delivering the first judgment at the invitation of Simon Brown LJ).

Introduction

On 18 May 1999 Jules Sher QC, sitting as a deputy High Court judge, made an order on the petition, presented by the Secretary of State for Trade and Industry on 2 June 1998 under s 124A of the Insolvency Act 1986 (following an investigation under s 447 of the Companies Act 1985), for the winding up of Aurum Marketing Ltd (the company) on the ground of the public interest.

On 15 July 1999 the deputy judge ordered that the Secretary of State's costs of the petition be paid out of the assets of the company. He dismissed applications by the Secretary of State for orders that:

(1) the Secretary of State's costs and the company's costs of the winding-up proceedings be paid personally by the sole recorded director and owner of the company, Mr Michael Richards; and that

(2) the company's costs should not be paid out of the company's assets until after the company's unsecured creditors had been paid (a Bathampton order).

This is an appeal by the Secretary of State, with the permission of this court, from the refusal of the deputy judge to make either order.

Mr Green appears for the Secretary of State. Mr Greenwood now appears for Mr Richards. He did not appear for him or for the company either on the hearing of the petition or on the application for costs before the deputy judge.

Background

Following the presentation of the petition and the appointment of a provisional liquidator, affidavit evidence by Mr Richards was filed in opposition to the petition, which was set down for a three day hearing starting on 18 May 1999. The solicitors acting for the company indicated to the Secretary of State on 17 May 1999 that the defence to the petition was being withdrawn and that it would not be opposed at the hearing on 18 May.

On 18 May the case was listed as a mention. The deputy judge heard brief submissions from Mr Green for the Secretary of State on the essential facts relating to the company's activities between September 1997 and May 1998 in raising £2.5m (from which substantial sums had been remitted to accounts in Switzerland and Florida) by 'reverse marketing promotion' of health foods in 'Exchange and Mart', in other magazines and on the internet. This scheme involved promising members of the public 100% profit on an initial payment of £40 by the customer or 'agent' to the company.

The deputy judge had read a skeleton argument prepared by Mr Green. The deputy judge's attention was drawn to some of the Secretary of State's extensive evidence, but not to the detail of the company's evidence (running to four lever arch files) in which Mr Richards asserted that the company was conducting a genuine business scheme under which income would be generated by the retail marketing of health foods. The deputy judge said that he was satisfied that there was no business plan and that there was no evidence that the company had any rights to the 'Body Bite' edible health food bar or the 'Body Burst' energy health drink promoted in the company's scheme. The scheme was a 'smokescreen for money generation' that was bound to fail and hurt a lot of people financially. The deputy judge concluded that he was 'convinced and clear that this was a proper case for the making of a compulsory order on the public interest ground' and that he had 'no hesitation in making the compulsory winding-up order.'

Mr Green, on behalf of the Secretary of State, then applied for an order for the entire costs, including the company's costs as well as the Secretary of State's costs, against Mr Richards personally. The solicitors then acting for Mr Richards had been given notice on the previous day of the intention to make that application. The application was opposed by Mr David Chivers, who was counsel then acting for Mr Richards. Mr Chivers had been present in court during the hearing of the petition. The deputy judge ordered Mr Richards to be joined as a party for the purposes of deciding the costs application and adjourned the application with directions for evidence and skeleton arguments.

The deputy judge heard the application on 28 May 1999. He described the application as 'a summary process upon the heels of a summary process'. He delivered a reserved judgment on 15 July 1999 (see [1999] 2 BCLC 498).

The judgment

The deputy judge held that the 'summary way' in which the petition and the issue of costs were dealt with meant that the Secretary of State's application faced 'considerable difficulties'. He accepted that on the Secretary of State's case-

'the business of the company was a smokescreen for a scheme of money generation that was bound eventually to collapse leaving a lot a people hurt financially.' (See [1999] 2 BCLC 498 at 501.)

But he pointed out (at 501):

'[The company's] defence, that the scheme was a marketing campaign and that it was hoped or expected that the proceeds of sale of the products themselves would have supported the continuing cost of that campaign was not investigated at all. From the investigations made on behalf of the Secretary of State there appeared to me to be no substance in any such hope or expectation. But for all I know, had I been taken over all the extensive evidence put in by [the company], I might have come to the conclusion that such hope or expectation, misguided as it was, was at least genuinely held. I simply do not know.'

The deputy judge said that he undoubtedly had jurisdiction to order payment of the costs of the proceedings by a person who was not a party to them and commented (at 501):

'That I would have made the order if it could have been shown that Mr Richards had caused [the company] to put forward a defence which was not bona fide or otherwise manipulated the procedures of this court so as to delay the inevitable liquidation of this company is also not in doubt.'

The deputy judge then returned to the difficulties in taking this course (at 501-502):

'But how can I be clear that this is the case after a summary hearing of the petition without reference to the evidence put forward by [the company] and the equally summary hearing on the issue of costs ?'

The essence of the deputy judge's reasoning is in the following passage (at 502):

'In a claim against an individual director of the kind under consideration it is not enough, in my opinion, to rely on a judgment procured in default of defence and no more. The fact I have concluded on the evidence put forward by the Secretary of State that the business of [the company] was a swindle does not necessarily mean that the defence put forward, details of which I have not seen, has not been genuinely put forward as a bona fide defence. To obtain an order of the kind put forward in this application there must be evidence of abuse of the court's process by the director or breach by him of his fiduciary duty to [the company] in causing [the company] to put forward a defence known by him to be hopeless. However strong my view of the case on the uncontradicted evidence of one side, I do not think it can be a substitute, in a claim against an individual director, for such claim to be supported by appropriate evidence of mala fides or abuse which at the least calls for an explanation on the part of the director. Such is sorely lacking in the present case.'

The deputy judge added (at 503):

'If a petitioning creditor has nothing beyond the sheer strength of the evidence supporting the petition itself then, in my judgment, to make good a claim against the director for the costs of the petition, the petitioning creditor must show the court the evidence filed on behalf of the company. Even then it may not be possible to make good the claim; but at least the judge would be in a

better position to make a judgment as to whether the director has abused the process of the court.'

He concluded (at 504):

'I must say that I have serious doubts whether the defence of this petition was proper, but I am not satisfied , on the very limited material put before me, that it was improper. It is plainly for the Secretary of State to so satisfy me before making what is, in any event, an extraordinary order against a non-party. I am in the circumstances not prepared to make the order against Mr Richards either in respect of the costs of the Secretary of State or the costs of [the company].'

He also refused to make an order in the Bathampton form (ie that the costs of the company after the first hearing of the petition should not be paid out of the assets of the company in priority to the payment in full of the unsecured creditors of the company, thus depriving the company's solicitors of their costs: see Re Bathampton Properties Ltd [1976] 3 All ER 200, [1976] 1 WLR 168), saying that the 'real question for the court is whether the director should pay the costs of the proceedings'; that he had already answered that question in the negative ; and that was the end of the matter.

The law

This court will not disturb the deputy judge's exercise of his discretion on costs unless there is an error of principle or his decision is plainly wrong.

The relevant legal principles governing orders for costs against non-parties are as follows:

(1) Under s 51 of the Supreme Court Act 1981 the costs are 'in the discretion of the court, and the court shall have full power to determine by whom and to what extent the costs are to be paid.' This wide statutory discretionary power, which is to be exercised by courts 'in accordance with reason and justice', is not subject to any express or implied limitation that costs can only be ordered to be paid by the parties to the proceedings: Aiden Shipping Co Ltd v Interbulk Ltd, The Vimeira [1986] 2 All ER 409 at 416, 416-417, [1986] AC 965 at 980 and 981. A non-party may be ordered to pay the costs if the circumstances are such that it is just to do so.

(2) CPR 44.3(2) provides that-

'If the court decides to make an order about costs-(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but (b) the court may make a different order.'

These provisions have been applied to the costs of insolvency proceedings, save where inconsistent: r 7.33 of the Insolvency Rules 1986, SI 1986/1925, as amended by the Insolvency (Amendment) (No 2) Rules 1999, SI 1999/1022. The discretion to make a different order must accordingly be exercised to give effect to the overriding objective of dealing with the case justly and in a way which is proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party: CPR 1.1(1) and (2) and 1.2.

(3) As Morritt LJ said in Globe Equities Ltd v Globe Legal Services Ltd (1999) BLR 232 at 240:

'. . . in the ordinary run of cases where the party is pursuing or defending the claim for his own benefit through solicitors acting as such there is not usually any justification for making someone else pay the costs.'

In this sense such an order is 'exceptional', but I agree with the comment of Morritt LJ in Globe Equities Ltd v Globe Legal Services Ltd (1999) BLR 232 at 239-240 cited by Hart J in his valuable review of the authorities in Re Northwest Holdings (24 September 1999, unreported) (ie after the costs judgment in this case) that-

'there appears to me to be a danger of treating the requirement that the circumstances are "exceptional" as being part of the statute to be applied. It is not . . . In none of the cases to which I have referred have "exceptional circumstances" been elevated into a precondition to the exercise of the power; nor should they be.'

(4) There is guidance in the cases highlighting various factors relevant to the exercise of the discretion (see, in particular, Symphony Group plc v Hodgson [1993] 4 All ER 143, [1994] QB 179), but none of the authorities attempt to legislate for the exercise of the discretion. That must always depend on consideration of the actual circumstances of each case. There is, for example, no general rule that it is right in every case of a one-man company to make the controlling shareholder and director personally liable for the costs on the ground that he has caused the company to defend the proceedings: see Taylor v Pace Developments Ltd [1991] BCC 406 at 409. It is wrong to treat the reported cases as providing a comprehensive check list of factors which must be present in every case before the discretion can be exercised in a particular case. What may be sufficient to justify the exercise of the discretion in one case should not be treated as a necessary factor for the exercise of the discretion in a different case.

Nature of the proceedings

I agree with Hart J who pointed out in Northwest Holdings that public interest petitions are themselves an unusual form of proceedings which are more likely to attract orders for costs against non-parties. He said:

'In particular they have the characteristics that, while the burden of proof is on the Secretary of State, in practice a respondent company will usually be starting on the back foot; that (unlike most forms of litigation) they do not lend themselves readily to compromise; and that the effect of a successful petition is likely to be adverse to the general commercial reputation of those involved in the promotion and management of the respondent company. Moreover, and particularly where a provisional liquidator has been appointed, it is likely that in the typical case the cost of the company's defence of the petition will be underwritten by its owners and managers. It will therefore more often than not be a normal feature of this type of litigation that, if the petition is successful, the Secretary of State will be able to make out a case for saying that some individual connected with the company has for his own purposes resisted the making of an order which it was all along in the public interest should be made, and that it is just that that individual should make good to the public purse the cost incurred in the petition , or at least that part of those costs directly attributable to the fact that the petition was opposed.'

Relevant circumstances

In deciding whether to make a costs order against Mr Richards the deputy judge should have had regard to all the relevant circumstances, in particular the following which appear either from the Secretary of State's evidence on the petition, which was uncontradicted as the company had withdrawn its defence to the petition, or from the record of the proceedings:-

(1) The Secretary of State authorised a s 447 investigation into the affairs of the company by Mr David Boote who deposed to the fact that Mr Richards had

been evasive, contradictory and unco-operative in the provision of information. Mr Richards was the sole recorded director and shareholder of the company.

(2) The substance of the petition, which was verified and supported by affidavit evidence from Mr David Boote, was that it was in the public interest to wind up the company as it was insolvent and unable to pay its debts and that the scheme operated by it-

'is a swindle and has been conducted dishonestly. Members of the public are induced to send cash to the company in the expectation of receiving a larger sum in return. However, the company has not and never has had any serious expectation of being able to pay all the money it has promised to pay. A large amount of the money so received by the company has been transferred abroad and misappropriated.'

(3) On 3 June 1998 Rimer J appointed a provisional liquidator of the company. Following the commencement of the winding up any disposition of the company's assets was void, unless validated by order of the court. The company had already ceased trading in May 1998. Affidavit evidence was sworn by Mr Richards alone in opposition to the petition, which was set down for hearing and was due to be heard on 18 May for an estimated 2 to 3 days.

(4) On 11 March 1999 the official receiver filed a report on the provisional liquidation referring to the transfer abroad of substantial sums from the company's accounts and to the refusal of Mr Richards to cooperate with the investigations of the official receiver or to return the money transferred.

(5) In April 1999 new solicitors instructed on behalf of the company gave notice of cross-examination at the hearing.

(6) On 14 May 1999 an unsuccessful application was made on behalf of the company to Blackburne J to adjourn the hearing and for the release of money by the provisional liquidator to pay legal fees and expenses. An affidavit was sworn on 13 May 1999 by a solicitor (Mr Michael Gardner of Morgan Cole) freshly instructed on behalf of Mr and Mrs Richards, and through them, on behalf of the company. He stated that his firm needed 'to be put in funds for the purpose of continuing the company's defence'. The applications were rejected on the ground that the reality was that the petition was being opposed by Mr Richards, that there was no evidence that he was unable to fund the company's defence and that indeed he had considerable assets at his disposal. The evidence in support of that application does not reveal how the legal costs and expenses of opposing the petition had been funded up till then.

(7) On 17 May, when the company's solicitors informed the Secretary of State that its defence to the petition was being withdrawn, it was made clear by the Secretary of State's solicitors that a personal costs order against Mr Richards would be sought.

(8) The hearing of the petition and of the applications for costs took place and the two judgments were given in the circumstances already described.

Conclusion

In my judgment the deputy judge took the wrong approach to the costs application. In the circumstances outlined above justice requires that orders be made that Mr Richards personally pays both the Secretary of State's costs and the company's costs of the winding-up proceedings and that none of the company's costs should be paid directly or indirectly out of the company's assets until after the company's unsecured creditors have been paid in full.

The legal position is as follows.

(1) The scheme operated by the company was a swindle. That has been found as a fact on the petition. It was not appealed. The deputy judge came to this conclusion on the evidence of the Secretary of State. The fact that this was denied in the evidence filed by Mr Richards on behalf of the company, which then withdrew its defence, and that Mr Richards asserted and believed that it was not a swindle and that the business was conducted in good faith is irrelevant in view of that finding.

(2) As Mr Richards was the sole director and shareholder of the company, it was he who was operating the swindle through the company. He was the controlling force behind the company's opposition to the winding-up order. He cannot be heard to say that he was resisting the winding-up order in the interests of the public, who were liable to be swindled; or in the interests of the creditors, who had been swindled; or in the interests of the company, which he was using to operate the swindle. The proceedings were contested by the company from June 1998 to mid-May 1999 because Mr Richards, as controller and owner of the company, conceived it to be in his own interests to do so.

(3) Mr Richards is not entitled in those circumstances to distance himself from the deputy judge's decision on the winding-up petition and contend that the findings of fact were made against the company in proceedings to which he was not a party and that they are not binding on him. I reject Mr Greenwood's submission that the Secretary of State failed to adduce evidence to the deputy judge sufficient either to prove his case against Mr Richards or sufficient to 'obligate' Mr Richards to adduce evidence in order to avoid adverse findings of fact. Mr Richards knew what was alleged. He had ample opportunity to answer it. He swore evidence in opposition to the petition. He then decided not to oppose it.

(4) The effect of the order made by the deputy judge is that the burden of costs of proceedings successfully brought in the public interest to put an end to a swindle operated by Mr Richards through the company are borne not by Mr Richards but by the assets of the company, which has been found to be insolvent. In effect Mr Richards is able to throw the costs of the proceedings onto the general public and onto the creditors of the company who are the very people who have been or were liable to be swindled. This does not seem to me to be just.

(5) I doubt whether the deputy judge in fact thought that this was a just result in the light of his findings on the winding-up petition. The reason that we do not know for certain what the deputy judge thought on the justice of the outcome on costs is that the deputy judge did not ask himself the correct question, that is whether it was just to make the costs order against Mr Richards. That is the flaw in his approach to the costs application.

(6) In his detailed judgment the deputy judge proceeded on the basis that the winding-up order was made 'in default of defence and no more' and that it was not appropriate to make 'an extraordinary order' against Mr Richards 'by a summary process' (a) without evidence from the Secretary of State against him of mala fides, abuse of process, procedural manipulation or improper defence of the petition by Mr Richards, known by him to be hopeless and 'for the sole reason of avoiding a finding of dishonesty against himself' and (b) without reference to 'the extensive evidence' put in by the company on the petition.

That is not the correct approach. First, the winding-up order was not made 'in default of defence.' It was not a default order. The order was made after a trial of the merits of the petition in which Mr Richards elected not to take part and on the basis of facts which the deputy judge held were established from the Secretary of State's evidence. The fact that on the eve of the trial Mr Richards deliberately chose not to argue the merits and not to rely on his own

evidence to oppose the making of the order does not make the order a 'default' order. Nor does it diminish the force of the deputy judge's findings of fact by which Mr Richards, as the alter ego of the company, is bound unless and until that order is set aside. He must take the consequences of electing not to rely on the extensive evidence put in by him on behalf of the company.

Secondly, as already explained, the power to order a non-party to pay the costs of legal proceedings is not limited to cases of bad faith, abuse of process, impropriety or procedural manipulation. The power can be exercised if, in all the circumstances, it is just to do so.

In this case it is just to order Mr Richards to pay all the costs personally, both of the Secretary of State, who has presented and successfully pursued this petition for the protection of the public, and of the company, whose assets should be preserved for the benefit of the creditors of the company and should not be available for the personal benefit of Mr Richards, who, for his own reasons, made the decision to oppose and then the decision not to oppose the petition. It would have been appropriate to make such an order at a 'summary hearing' of the kind which took place before the deputy judge on 28 May 1999 following on his earlier decision to put the company into liquidation on public interest grounds. It was, in the words of Laddie J in Robertson Research International Ltd v ABG Exploration BV (13 October 1999, unreported) 'a plain and straightforward case', fit for summary treatment.

I would not exclude from those costs, as Mr Greenwood submitted should be done, the costs of the petition, of the preparation of the evidence in support, of the application for the appointment of the provisional liquidator and of the first hearing of the petition. It was argued that it had not been demonstrated that Mr Richards, by causing the company to defend the petition, had caused the Secretary of State to incur those costs. They would have been incurred anyway. I disagree. All those costs (and more) were caused by Mr Richards operating the company against the public interest by perpetrating swindles which led to the presentation of the petition by the Secretary of State and to the incurring of costs, which would not otherwise have been incurred.

This is also a case in which none of the company's assets should be used to pay any of the costs of the petition until after all the unsecured creditors of the company have been paid. Following the presentation of the petition no order was made authorising the disposition of the company's assets for the purpose of funding the opposition to the making of a winding-up order. In those circumstances the interests of the unsecured creditors of the company should be protected.

For those reasons I would allow this appeal.

JUDGMENTBY-2: SCHIEMANN LJ

JUDGMENT-2:

SCHIEMANN LJ: For the reasons set out by Mummery LJ I agree that this appeal should be allowed.

JUDGMENTBY-3: SIMON BROWN LJ

JUDGMENT-3:

SIMON BROWN LJ: I also agree.

DISPOSITION:

Appeal allowed. Leave to appeal to the House of Lords refused.

SOLICITORS:

Treasury Solicitor; Phillip Rudall, Swansea.

Respondents to *Anton Piller* orders, who do not allow immediate entry and search in accordance with the terms of the orders, are at risk. The defendants in the present case were, in my judgment, at risk from 11 a.m. on 25 September onwards. Respondents who choose to postpone a search for their own reasons should be warned as these defendants were warned, that if they do so, they are at risk of committal. But when a committal application is made, something more to justify an order under it must be shown than a mere technical breach of the obligation to allow entry forthwith.

On the facts of the present case I can see no point in this committal application and no ground upon which the first and third defendants' refusal to allow execution until after their application made on the afternoon of the same day to Aldous J. could justify committal or the imposition of any other penalty. Accordingly, I dismiss the application. But I emphasise that any other respondent who chooses to postpone the execution of an *Anton Piller* order will do so, as these defendants have done, at his own risk. The result of a consequent committal application will depend on the facts of the particular case. This committal application fails.

Motion dismissed with costs.

Solicitors: McKenna & Co.; Herbert Smith.

T. C. C. B.

[CHANCERY DIVISION]

In re A COMPANY (No. 004055 of 1991)

1991 July 11; 16 Hoffmann J.

Insolvency—Winding up—Costs—Company disputing debt applying to strike out petition—No bona fide dispute—Order for costs—Whether unsecured creditors' claims to be met before company's costs paid

A creditor presented a petition for the winding up of the company but the company disputed the debt and claimed that moneys were due to it by way of set off. On its motion to strike out the petition, the judge, held that the amount so claimed was relatively trivial, that there was no bona fide dispute as to the rest of the petitioning creditor's claim, that the company was, admittedly, insolvent and accordingly he dismissed the company's motion. The petitioning creditor then sought an order that, if the company should be wound up on the hearing of the petition, an order should be made that the company's costs should not be paid out of the assets of the company in priority to payment in full of all the unsecured creditors.

On the question of costs:—

Held, that if a company was insolvent the effect of an order in the form sought by the petitioning creditor was to deprive the company's solicitors of their costs; that, since the court had jurisdiction to make an order for costs against a person who was not a party to the proceedings, the making of an order in the form sought was probably no longer appropriate, and certainly was not in the present circumstances; and that, accordingly, the court would order the company to pay the petitioning creditor's costs of the motion on the standard basis in any event, with liberty to the petitioning creditor to apply, if so advised, on notice to the persons affected, for an order that the company's costs be paid by one or more of the directors personally or that such costs be disallowed under R.S.C., Ord. 62, r. 11 (post, p. 1006B–C, D–G).

Aiden Shipping Co. Ltd. v. Interbulk Ltd. [1986] A.C. 965, H.L.(E.) considered.

In re Bathampton Properties Ltd. [1976] 1 W.L.R. 168 not followed.

The following cases are referred to in the judgment:

Aiden Shipping Co. Ltd. v. Interbulk Ltd. [1986] A.C. 965; [1986] 2 W.L.R. 1051; [1986] 2 All E.R. 409, H.L.(E.)

Bathampton Properties Ltd., In re [1976] 1 W.L.R. 168; [1976] 3 All E.R. 200

Land and Property Trust Co. Plc., In re [1991] 1 W.L.R. 601, [1991] 3 All E.R. 409, C.A.

The following additional case was cited in argument:

Reprographic Exports (Euromat) Ltd., In re (1978) 122 S.J. 400

MOTION

The company moved to strike out the winding up petition issued by the petitioning creditor, on the ground that the debt was disputed. Hoffmann J. held that there was no bona fide dispute and dismissed the motion. The report deals solely with the subsequent judgment on the question of costs.

The facts are stated in the judgment.

Stephen Moverley Smith for the company.

Richard Snowden for the petitioning creditor.

Cur. adv. vult.

16 July. HOFFMANN J. read the following judgment. This is a motion to strike out a creditor's petition on the ground that the debt is disputed. The claim is for the balance of moneys under a contract for the construction of two tennis courts and the alleged defence is a set-off on the ground of defective work. I have decided that the company's set-off, if any, is for a relatively trivial sum and that there is no bona fide dispute as to the rest of the claim. The company is admittedly hopelessly insolvent and its parent company has recently gone into receivership. I said in my judgment dealing with the merits of the company's motion that the alleged set-off had been conjured up at a late stage to avert liquidation. I dismissed the motion and it remains to deal with the question of costs.

Mr. Snowden, for the petitioning creditor, asked me to order that if the company should be wound up on the hearing of the petition, the company's costs of the motion should not be paid out of the assets of the company in priority to the payment in full of all the unsecured creditors of the company. As the unsecured creditors are certain to get nothing, the effect of this order would be to deprive the company's solicitors of their costs.

Under rule 4.218(1)(*h*) of the Insolvency Rules 1986, the "costs of the petitioner, and of any other person appearing on the petition whose costs are allowed by the court" are expenses in the liquidation which rank before both preferential and ordinary debts. On the hearing of the petition, the petitioner's counsel almost invariably asks for "the usual compulsory order." This provides for the costs of the petitioner and the company to be paid out of the assets of the company. Solicitors instructed on behalf of a company to oppose a petition can therefore expect that in ordinary circumstances, win or lose, their fees and disbursements will rank as an expense of liquidation.

Although this is the normal practice, the court retains a complete discretion and can vary the usual order. In *In re Bathampton Properties Ltd.* [1976] 1 W.L.R. 168, Brightman J. did so by making an order in the form which Mr. Snowden seeks today. *Bathampton* was a case of a one-man company which opposed a creditor's petition on the ground that the debt was disputed. After several adjournments and a three-day hearing, Brightman J. decided that there was no bona fide dispute on substantial grounds and made a compulsory order. The company had secured debts of £19,000 and unsecured debts of about £22,000, some of which was owed to the director and sole beneficial shareholder, Mr. Harrison. As against these debts, it had three properties which Mr. Harrison estimated could in time be sold for £108,000 and virtually no liquid assets. But the property market was then as depressed as it is now and Mr. Harrison had caused the company to resist the petition because he wanted to postpone sale until he could get a better price. Brightman J. said that the opposition to the petition was entirely for the benefit of Mr. Harrison, and that there would be

> "a great injustice in permitting the beneficial owner of all the shares in the company to oppose a winding up petition in order to seek a benefit for himself as shareholder and then, having failed in his opposition, to charge the costs of such unsuccessful opposition to the creditors of the company."

The obvious way to avoid such injustice would be to order the company's costs to be paid by Mr. Harrison personally. But this the judge felt unable to do. He said that he had no jurisdiction to make an order for costs against Mr. Harrison except as a party to the petition. As it happened, Mr. Harrison had also appeared in the character of an opposing creditor and accordingly there was jurisdiction to make an order for costs against him. But Brightman J. said that this accidental circumstance, which had not added to the costs, could not justify making an order which could not have been made if Mr. Harrison had not been a party and had been content merely to instigate the company to put forward its groundless defence.

Accordingly, Brightman J. adopted the course of ordering that the company's costs should not be paid out of the assets of the company in priority to the payment, in full, of all unsecured creditors. He pointed

out that if the company's solicitors had been retained by Mr. Harrison personally or if he had given them an indemnity for their costs or if Mr. Harrison "as a man of honour" voluntarily paid their costs, the order would have achieved indirectly what he felt that he could not achieve directly by ordering Mr. Harrison to pay the costs. Later passages in the judgment suggest that Brightman J. thought that in one way or another this was likely to be the outcome. As he remarked, "each case must depend upon its own facts" and it may be that the judge had grounds for his belief which do not appear from the judgment. Nevertheless, the case was reported, and since then "*Bathampton* orders" have occasionally been made by judges in the Companies Court.

Prima facie however the solicitors are retained by the company and must look to the company alone for their costs. If the company is insolvent, the effect of an order in the *Bathampton* form is to deprive them of their costs. It seems to me unfair to make such an order on grounds which have no necessary connection with the conduct of the solicitors themselves. The court has of course jurisdiction under R.S.C., Ord. 62, r. 11 to disallow the costs as between the company and its solicitors if it considers that they have been unreasonably or improperly incurred. Under that rule, however, the court must give the solicitor a reasonable opportunity to appear and show cause why such an order should not be made. The inquiry is into the conduct of the solicitor and not that of the shareholders or directors of the company.

Since *Bathampton* the decision of the House of Lords in *Aiden Shipping Co. Ltd. v. Interbulk Ltd.* [1986] A.C. 965 has established that the court does have jurisdiction to make an order for costs against a person who is not a party to the proceedings. *In re Land and Property Trust Co. Plc.* [1991] 1 W.L.R. 601 shows this jurisdiction being exercised in the Companies Court to make an order against directors of a company which had presented what the judge considered to have been a hopeless petition for an administration order. Nicholls L.J. remarked that the circumstances in which it will be just to make such an order are exceptional and that "in the nature of things it will very seldom be right to order a person who is not a party to the proceedings to pay the costs of the proceedings." Justice also requires that the director should be given an opportunity to defend himself and if necessary put in evidence before such an order is made. But the jurisdiction undoubtedly exists.

The court therefore now has power to do directly what Brightman J. tried to do indirectly in *Bathampton*. In these circumstances, I find it difficult to imagine a case in which it would be proper in future to make an order in the *Bathampton* form. This is certainly not such a case. I will therefore simply order that the company pay the petitioning creditor's costs of the motion on the standard basis in any event, with liberty to the petitioning creditor to apply, if so advised, on notice to the persons affected, for an order that the company's costs of the motion be paid by one or more directors personally or that such costs be disallowed under R.S.C., Ord. 62, r. 11.

Order accordingly.

Solicitors: Piper Smith & Basham; Baileys Shaw & Gillett.

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[HOUSE OF LORDS]

AIDEN SHIPPING CO. LTD. RESPONDENTS AND INTERBULK LTD. APPELLANTS

1986 April 15, 16, 17; May 22

Lord Bridge of Harwich, Lord Brightman, Lord Mackay of Clashfern, Lord Ackner and Lord Goff of Chieveley

Costs - Discretion of court - Motions to remit arbitration awards - Awards arising out of same incident - Motions heard together - Respondent to first motion applicant in second motion - Whether court having jurisdiction to order applicant in first motion to pay costs incurred in second motion - Whether jurisdiction to order payment of costs limited to parties to proceedings - Supreme Court Act 1981 (c. 54), s. 51(1) 1 - R.S.C., Ord. 62, r. 2(4) 2

Following damage to their vessel, shipowners made a claim against the charterers under the charterparty. The charterers in turn claimed against the sub-charterers under a sub-charter. Both charterparties contained arbitration clauses, and both sets of arbitrators duly made awards. Both awards were ultimately remitted for further consideration by the relevant tribunals, and, disputes having arisen as to the scope of the remissions, the owners in the head charter arbitration and the charterers in the sub-charter arbitration issued originating notices of motion seeking a wider remission. Hirst J. heard both motions together and refused the relief sought. He made an order in relation to the head charter arbitration that the owners pay the charterers' costs of the application, such costs to include any costs paid by the charterers to the sub-charterers in the sub-charter proceedings. The Court of Appeal allowed an appeal by the owners, holding that they were bound by previous decisions of the court to hold that an order for costs could only be made against a party to the proceedings in question.

On appeal by the charterers:-

Held, allowing the appeal, that the discretionary power to award costs in section 51(1) of the Supreme Court Act 1981 was expressed in wide terms, leaving it to the rule-making authority, if it saw fit to do so, to control its exercise by rules of court and to the appellate courts to establish principles for its exercise; and that there was no justification for implying a limitation to the effect that costs could only be ordered to be paid by parties to the proceedings (post, pp. **972B-D**, **975F-H**, **979B-C**, **980C-D**).

John Fairfax & Sons Pty. Ltd. v. E. C. de Witt & Co. (Australia) Pty. Ltd. [1958] 1 Q.B. 323, C.A. overruled.

Dictum of Collins L.J. in Forbes-Smith v. Forbes-Smith [1901] P. 258, 271, C.A. not applied.

Decision of the Court of Appeal [1985] 1 W.L.R. 1222; [1985] 3 All E.R. 641 reversed.

1 Supreme Court Act 1981, s. 51(1): see post, p. **972E-F**.

2 R.S.C., Ord. 62, r. 2(4): see post, p. **975C-D**.

The following cases are referred to in the opinion of Lord Goff of Chieveley:

Bremer Handelsgesellschaft m.b.H. v. Westzucker G.m.b.H. (No. 2) [1981] 2 Lloyd's Rep. 130, C.A.

Fairfax (John) & Sons Pty. Ltd. v. E. C. de Witt & Co. (Australia) Pty. Ltd. [1958] 1 Q.B. 323; [1957] 3 W.L.R. 877; [1957] 3 All E.R. 410, C.A.

Forbes-Smith v. Forbes-Smith [1901] P. 258; 84 L.T. 789, Sir Francis Jeune P. and C.A.

The following additional cases were cited in argument:

Attorney-General v. Kerr (1841) 4 Beav. 297

Attorney-General v. Logan [1891] 2 Q.B. 100, D.C.

Attorney-General v. Scott [1905] 2 K.B. 160, C.A.

Department of Health and Social Security v. Envoy Farmers Ltd. [1976] 1 W.L.R. 1018; [1976] 2 All E.R. 173

Eady v. Elsdon [1901] 2 K.B. 460, C.A.

Edginton v. Clark [1964] 1 Q.B. 367; [1963] 3 W.L.R. 721; [1963] 3 All E.R. 468, C.A.

Fahy's Will Trusts, In re [1962] 1 W.L.R. 17; [1962] 1 All E.R. 73

Gibson's Settlement Trusts, In re [1981] Ch. 179; [1981] 2 W.L.R. 1; [1981] 1 All E.R. 233

Horwood v. Statesman Publishing Co. Ltd. (1929) 141 L.T. 54, C.A.

Knight v. Clifton [1971] Ch. 700; [1971] 2 W.L.R. 564; [1971] 2 All E.R. 378, C.A.

Llewellin, In re, (1887) 37 Ch.D. 317

Myers v. Elman [1940] A.C. 282; [1939] 4 All E.R. 484, H.L.(E.)

Palmer v. Walesby (1868) L.R. 3 Ch.App. 732

Pink v. J. A. Sharwood & Co. Ltd. [1913] 2 Ch. 286

Southmolton Corporation v. Attorney-General (1854) 5 H.L.Cas. 1, H.L.(E.)

APPEAL from the Court of Appeal.

This was an appeal by the charterers, Interbulk Ltd., by leave of the House of Lords from the decision of the Court of Appeal (Sir John Donaldson M.R., Parker and Croom-Johnson L.JJ.) on 10 October 1985 allowing an appeal by the owners, Aiden Shipping Co. Ltd., from the order of Hirst J. on 26 November 1984 that in relation to proceedings between the owners and the charterers the owners pay the charterers' costs of the owners' motion for remittal of an arbitration award, such costs to include any costs paid by the charterers to sub-charterers, I.C.C.O. International Corn Co. N.V., in sub-charter proceedings.

The Court of Appeal refused the charterers leave to appeal, but on 18 December 1985 the Appeal Committee of the House of Lords (Lord Bridge of Harwich, Lord Templeman and Lord Mackay of Clashfern) [1986] 1 W.L.R. 100 allowed a petition by the charterers for leave to appeal.

The facts are set out in the opinion of Lord Goff of Chieveley.

Bernard Rix Q. C. and ***Simon Gault*** for the charterers. *1. Section 51 of the Supreme Court Act 1981.* The wording goes back to section 5 of the Supreme Court of Judicature Act 1890, where the essential words appeared, then to section 50(1) of the Supreme Court of Judicature

rule (Order 55 in Schedule 1 to the Supreme Court of Judicature Act 1875) was confined to the words "costs of and incident to all proceedings . . . shall be in the discretion of the court." The words "and the court shall have full power . . ." go back only to 1890. *John Fairfax & Sons Pty. Ltd. v. E. C. de Witt & Co. (Australia) Pty. Ltd.* [1958] 1 Q.B. 323 was a case not on the statute but on the rule; the rule was that in force prior to the amendment made in 1959 and did not contain the words "full power."

Fairfax and *Forbes-Smith v. Forbes-Smith* [1901] P. 258 do not impose the limitation that the Court of Appeal thought they did. If they did, they were wrongly decided. If any limitation is to be implied into section 51, it should only be on the ground that reason and justice demand it. As to this: (i) reason and justice demand no limitation at all; (ii) alternatively, any limitation should be no wider than reason and justice demand; (iii) this is not an undesirable power for the judge to have; (iv) as to the alteration of the rule in 1959, why apply a limitation in the first place? If the draftsman intended a limitation, alteration of the rule would not help. [Reference was made to *Cordery, The Law Relating to Solicitors*, 7th ed. (1981), p. 125; *Attorney-General v. Logan* [1891] 2 Q.B. 100; *Palmer v. Walesby* (1868) L.R. 3 Ch.App. 732 and *Pink v. J. A. Sharwood & Co. Ltd.* [1913] 2 Ch. 286.]

2. *The authorities, especially Fairfax and Forbes-Smith*, (i) The actual decision in *Forbes-Smith* was on section 34 of the Matrimonial Causes Act 1857, not section 5 of the Act of 1890. Section 5 was held to be excluded by section 34. The decision was probably correct on that basis (ii) It follows that what was said about the Act of 1890 was obiter. (iii) As to the Act of 1890, Sir Francis Jeune P. and Collins L.J. propounded different tests: Sir Francis Jeune P.'s test was much broader. (iv) It is not clear whether the order made against the co-respondent was made in the wife's or in the husband's proceedings; it is, therefore, not clear what Collins L.J. treated as the vice of the order. (v) It is not clear from Collins L.J.'s judgment whether his test for making two suits into one (consolidating) was a formal or factual test. (vi) On consolidation, Collins L.J. considered that the two petitions were incapable of consolidation. He applied a different, old-fashioned rule that would not be upheld today. (vii) For all those reasons, the case is a very shaky foundation for any decision as to the construction of the Act of 1890. In particular, Collins L.J. does not do justice to the jump from the requirement that a person must not be a stranger to the proceedings to the requirement of formality that be must be a party, nor to the formal distinction between two suits, as distinct from considering more broadly, as Sir Francis Jeune P. did, whether the suit in question could be said to be "the proceedings."

On *Fairfax*: (i) the case was not concerned with the statute (then the Act of 1925) but with the rule of court (Ord. 55. r. 1), which was wider than the statute in that it contained the words "shall have full power." (ii) After the decision in *Fairfax* the rule was changed and brought into line with the Act. Parker L.J.'s words did not, therefore, fall on deaf ears. (iii) The need for formal consolidation in the strictest sense could

be understood on that basis. (iv) Parker L.J. was expressing the same philosophy as Sir Francis Jeune P. in *Forbes-Smith*, highlighting the flexibility of "all proceedings" in the context of the statute. (v) The facts in *Forbes-Smith* and *Fairfax* were different. (vi) The problem that arose in *Fairfax* would now be dealt with not only by the expanded words of the rules but also by Ord. 17, r. 8 (interpleader) *Fairfax* was not a case on the statute at all, but on a different rule only, so it is of no assistance here one way or the other. It was dealing with a very formal and technical position: a matter of form rather than of substance. [Reference was made to *Edginton v. Clark* [1964] 1 Q.B. 367, 379 (Upjohn L.J.) and *Knight v. Clifton* [1971] Ch. 700.]

3. *"Costs incidental to all proceedings"* (alternative submission). These were plainly intended to be words of extension. It may be very much a question of fact: categorising the facts and seeing whether they come under the particular heading or not. [Reference was made to *In re Llewellin* (1887) 37 Ch.D. 317; *In re Fahy's Will Trusts* [1962] 1 W.L.R. 17; *Department of Health and Social Security v. Envoy Farmers Ltd.* [1976] 1 W.L.R. 1018 and *In re Gibson's Settlement Trusts* [1981] Ch. 179.] The charterers do not say that any of those applications of the words in those four cases applied an exclusive or exhaustive definition of the phrase, but they were intended to express, in

general, a causal connection. Further, determination of whether costs are incidental to the proceedings is a categorisation sometimes described as a mixed question of fact and law. The trial judge is in the best position to make such a determination (in this case, to judge to what extent the sub-charterers' affidavits, etc., were necessary in order to determine the issue before him). In such case, unless the judge has plainly misconstrued his jurisdiction, so that his view of "incidental to" cannot possibly be supported, an appellate court should be very slow to disturb his judgment.

4. Whether there was in these proceedings a de facto arrangement of consolidation or whether the proceedings were of a third party nature so as to make the head - and sub-applications referable to as "the proceedings," and whether the consolidation order made by the Court of Appeal in Bremer *Handelsgesellschaft m.b.H. v. Westzucker G.m.b.H. (No. 2)* [1981] 2 Lloyd's Rep. 130 could be made. In other words, assuming that section 51 is subject to the implied limitation: (a) one nevertheless asks whether the test of a single set of proceedings is the purely formal test of whether they were consolidated or there were third party proceedings, or whether they were a real or substantive single set of proceedings, or whether something analogous (Collins L.J. in Forbes-Smith) would suffice; (b) or can the court provide the form by consolidating the applications at a late stage?

On (a), Sir John Donaldson M.R. [1985] 1 W.L.R. 1222, 1228, did seem to consider that a de facto third party arrangement would be sufficient. That was the situation before Hirst J. The charterers do not rely on *Westzucker* as authority on the statute but because the Court of Appeal there purported to treat the proceedings as consolidated: it was a matter of discretion.

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As to whether these proceedings would be more apt for third party proceedings than consolidation, both reflect the same overall consideration: convenience and saving of costs and bringing all the litigants together. The test is the same: some common element of fact or law. Precisely the same question arose here either way. Compare also the procedure by which a person intervenes in an action. There is no reason why third party procedure should not be applicable to a notice of motion. It is accepted that these proceedings never proceeded as third party proceedings, but they had the substance and form of third party proceedings: they were de facto third party or consolidated proceedings.

As to solicitors, the provision for awarding costs against them first appeared in 1883 (R.S.C., Ord. 65, r. 11, the ancestor of Ord. 62, r. 8); it was not in Schedule 1 to the Act of 1875. As to trusts, see Ord. 44, r. 2. As to interpleader, see Ord. 17, r. 5 (and see the alternative procedure in sub-rule (2)); this is an example of a global proceeding that covers two formally distinct actions.

David Hunt for the owners. The owners do not quarrel with the charterers' history of the position under the various statutes and rules of court, but they do with some of the inferences that they draw.

As to the implied limitation on section 51, the Court of Appeal were entirely correct to hold that the jurisdiction under section 51(1) is limited to the making of an order for costs to be paid by a party to *those proceedings* ("costs of and incidental to"). If section 51 is subject to that limitation, there was no power to order the owners to pay the costs of the sub-application because they were not a party to the sub-application.

The width or otherwise of the express wording of section 51(1) does not advance the matter either way. The owners do not suggest otherwise than that wording is, as Sir John Donaldson M.R. said [1985] 1 W.L.R. 1222, 1226, "extremely wide," but that is no warrant for reading "all proceedings" as "any proceedings between anybody." It means "any *sort* of" cause, action, matter, etc. It is used as convenient shorthand and was so regarded by Jenkins L.J. in *Fairfax*, at p. 329.

Conversely, "all proceedings" do not of themselves justify construing section 51 as extending the jurisdiction beyond the particular proceedings (of whatever sort) in which the order for costs is sought.

"Reason and justice," if that is an appropriate expression, do demand the limitation that was upheld by the Court Appeal. The reason for it is treated as self-evident in the authorities and is not hard to find: that it is the *parties* to the proceedings alone who in the end decide on their initiation and conduct. So also must the responsibility for the costs of the proceedings be theirs and theirs alone.

There are grave difficulties in the way of any intermediate limitation: great difficulties in practice and the

generation of a great deal of litigation as to costs. It is accepted that the matter could be within the judge's discretion, but there could be a great deal of argument as to where the line was to be drawn.

As to "interconnected proceedings," unless one has consolidation properly so called there is no power to award costs with regard to interrelated proceedings. It is up to the parties to make an arrangement as to costs.

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The restriction in section 18(1)(f) of the Act of 1981 reflects the limitation in section 51. [Reference was made to *The Supreme Court Practice (1985)*, note 59/1/12.]

As to the unsatisfactory definition of "party" relied on by the charterers, see *The Supreme Court Practice (1985)*, p. 1369, also para. 5343. On this: (i) albeit the definition is inclusive and not exclusive, there is no difficulty in practice in determining who is a party, and any difficulty could be cured by an amendment of the Rules. (ii) It is true that the definition has changed in a minor way since 1925, but this has not caused any problems. (iii) It is in no way illogical that the scope of the implied limitation should vary with rules of court from time to time as to who a party is.

As to *Forbes-Smith v. Forbes-Smith* [1901] P. 258, 259, 261, see also the report in 84 L.T. 789, 790, where the language is different; see also *per* Marshall Hall arguendo, at pp. 265; 792. Thus, on the Law Times version, Sir Francis Jeune P. and Collins L.J. were unanimous. As to *Fairfax*, see the argument, at pp. 326 et seq. [Reference was made to *Edginton v. Clark* [1964] 1 Q.B. 367, 379 and *Knight v. Clifton* [1971] Ch. 700.]

The owners general submissions on the authorities are: (1) in all cases where section 51 or its predecessors or equivalent provisions have been the subject of full argument (excluding *Bremer Handelsgesellschaft m.b.H. v. Westzucker G.m.b.H. (No. 2)* [1981] 2 Lloyd's Rep. 130), all the judges (except Hirst J.) have held that section 51 is subject to the implied limitation and, indeed, have treated that as self-evident. It is a formidable line of authority. (2) None of the judges who have expressed that view has suggested that it is of itself productive of injustice or that he would have reached the opposite conclusion on the statute itself if it had been open to him to do so. To the extent that there has been any criticism, it has been of the rules that have prevented the application of section 51 in appropriate cases.

If the House of Lords has power to consolidate or allow third party proceedings, it would not be right to do it at this stage.

As to solicitors, see *Myers v. Elman* [1940] A.C. 282, 318-319. A solicitor is an officer of the court. As to relators (R.S.C., Ord. 15, r. 11), see *The Supreme Court Practice (1985)*, p. 201. They give the Attorney-General an indemnity as to costs. As to next friends, see *The Supreme Court Practice (1985)*, notes 80/2/6; 13. They are also officers of the court; see also *Palmer v. Walesby*, L.R. 3 Ch.App. 732, 735. An order for costs in the case of a solicitor or next friend is to ensure that they do not abuse the process of the court.

[LORD BRIDGE OF HARWICH. Their Lordships need not trouble the owners as to the effect of the words "incidental to" in sections 51. The owners may also deal shortly with the suggestion of consolidation.]

As to consolidation, the Court of Appeal were right. Consolidation and third party proceedings are mutually exclusive. If there is no authority for that proposition, the owners simply assert it. If by some lacuna third party proceedings cannot be brought, the practice should not be bent so as to consolidate.

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As to third party proceedings, it cannot be right that any consent to third party proceedings can be construed from what the owners said before Hirst J. They never intended to consent and never would have done. As to "unless the context otherwise requires" in Ord. 1, r. 4 and the charterers' submission that "notice of intention to defend" (Ord. 16, r. 4) means nothing at all, what really happened here was simply that the two proceedings came on together.

As to the way in which the problems revealed by this appeal, if such they be, ought properly to be resolved, the immediate solution to the immediate problem would be to change the rules of court as suggested by Sir John Donaldson M.R. But then there would be an anomaly in that one could pass costs up and down the line in court but not in the arbitration. Alternatively, there could be a more comprehensive review of arbitration providing for third party proceedings.

Rix Q. C. in reply. No rationale in terms of reason and justice had been put forward in support of the suggested implied limitation except that the court would not make an order against a stranger to the proceedings. That depends on what one means by "a stranger" and "the proceedings." One should begin by asking what the rationale of the Act is. It is to put the court in a position where, because it is clothed with the widest possible power and discretion, it can do perfect justice with regard to costs in all proceedings that come before it: to make the person substantially responsible for causing the costs to be incurred bear them. The rationale is, therefore, necessarily an extremely broad one, reflected in the broad wording of the Act. It is not to be cut down by an implied limitation preventing the court from achieving the justice that it conceives should be done.

The owners say that "by whom" is to be read as "by which party to the proceedings." That is a gloss on the statute and is contrary to its rationale. It could easily have been said by the draftsman if it had been intended. The words were to hand. It would also be contrary to the existing practice regarding solicitors, guardians ad litem, relators, etc. Whatever may have been the precise origin or rationale of those particular circumstances in which costs are given, if one assumes that the Act is to be read subject to an implied limitation an order in favour of a non-party is one that would run counter to the Act. Even if the words are read as "by which party," that leaves open the question of what "proceedings" mean (Sir Francis Jeune P.'s test in Forbes-Smith). [Reference was made to *Horwood v. Statesman Publishing Co. Ltd.* (1929) 141 L.T. 54, 58-59.]

At to solicitors, in view of the fusion of common law and equity in the 1870s it does not matter what the nature of the court's inherent jurisdiction was before 1873.

As to relators, see *Seton's Judgments and Orders*, 7th ed. (1912), vol. II, p. 1268; *Attorney-General v. Kerr* (1841) 4 Beav. 297; *Southmolton Corporation v. Attorney-General* (1854) 5 H.L.Cas. 1 and *Attorney-General v. Scott* [1905] 2 K.B. 160.

As to guardians ad litem, see *Eady v. Elsdon* [1901] 2 K.B. 460.

In *Westzucker*, a formal order for consolidation was made.

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Hunt. If the cases just cited were to persuade the House that the implied limitation excludes relators and guardians ad litem, that would not assist the charterers.

Their Lordships took time for consideration.

22 May. LORD BRIDGE OF HARWICH. My Lords, for the reasons given in the speech of my noble and learned friend Lord Goff of Chieveley, with which I agree, I would allow the appeal.

LORD BRIGHTMAN. My Lords, I agree with the conclusion reached in the speech to be delivered by my noble and learned friend, Lord Goff of Chieveley, and for the reasons which he gives I would allow this appeal.

LORD MACKAY OF CLASHFERN. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Goff of Chieveley, and for the reasons which he gives I too would allow this appeal.

LORD ACKNER. My Lords, I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend, Lord Goff of Chieveley, and I agree that the appeal should be allowed for the reasons which he gives.

LORD GOFF OF CHIEVELEY. My Lords, there is before the House a question of construction of section 51(1) of the Supreme Court Act 1981. Section 51(1) provides as follows:

> "Subject to the provisions of this or any other Act and to rules of court, the costs of and incidental to all proceedings in the civil division of the Court of Appeal and in the High Court, including the administration of estates and trusts, shall be in the discretion of the court, and the court shall have full power to determine by whom and to what extent the costs are to be paid."

The main question at issue in the case is whether, despite the broad words of the section, there is to be implied a limitation upon persons by whom costs may be ordered to be paid, viz. that costs may only be ordered to be paid by persons who are parties to the relevant proceedings. There are other subsidiary issues to which I will refer later.

The matter has arisen in the following way. The respondents, Aiden Shipping Co. Ltd. (to whom I will refer as "the owners"), chartered their vessel *Vimeira* to the appellants Interbulk Ltd. (to whom I will refer as "the charterers") under a time charter dated 11 April 1979. The charterers sub-chartered the vessel to I.C.C.O. (International Corn Co. N.V., to whom I will refer as "the sub-charterers") by a voyage charter dated 8 November 1979. Both charters contained safe port clauses in terms which are to all intents and purposes identical, and both also contained London arbitration clauses.

Under these charters, the vessel discharged a cargo of grain in the Rodenhuizedok at Ghent. When she left the dock on 4 January 1980,

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she was found to have suffered damage to her rudder. The owners commenced arbitration proceedings in London against the charterers, claiming damages resulting from the alleged unsafety of the Rodenhuizedok; and the charterers then commenced arbitration proceedings in London against the sub-charterers claiming to be indemnified against any liability which they might be held to be under to the owners. I shall refer to the first arbitration as "the head arbitration," and to the second as "the sub-arbitration." The same three gentlemen were appointed as the arbitral tribunal in each arbitration, though in different roles. The two arbitrations were held separately. By an award dated 30 September 1982, the charterers were held liable to the owners; and by an award dated 13 January 1983, the sub-charterers were held liable to the charterers. However, both awards were determined on points which were not in issue in the arbitrations, and as a result both were remitted to the arbitrators in terms which, in the case of the head arbitration, gave the owners the opportunity to raise and argue the point on which the arbitrators had found in their favour.

By a notice of originating motion dated 2 August 1984, the owners applied for an order further remitting the award in the head arbitration to enable them to raise a new point, viz. that the dock was unsafe by virtue of the presence of submerged concrete blocks, and that it was contact with one of these that had caused the damage to the vessel's rudder. The charterers then in their turn issued and served on the sub-charterers a notice of originating motion seeking the same relief in the sub-arbitration. Both motions were heard together by Hirst J. in November 1984, though no formal order was made that they should be heard together. On 26 November 1984, Hirst J. dismissed the owners' application against the charterers, and in consequence, the charterers' application against the sub-charterers was also dismissed.

A question then arose as to the order for costs. It was plain that the charterers were entitled to an order against the owners that they should pay the charterers' costs of the owners' originating motion, and that the sub-charterers were entitled to a similar order against the charterers. But the question arose whether the judge had jurisdiction to order that there should be included, in the charterers' costs which the owners were liable to pay, the costs which the charterers were ordered to pay to the sub-charterers. After a discussion late in the evening following the delivery of a long judgment, the judge held that, having regard to the wide terms of section 51(1) of the Act of 1981, he had jurisdiction to make such an order which, in the exercise of his discretion, he then made. He therefore ordered that the owners pay the charterers' costs of the application (such costs to include any costs paid by the charterers to the sub-charterers in the sub-arbitration proceedings).

The owners then appealed to the Court of Appeal against the judge's order as to costs. The leading judgment in the Court of Appeal [1985] 1 W.L.R. 1222 was delivered by Sir John Donaldson M.R. He observed that common sense and justice suggested strongly that the judge was right. However, on the basis of two earlier decisions of the Court of Appeal, *Forbes-Smith v. Forbes-Smith* [1901] P. 258 and *John Fairfax & Sons Pty. Ltd. v. E. C. de Witt & Co. (Australia) Pty. Ltd.* [1958] 1

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Q.B. 323 (the latter of which was not cited to the judge), he concluded that the jurisdiction to award costs of and incidental to proceedings was confined to parties to proceedings. He then said, at p. 1227:

> "In the light of these authorities, it is, alas, clear that the judge [had] no power to make the order which he made unless it can properly be said that in some way the proceedings on the two motions to remit became one single set of proceedings. This

> could only be done by consolidation or treating the sub-charter arbitration proceedings as 'third party' proceedings, dependent on and part of the head charter arbitration proceedings."

He went on to consider whether it was possible for the proceedings to be treated as having been consolidated, a course which had been taken in *Bremer Handelsgesellschaft m.b.H. v. Westzucker G.m.b.H. (No. 2)* [1981] 2 Lloyd's Rep. 130. He concluded, however, that it would not be right to follow that case (in which the matter had been dealt with in a very robust way, without any citation of authority, by a two-judge court) on this point. He said of the present case:

> "Quite apart from the fact that there was no consolidation order or agreement to consolidate, it is difficult to see how the proceedings could have been consolidated. In consolidated actions, parties with the same interest are represented by the same solicitors and counsel."

He also pointed out that, although this was a classic "third party" situation, the relevant order, R.S.C., Ord. 16, did not on its true construction apply in the case of an originating motion. He concluded his judgment as follows, at p. 1228:

> "With unconcealed regret, I would allow the appeal and delete the words in parenthesis in paragraph 2 of the judge's order. It is a quarter of a century since Parker L.J. *[John Fairfax & Sons Pty. Ltd. v. E. C. de Witt & Co. (Australia) Pty. Ltd.* [1958] 1 Q.B. 323, 331-332] drew attention to this problem and I hope that the Supreme Court Rule Committee will now produce a solution. The committee will not have jurisdiction to amend section 51 so as to enable orders for costs to be made in one set of proceedings against a stranger to those proceedings, but I apprehend that it has ample power to provide that where separate proceedings are ordered to be tried together, the court can also order that thenceforward they should be treated as combined (as contrasted with 'consolidated') proceedings in which the parties to the several parts become parties to the whole. Section 51 and R.S.C., Ord. 62, r. 2(4) would then enable the court to do justice between all concerned."

Parker and Croom-Johnson L.JJ. delivered concurring judgments. It is against that decision that the charterers now appeal, with leave of this House.

As I have already stated, the main issue in the case is whether there is to be implied into section 51(1) of the Act of 1981 a limitation restricting orders as to costs to orders made against parties to the

relevant proceedings. Section 51(1) is (for all material purposes) identical to section 50(1) of the Supreme Court of Judicature (Consolidation) Act 1925, which itself is (for all material purposes) identical to section 5 of the Supreme Court of Judicature Act 1890 (an Act passed to amend the Supreme Court of Judicature Acts 1873-1875). In the rules of court contained in Schedule 1 to the Supreme Court of Judicature Act (1873) Amendment Act 1875, Order 55, which related to costs, opened with the words: "Subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the court; . . ." The words: "and the court or judge shall have full power to determine by whom and to what extent such costs are to be paid" (now to be found in almost identical terms in section 51(1) of the Act of 1981) were introduced by section 5 of the Act of 1890. It is of some interest to observe that these words were not added to the relevant rule of the Supreme Court (now Order 62, formerly Order 65) until 1959, after the decisions in both the authorities by which the Court of Appeal felt bound to reach its conclusion in the present case. The present rule of court, Ord. 62, r. 2(4), simply provides:

> "The powers and discretion of the court as to costs under section 51 of the Act (which provides that the costs of and incidental to proceedings in the Supreme Court shall be in the discretion of the court and that the court shall have full power to determine by whom and to what extent the costs are to be paid) . . . shall be exercised subject to and in accordance with this Order."

It is, I consider, important to remember that section 51(1) of the Act of 1981 is concerned with the *jurisdiction* of the court to make orders as to costs. Furthermore, it is not to be forgotten that the jurisdiction conferred by the

subsection is expressed to be subject to rules of court, as was the power conferred by section 5 of the Act of 1890. It is therefore open to the rule-making authority (now the Supreme Court Rule Committee) to make rules which control the exercise of the court's jurisdiction under section 51(1). In these circumstances, it is not surprising to find the jurisdiction conferred under section 51(1), like its predecessors, to be expressed in wide terms. The subsection simply provides that "the court shall have full power to determine by *whom* . . . the costs are to be paid." Such a provision is consistent with a policy under which jurisdiction to exercise the relevant discretionary power is expressed in wide terms, thus ensuring that the court has, so far as possible, freedom of action, leaving it to the rule-making authority to control the exercise of discretion (if it thinks it right to do so) by the making of rules of court, and to the appellate courts to a establish principles upon which the discretionary power may, within the framework of the statute and the applicable rules of court, be exercised. Such a policy appears to me, I must confess, to be entirely sensible. It comes therefore as something of a surprise to discover that it has been suggested that any limitation should be held to be *implied* into the statutory provision which confers the relevant jurisdiction.

I turn, therefore, to consider the authorities by which the Court of Appeal has felt it was bound to hold that there was such a limitation.

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The first is *Forbes-Smith v. Forbes-Smith* [1901] P. 258. In that case, a wife petitioned for divorce on the ground of cruelty. Subsequently, the husband petitioned for divorce on the ground of his wife's adultery with the co-respondent Chadwick. The registrar made an order that the husband's suit should be consolidated with the wife's suit. The suits came on for trial before Sir Francis Jeune P. and a jury. No evidence was advanced in support of the wife's charges of cruelty, and so her petition was dismissed. On the husband's petition, the jury found that the adultery was proved as against the wife and the co-respondent, and made an award of damages against the latter. A decree nisi was made for dissolution of the marriage with costs and damages against the co-respondent. On taxation, the husband claimed to tax against the co-respondent not only the costs of his own petition, but also his costs of the wife's petition. The matter then came back before the President. He held that he was entitled, under section 34 of the Matrimonial Causes Act 1857, to order the co-respondent to pay the costs of the whole of the proceedings on both suits. Section 34 provided:

> "Whenever in any petition presented by a husband the alleged adulterer shall have been made a co-respondent, and the adultery shall have been established, it shall be lawful for the court to order the adulterer to pay the whole or any part of the costs of the proceedings."

The President held (at p. 263) that he was entitled to treat both suits as one set of proceedings, on the ground that:

> "when the cases are so closely connected as these are and they are tried together, the whole becomes one set of proceedings (I do not say one suit, because they are two suits) . . ."

In the course of the argument before him, counsel for the husband had relied in the alternative on section 5 of the Act of 1890 (to which I have already referred as being, in all material respects, identical to section 51(1) of the Act of 1981). He said, at p. 261:

> "I agree that the decisions upon that section show that it was intended to confer in some cases a new jurisdiction. But, in the first place, though the words are so general, it cannot, I think, be doubted that this limitation must be understood - that the person who is ordered to pay the costs is connected with the proceedings. It cannot be supposed for a moment that a person not interested in or connected with the proceedings could be ordered to pay the costs of them. Therefore, I think the section must be read with that limitation; and if that is so, it does not help the present respondent, because the very question on this appeal is, whether the co-respondent was sufficiently connected with the proceedings initiated by the wife to enable an order for costs of those proceedings to be made against him."

It is to be noted that, in the official report from which I have quoted, the President used the words "that the person who is ordered to pay the costs is *connected with the proceedings.*" However, the case went on

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appeal to the Court of Appeal; and there is reason to believe that, at that time (just over three weeks after the hearing before the President), the transcript of the President's judgment then available to counsel and the court attributed to him the words "that the person against whom the costs are ordered to be paid is a *party to the proceedings.*" It was on that basis that Marshall Hall K.C. presented the argument for the co-respondent to the Court of Appeal (see p. 265): those are the words attributed to the President in the report in (1901) 84 L.T. 789, 790, and the judgment of Collins L.J., who delivered the leading judgment in the Court of Appeal, is only explicable on that basis. It may be, therefore, that, when the President came to correct the transcript of his judgment for the official report, he preferred the broader expression "connected with the proceedings" and corrected the transcript accordingly. At all events, the Court of Appeal allowed the appeal of the co-respondent on the ground that the jurisdiction under section 34 of the Act of 1857 only arose if the proceedings on the wife's petition had become part of the proceedings on the husband's petition, and they did not think that that was the result of the registrar's order of consolidation, which was not analogous to consolidation at common law. At the close of his judgment, Collins L.J. referred briefly to section 5 of the Act of 1890. He said, at p. 271:

> "The last point taken was upon section 5 of the Act of 1890. The learned President has satisfactorily disposed of the argument upon that section, and I entirely concur with him. Some limitation must be put upon the generality of the words. They cannot enable the court to order the costs to be paid by a stranger to the proceedings; they can only mean that the court may order the costs to be paid by any of the parties. The section does not confer jurisdiction to visit a co-respondent with costs unless he is a party to the proceedings, and here the co-respondent was not a party to the wife's petition unless the consolidation order has made him one. I have already stated my reasons for holding that the consolidation order had no such effect."

In the result, therefore, both the President and the Court of Appeal were disposed to put some limit upon the words of section 5 of the Act of 1890; but, in the official report, the limit which each chose to place upon it was not the same, though the reasoning of both was simply that the section could not enable the court to order the costs to be paid by a stranger to the relevant proceedings.

That case was followed and applied by the Court of Appeal in the second of the two cases, *John Fairfax & Sons Pty. Ltd. v. E. C. de Witt & Co. (Australia) Pty. Ltd.* [1958] 1 Q.B. 323. The case was concerned with interpleader proceedings in which, because of the number of parties involved, a consent order was made that two actions against the party interpleading should be listed and tried together, instead of an order that one claimant be made a defendant in the other claimant's action or that an issue between the claimants should be stated and tried. In the two actions, one claimant succeeded and the other failed. The judge held that he had no jurisdiction to order that the unsuccessful claimant

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pay the successful claimant's costs, having regard to the terms of Ord. 65, r. 1, which, so far as material, provided as follows:

> "Subject to the provisions of the Act and these rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge . . ."

It is to be observed that that rule did not continue with the words "and the court or judge shall have full power to determine by whom and to what extent such costs are to be paid," the words introduced by section 5 of the Act of 1890 (later section 50(1) of the Act of 1925). The appeal was disposed of in a single day; and the Court of Appeal (Jenkins and Parker L.JJ.) dismissed the appeal in extempore judgments. The argument for the appellants had been that, when an order is made in interpleader proceedings that two actions are to be listed and tried together, they are turned into a composite set of proceedings for the purposes of Ord. 65, r. 1. No reference was apparently made to the broad words used at the end of section 50(1) of the Act of 1925: "the court or judge shall have full power to determine by *whom* . . . the costs are to be paid." The Court of Appeal rejected the appellant's argument. Jenkins L.J. said, at p. 329:

> "After paying the best attention I can to Mr. Chapman's argument, I find myself unable to accept it. 'All proceedings' means all proceedings, I suppose, commenced in any manner authorised by the Rules of the Supreme Court. It is with respect to proceedings in that sense that the judge is given an absolute discretion as to costs. But what does that mean? When the rule says that costs are to be in the discretion of the court or judge, it cannot mean that the court or judge can direct the costs in question to be paid by any person the judge may choose, whether he is a party to the proceedings or not. Some limit must be

> placed on the language and I should have thought it reasonably plain that the limit is this: that the court has a discretion to order the costs of and incident to all proceedings to be paid by the parties to those proceedings, or any of them, as the court in its discretion thinks right."

He then proceeded to rely upon the judgment of Collins L.J. in *Forbes-Smith v. Forbes-Smith* [1901] P. 258, in support of that conclusion. Parker L.J. also rejected the appellant's argument. He said, at p. 331:

> "For my part I am satisfied that that order [i.e. the order made in the interpleader proceedings] does not have the effect of turning separate proceedings into one set of proceedings. In my view, nothing short of consolidation can do that under the existing rules, and in this case not only was there no order for consolidation, but on the facts it is clear that consolidation was impracticable."

He continued, at pp. 331-332:

> "The truth of the matter is that this order, which is not an uncommon order to make, is eminently one of convenience in that it enables all the evidence to be called at once before the court. But

> it does not, under the rules as at present constituted, enable the judge at the trial of the proceedings listed and tried together to make what I may call a global order in regard to costs. I confess that in cases where consolidation is not possible, it is not only convenient that this order should be made, but in the interests of justice it may be that the court should have power to deal with all the costs of the proceedings tried together. But under the rules, I am quite satisfied that that cannot be done at present."

It is to be observed that Parker L.J., like Jenkins L.J., did not refer to section 50(1) of the Act of 1925, and that he was by no means happy with the conclusion which he felt compelled to reach.

Neither of these decisions is binding on this House; and I am satisfied, having been referred to the terms of the relevant statute (now, of course, section 51(1) of the Act of 1981) and having, no doubt, heard far fuller argument than was presented to the court in either of the two decisions under consideration, that they should not be followed. I wish to emphasise once again that we are here concerned with a suggestion that an implied limitation should be imposed upon a subsection in a statute which confers a discretionary jurisdiction on the court in very wide terms, and which is expressed to be subject to rules of court. As appears both from Parker L.J.'s judgment in *John Fairfax & Sons Pty. Ltd. v. E. C. de Witt & Co. (Australia) Pty. Ltd.* [1958] 1 Q.B. 323 and from the judgment of the Master of the Rolls in the case under appeal, both considered that the implied limitation which they felt compelled to adopt was capable of producing a result which was, to adopt Parker L.J.'s words, contrary to "the interests of justice." It is strange that courts should think it right to impose, by way of implication, a limit upon a wide statutory jurisdiction which is productive of that result. Furthermore, the chosen limitation is that courts should only be free to award costs against a person who is a *party* to proceedings. That word has been defined both in the Act of 1925 and in the Act of 1981. In the former Act, a party is defined as including "every person served with notice of or attending any proceeding, although not named on the record" (see section 225); in the latter Act, a party, in relation to any proceedings, is defined as including:

> "any person who pursuant to or by virtue of Rules of Court or any other statutory provision has been served with notice of, or has intervened in, those proceedings" (see section 151(1)).

Both definitions are expressed not to be applicable if the context otherwise requires. It is plain, therefore, that, in the relevant statutes, the word "party" has been given a technical meaning. It has moreover been changed in the Act of 1981; and, since it includes a person upon whom notice of the relevant proceedings has been served pursuant to or by virtue of rules of court or any other statutory provision, it is so wide that it scarcely seems to provide an apt criterion upon which to found a limitation upon the jurisdiction to award costs. In any event, had the

legislature thought it right to limit the jurisdiction under section 51(1) of the Act of 1981 in this way, it would have been very easy to achieve

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such a result by drafting the concluding words of the subsection as follows:

> "... and the court shall have full power to determine *by which party to the proceedings* and to what extent the costs are to be paid."

We were referred by Mr. Rix, for the appellants, to certain somewhat special cases which are inconsistent with the implied limitation favoured by the Court of Appeal in the two cases under consideration. These are the cases where costs may be awarded against a solicitor acting for a party in the proceedings, against a relator in a relator action, and against a next friend. I accept his submission on those cases. In each of them, costs may indeed be awarded against a person who is not a party to the proceedings. The existence of these cases adds weight to his submission that no implied limitation with reference to the word "party" can be read into the broad terms of the statute; though, had these cases stood alone, I would perhaps have been unwilling to rely on such special cases as the sole justification for rejecting the previous authorities in the Court of Appeal. I prefer to proceed upon the broader ground, that there is no basis for the proposed implied limitation upon the express words of the statute; and, on that basis, I am happy to rely upon these special cases in support of that broader approach.

Before your Lordships Mr. Hunt, for the respondents, submitted that, putting on one side the special cases upon which Mr. Rix relied, it is the parties to proceedings who institute them and who have the conduct of them; for that reason, he submitted, costs should be their responsibility and theirs alone, so that an order imposing a liability to pay another's costs should only be made against a party to the proceedings. There is, I recognise, force in this submission; but it cannot, in my opinion, for the reasons I have already given, provide a basis for an implied limitation on the broad jurisdiction conferred by the statute. In truth, Mr. Hunt's submission is relevant not to the construction of the statute conferring the jurisdiction, but to the exercise of the discretionary jurisdiction conferred by the statute. In the vast majority of cases, it would no doubt be unjust to make an award of costs against a person who is not a party to the relevant proceedings. But, as the facts of the present case show, that is not always so. In the present case, the two originating motions were heard together without any formal order being made; but in such a case, and also in a case where a formal order has been made, one reason why that course of action is taken may be to achieve a saving of costs. If two separate sets of proceedings are heard together, because they have common features, it may be a matter of pure chance whether the expense of presenting an argument or evidence relevant to the common feature falls within one or other of the two sets of proceedings. Sometimes, indeed, it may be very difficult to attribute costs to one set of proceedings rather than the other. It is surely consistent with the interests of justice that, in such a case, the court's jurisdiction to make a global order for costs relating to both sets of proceedings should not be fettered by the imposition of an implied limitation upon that jurisdiction.

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I do not, for my part, foresee any injustice flowing from the abandonment of that implied limitation. Courts of first instance are, I believe, well capable of exercising their discretion under the statute in accordance with reason and justice. I cannot imagine any case arising in which some order for costs is made, in the exercise of the court's discretion, against some person who has no connection with the proceedings in question. If any problem arises, the Court of Appeal can lay down principles for the guidance of judges of first instance; or the Supreme Court Rule Committee can propose amendments to the Rules of the Supreme Court for the purpose of controlling the exercise of the statutory power vested in judges subject to rules of court.

I think it right, before concluding this opinion, to refer briefly to certain other submissions which Mr. Rix advanced on behalf of the appellants. He submitted that the costs which the charterers were ordered to pay to the sub-charterers should be regarded as "costs incidental to" the owner's originating motion, within those words as used in section 51(1) of the Act of 1981. I do not think that that submission is well founded: I cannot accept that the word "incidental" can be stretched that far. He also submitted that the Court of Appeal should (as in the previous case of *Bremer Handelsgesellschaft m.b.H. v. Westzucker G.m.b.H. (No. 2)* [1981] 2 Lloyd's Rep. 130) have made an order for consolidation of the two originating motions, so as to achieve the result that there was only one set of proceedings. In my judgment, however, the Court of Appeal was right to reject that submission, for the reasons given by the Master of the Rolls in his judgment. In truth this is, as the Master of the Rolls observed, a classic third party situation. Unfortunately, however, it is plain from the terms of Order 16, which governs such

cases, that that order applies only to cases where the proceedings in question have been begun by writ or originating summons; it does not apparently apply to cases where proceedings have been commenced by originating motion or indeed by petition. Quite apart from the fact that (as the Master of the Rolls pointed out [1985] 1 W.L.R. 1222, 1228) the application of the rule is dependent upon the defendant having given notice of intention to defend (see Ord. 16, r. 1(1)), a procedure which is not applicable in the case of originating motions, the parties to the main action are described in many of the rules in the Order as "plaintiff" and "defendant," which is not the appropriate nomenclature in the case of originating motions. This is perhaps a point, thrown up by the present case, which the Supreme Court Rule Committee might wish to consider.

In conclusion, let me pay tribute to the arguments of both counsel, which I myself found to be of great assistance. In the result, I am satisfied that Hirst J.'s instinctive reaction at 5.45 p.m. on the evening of 22 November 1984 was sound; and it is plain that the Court of Appeal would have reached the same conclusion had they not felt themselves to be compelled by authority to do otherwise. I am unable to accept the limitation imposed on section 5 of the Act of 1890 by Collins L.J. in the Court of Appeal in *Forbes-Smith v. Forbes-Smith* [1901] P. 258, and I would overrule the decision of the Court of Appeal in *John Fairfax &*

Sons Pty. Ltd. v. E. C. de Witt & Co. (Australia) Pty. Ltd. [1958] 1 Q.B. 323.

Since preparing this opinion, your Lordships' attention has been drawn to the new rule 9(2) of Order 4 of the Rules of the Supreme Court, which has very recently been introduced by paragraph 3 of the Rules of the Supreme Court (Amendment) 1986 (S.1. 1986 No. 632 (L.2)). It prescribes as follows:

> "Where the court makes an order under paragraph (1) that two or more causes or matters are to be tried at the same time but no order is made for those causes or matters to be consolidated, then, a party to one of those causes or matters may be treated as if he were a party to any other of those causes or matters for the purpose of making an order for costs against him or in his favour."

This amendment has no doubt been made as a result of the suggestion of the Master of the Rolls in his judgment in the case under appeal. It is evident that it has been tailored to take account of the supposed limitation upon the jurisdiction under section 51(1) of the Act of 1981. Since, in my opinion, there is no such limitation, I am able to stifle such doubts as I might have had whether an amendment in this form might have been ultra vires because it was inconsistent with section 51(1) of the Act of 1981 read with the limitation that the court only has power to order that costs shall be paid by those who are parties to proceedings. For the future, the new rule 9(2) can, if the Supreme Court Rule Committee thinks fit, be remoulded in a less convoluted form.

For these reasons, I would allow the appeal with costs here and before the Court of Appeal, and restore the passage expunged by the Court of Appeal from the order of Hirst J.

Appeal allowed with costs.

Solicitors: *William A. Crump & Son; Middleton Lewis Lawrence Graham for Ingledew Botterell Roche & Pybus, Newcastle-upon-Tyne.*

M G.