Neutral Citation Number: [2003] EWCA Civ 239
IN THE SUPREME COURT OF JUDICATURE A3/2002/2692
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
(Mr Justice Toulson) Royal Courts of Justice
Strand
London WC2

Wednesday, 5th February 2003

B e f o r e :

LORD JUSTICE CLARKE and
LORD JUSTICE LONGMORE

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(1) BERRY TRADE LIMITED
(A company formed in Bermuda)
(2) VITOL ENERGY (BERMUDA) LIMITED Claimants
(Respondents)

-v-

(1) KAVEH MOUSSAVI
(2) KHADIJEH SAEBI
(3) FARZANEH PIROUZ-MOUSSAVI (Applicant)
(4) BERRY TRADE LIMITED
(A company formed in the Isle of Man)
(5) EASTWAY PETROLEUM LIMITED
(6) SILVERSTREAM LIMITED Defendants

Computer Aided Transcript of the Palantype Notes of
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(Official Shorthand Writers to the Court)

Mr S Cakebread (instructed by Messrs Marshall Galpin, Oxford) appeared on behalf of the Applicant Third Defendant.
Mr P Marshall (instructed by Messrs Ince & Co, London EC3) attended on behalf of the Respondent Claimants.

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

1. LORD JUSTICE CLARKE: This is an application for permission to appeal out of time against orders for costs made by Mr Justice Toulson on 27th September 2001 against the applicant, who is the third defendant in an action in which the respondents are the claimants. The other defendants are the first defendant, who is the third defendant's husband, the second defendant, who is the first defendant's mother, and the fourth, fifth and sixth defendants, which are companies said to be controlled by the first defendant. We were told just now that there is now a seventh defendant and that the claimants are presently proposing to seek summary judgment against the first and seventh defendants.

2. The action has a long history and has had perhaps more than its fair share of complication. The underlying facts are stated in a judgment given on 29th July 2001 by Mr Justice Laddie and in a further judgment given on 29th May 2002 by Mr Justice Langley. In short, the second claimants entered into a joint venture with the first defendant's nominee company, which led to the formation of the first claimants. The joint venture came to an end in 1996, having suffered substantial losses. The claimants' case is that those losses resulted from fraudulent misrepresentations by the first defendant. Other frauds are also alleged. The total losses are said to exceed US$20 million.

3. On 29th July 2001 Mr Justice Laddie made a without notice world-wide freezing order and a search order against all the defendants. He expressed the view on the evidence before him that there was strong evidence of dishonesty against the first defendant, including evidence that he would use “every stratagem to defeat the claim”. The claimants say that the first defendant used accounts in the name of his mother, the second defendant, and his wife, the third defendant, for the purpose of concealing assets, especially from the claimants. They further say that the third defendant was aware of the position. It is also said that when money and oil belonging to the claimants were misappropriated the proceeds of the fraud were used to purchase assets in the name of the third defendant and that accounts in her name were used for the payment of bribes.

4. The claimants' case vis-a-vis the third defendant is summarised in paragraph 23 of the skeleton argument prepared on behalf of the claimants in connection with this application. The claimants say that the third defendant has received property representing the proceeds of fraud to which they are beneficially entitled under equitable tracing principles, she being a mere volunteer. Further or alternatively, they say that the assets held in her name are held as the nominee of the first defendant and are in reality his property and available for execution of any judgment against him. There is an alternative claim based on section 423 of the Insolvency Act 1986, namely that the transfers of assets into her name by the first defendant were designed to defeat the claims of the claimants as creditors and are therefore liable to be set aside.

5. It is important to note that the claimants do not say that the third defendant was a party to any of the fraudulent activity which they allege against the first defendant. Their claim is essentially a tracing claim. It is also important to note that the third defendant denies all knowledge of, or participation in, any wrongdoing. She further denies that she was aware that any of the funds in her accounts had been dishonestly obtained. She accepts, however, as I understand it, that the first defendant did from time to time use her accounts for his business purposes.

6. The order of Mr Justice Laddie dated 29th July 2001 was made against all the defendants, including the third defendant. It contained a penal notice and included a disclosure order. The claim form was issued on 30th July 2001. The search order was executed at two premises, including the first and third defendants' home in Oxford, although the third

defendant was not present at the time. On 2nd August 2001 Mr Justice Colman continued the freezing order and certain other orders until trial. The first defendant was present, but not represented. The third defendant was not present or, so far as I understand it, represented.

7. The third defendant served affidavits of assets and other information on 16th August 2001 and 6th September 2001 respectively. She says that those affidavits were drafted by the first defendant. The claimants did not, and do not, accept that either these affidavits or affidavits served by the first defendant complied with Mr Justice Laddie's order, as they purported to do.

8. 8.The claimants subsequently made a number of applications to the court, including applications against the first and third defendants, namely (1) for the service of further affidavits properly complying with the order; (2) for the appointment of a receiver over the assets of both the first and third defendants; (3) for the cross-examination of the first and third defendants in order to remedy alleged defects in the affidavits; and (4) for the committal of the first and third defendants for alleged breaches of the disclosure provisions of the order. The claimants also issued an application against the first defendant for directions as to how allegedly privileged documents were to be dealt with.

9. The first defendant, who was then acting in person, issued an application for discharge of the orders of Mr Justice Laddie and Mr Justice Colman. The application is on its face made only on his on behalf.

10. On 25th September 2001 the various applications came before Mr Justice Toulson. Mr Romie Tager QC told the judge that he represented the first and third defendants, together with Mr Mark Hoyle. They were instructed by Messrs Sebastians. He also told the judge that he would soon represent the second defendant and, indeed, the corporate defendants. In short, he told the judge that the first defendant had only recently instructed solicitors and counsel and that, despite their best efforts, they were not able to proceed. However, he told the judge that he and Mr Hoyle had had discussions with both the first and third defendants on the morning of 25th September.

11. He then said this:

> "In the light of what was said [in Mr Hickey's affidavit] to be the anticipated way in which the receivership would proceed and the purpose of the receivership, Mr Hoyle and I considered, plus with our client, and had further discussions this morning both with him and his wife, how those expectations of the claimants could be met.
>
> My Lord, they are prepared to undertake -- although we do not as yet act for the second defendant, Mr Moussavi's mother, he is prepared to undertake to procure in anticipation that his mother will do his bidding -- whatever authorities are required to be addressed to banking, credit card or other financial institutions by him, his wife or his mother, or indeed any of the three corporate defendants, so that armed with those authorities the forensic accountants retained by the claimants, Messrs Lee & Allen, will be able to approach those financial institutions, and they might wish to approach the 70 or more banks that are mentioned in the evidence with a request to provide bank statements, any other documents on file and any information regarding the conduct of any of the accounts there.

> My Lord, I am assured by Mr Moussavi and his wife that they have nothing to hide with regards to their financial affairs, and they understand that armed with such authority and, indeed, my Lord, a lot quicker than if this had to be undertaken through receivers acting the way envisaged, armed with such authorities, the claimants' forensic accountants will be able to get whatever information they want, as quickly as they want it, and will be able to prepare such analysis that the claimants might wish for of the defendants' financial affairs, going as far back as the claimants wish.
>
> My Lord, in that sense, the requirement for further information will be met."

12. In short, Mr Tager told the judge that the first and third defendants were willing to give wide undertakings to the court, in effect instead of the appointment of a receiver and cross-examination. He made it clear that he wanted the committal applications adjourned because they were not ready and because any historical shortcomings would be made good as a result of honouring the undertakings relating to the documents and the like. Mr Tager made it clear throughout that he was acting for both the first and third defendants.

13. As to the third defendant, he said this:

> "There we have it. [The first defendant] has a wife who is a well-educated woman. I understand that she is a curator at the Ashmolean who has always trusted her husband in relation to business matters and the family finances. Until the weekend before last when he was effectively breaking under the strain -- that is probably an exaggeration, but when he was finding he was coming to terms with the fact that he really could not handle this case -- she had assumed, knowing very little about it but trusting her husband, that her interests were being well looked after. She is now aware that that is clearly not the case and has not been the case. I do not think that she had fully appreciated the significance of the committal application. It is simply another thing which she passed immediately to her husband and he told her not to worry about it, he would look after it and he would deal with it. Her interests in this, of course, had to be separately considered, and certainly have been carefully considered by us."

14. Thus Mr Tager said that the third defendant had trusted her husband but that her interests were then separately considered by "us", presumably meaning both counsel and solicitors on her behalf.

15. The judge summarised the position in this way:

> "First, it took Mr Moussavi a very long time to realise that he was out of his depth. Secondly, it became obvious to his lawyers that they could not properly deal with the full matters before the court, not least because they have not been able to master the case, and it has been apparent to them that his evidence is deficient. Thirdly, I have to do justice, bearing in mind the unsatisfactoriness of the delay but also the seriousness of the applications which include applications to commit. Fourthly, the defendants offer to undertake to give letters of authority to banks, etc., to permit him disclosure of information. Fifthly, the defendants will swear affidavits giving frank, full and clear disclosure of assets, and sixthly, the privilege application is unopposed."

16. A little later Mr Tager said:

> "May I say that when the skeleton was prepared, we had discussed with our client the question of the undertakings, but we felt, Mr Hoyle and I felt, as indeed did our instructing solicitors, that he ought to be given time to think about whether he was prepared to give such undertakings and to follow it through and, indeed, the matter had to be discussed with his wife this morning as well. That explains why that part of our application was not put on paper."

17. The claimants agreed to an adjournment on the basis of the undertakings, although they asked the judge to stand the matter over for two days until Thursday 27th September for an order to be agreed. Mr Croxford made it clear on behalf of the claimants that they contemplated that the undertakings would have the same effect as the appointment of receivers. It was in effect agreed that the application to discharge would be adjourned and so would the claimants' applications to commit the first and third defendants to prison and to cross-examine them on their affidavits. The claimants also made it clear that they would want the question of costs thrown away and the costs of some at least of the applications to be determined on the resumed hearing two days later.

18. The judge was well aware of the position of the third defendant. There was this exchange with Mr Tager:

> "MR JUSTICE TOULSON: I imagine that you are giving consideration to whether it is appropriate for Mr Moussavi's wife, for example, to be jointly represented with him. I did note when you were making your opening comments and submissions this morning one phrase. You said that you did not have any authority or instructions at the moment from Mr Moussavi's mother but that you were quite prepared to procure that and would get his mother to do the same. There is more than a vein running through all of this that the ladies in the case have been doing his bidding."
>
> MR TAGER: Yes, my Lord. There is both that vein and, indeed, those are my instructions from Mr Moussavi."
>
> MR JUSTICE TOULSON: Right, but whether it is appropriate in all the circumstances for them to have independent advice will be a matter which you will obviously be considering.
>
> MR TAGER: Yes. Can I say that we gave particular attention to the question of potential conflict between Mr and Mrs Moussavi. That was resolved on the basis that we felt able to act for them both professionally. In the light of the instructions we have had so far from Mr Moussavi but obviously not from his mother, we believe that Messrs Sebastians will be able to act on her instructions. Indeed, we believe that it will not even be necessary to have separate counsel, for only one of the leading counsel to act for one and not the other, or whatever might be done. We certainly do not want the family's wealth wasted, and I am sure the claimants would not want moneys held by the defendants to be wasted on having two teams of lawyers where one can do the same job."

19. There was then some discussion about costs thrown away and the judge indicated that in principle the claimants should have the costs thrown away by the adjournment.

20. On 25th September the first and third defendants were both present. The third defendant says that her role was principally providing coffee, but the contemporary material to which I have just drawn attention makes it clear that the judge was told that relevant matters relating in particular to the undertakings were discussed with her as well as with the first defendant. In paragraph 12 of the statement which the third defendant made in support of this application on 16th December 2002 she said this as to the events of that day:

> "It is clear from the transcript of the hearing before Toulson J that the court was informed by Mr Tager that he represented me. I have thought hard about this and my recollection is as follows. When I arrived at court with Kaveh (as he had requested that I attend because he said it would look better for him) Mr Tager asked me if he should represent me as well. I did not give it a moment of thought and agreed. However I did not at any time give him any instructions and I am not aware that he said anything of substance on my behalf. At no time, however, did anyone discuss the case with me, or take any instructions from me. Indeed, my only input during the half day I was at court was to provide coffee for my husband and his solicitors."

21. It is clear from that paragraph that, perhaps naturally, the third defendant is seeking to distance herself to some extent from the events of 25th September. However, it is clear that she did give counsel instructions to represent her as well as the first defendant. That every point was discussed with her is perhaps very unlikely, but it is clear that counsel purported to act on her behalf and, moreover, that he did so with her authority. It may well be that she trusted her husband to give appropriate instructions to counsel, but it is quite clear that she knew that undertakings were being given by counsel on her behalf.

22. Between 25th September and 27th September the matter was discussed between counsel for the claimants on the one side and counsel for the first and third defendants on the other. As I understand it, an order was largely agreed.

23. Thus on 27th September the judge determined an issue which had arisen between the parties. It had originally arisen in the form of an application by the claimants to vary part of the order of Mr Justice Laddie, but in the event it was treated as an application by the first defendant for permission to sell certain shares in a company called Hurricane for the purpose of paying the legal costs of the first and thus the third defendant. The claimants resisted the application on the basis that the first defendant had not been candid about his assets and that he had other assets on which to draw, notably family assets in Iran. The judge then gave a detailed judgment and declined to make the order sought, at any rate until the first defendant gave a fuller picture of his funding from Iran. The judge left open the possibility of the first defendant returning to the point once the undertakings given to the court relating to his assets had been satisfied.

24. Once that question was resolved the form of the order was uncontentious, except for costs. The order records undertakings on the part of the first and the third to fifth defendants by their counsel. It is not necessary for me to read those undertakings in detail, but they permit inspection of certain documents relating to the value, location and nature of the assets and the present whereabouts of various funds and assets. They include an undertaking, immediately following a request from Robson Rhodes, to execute a power of attorney giving appropriate authorisation to Robson Rhodes to ensure that they have full and unrestricted access to a wide variety of information. The order contained a provision relating to the drafting of the wording of the power of attorney. Then in paragraphs 4 to 8 the order adjourned the committal applications and the discharge application. It included various other

orders for directions, and then this:

> "7.The Claimants having decided (in the light of the Defendants' undertakings set out above) not presently to pursue the application to cross-examine and the receivers application, without prejudice to their right to seek the same or different relief in the future, the said applications shall be adjourned generally but with permission to the Claimants to restore the same."

25. The order then included a variation of the search order and a clarification of the freezing order which dealt with the shares point.

26. The costs order which has given rise to this application is in these terms:

> "11.The claimants' costs of and occasioned by the application to vary the search order, the cross-examination application, the receiver's application and the shares sale application and the claimants' costs thrown away by the adjournment of the first committal application, the second committal application and the discharge application shall be paid by the first and third defendants in any event, such costs to be subject to detailed assessment on the standard basis, the assessment to commence forthwith.
>
> 12.The first and third defendant shall pay to the claimants on account of the said costs the sum of £40,000, such sum to be paid by 4.30pm on Friday 12th October 2001."

27. The remaining costs were reserved.

28. It is to my mind important to note that the undertakings given were properly given on behalf of the third defendant by counsel within their authority. As I understand it, that is recognised on behalf of the third defendant, but in any event there is no reason to conclude that they were not given with authority. Equally, in the light of the account which I have given, as at 27th September it is plain that counsel had authority not only to give those undertakings on behalf of the third defendant and the first defendant, but also to make submissions on behalf of both in relation to costs.

29. Apart from the issue relating to the shares, the only question debated related to costs. The order essentially covered costs of three types: (i) costs thrown away by the adjournment; (ii) costs of the applications which did not proceed because of the undertakings, viz the application to appoint a receiver and the application for permission to cross-examine the first and third defendants; and (iii) the costs of issues debated on which the claimants succeeded.

(i)Costs thrown away by the adjournment

30. There was no issue of principle. There could scarcely have been any such issue. The usual order in such circumstances would be for the applicants to pay the costs thrown away by an adjournment. So much was conceded at page 29 of the transcript of the proceedings on 27th September. In relation to the costs thrown away, the only issues were who should pay them and whether they should be paid on an indemnity basis. On the second point the judge rejected the claimants' submissions and awarded the costs on the standard basis.

31. On the question of who should pay, the claimants submitted that the order should be made

against both the third defendant and the first defendant because, although both the claimants' application to commit and the first defendant's application to discharge Mr Justice Laddie's order were adjourned, if the third defendant wanted the committal application adjourned it followed that she had to expect the discharge application to be adjourned also because it was the natural consequence of her application. Mr Marshall also submitted on behalf of the claimants that it was plain from the first defendant's application to discharge that, whatever its form, he intended to make it on behalf of all the defendants. Mr Marshall submitted:

> "In substance I would submit that although perhaps formally [the third defendant] was not the applicant in the discharge application, she clearly had an interest in it. She wished no doubt to benefit from it and she applied to your Lordship for an adjournment in connection with it. For those reasons, my Lord, I would submit that she ought to be liable for the costs of the matter in addition to her husband."

32. Mr Hoyle's submissions were as follows:

> "The third defendant has really been a passenger in the context of this case. There seems no sensible purpose to have a discrete costs order against her. One might imagine that it is done so that there is in fact something hanging over her head. I am not making that as a pejorative statement, but I am just wondering what other purpose there could be for introducing the third defendant with a monetary sum that she has to pay. The reality is that this is a claim against the first defendant. All the other defendants fall away if the case against the first defendant fails. They are passengers because of the claim that they have handled moneys essentially that Vitol claims the first defendant has taken. We are not at the stage yet of doing anything else. She is not the applicant of the discharge. If the first defendant's application to adjourn had been successful, no court, with respect, would then have heard an application for committal against her, having already decided that it would be sensible not to hear an application for the committal against him because his application had been adjourned.
>
> It is wholly illusory to suggest that the third defendant in any way plays a separate part. She stands or falls with the first defendant. If there be fault in this case ... it will be the fault of the first defendant. I represent both. At the end of the day I can put it no higher than that."

33. The judge decided that the third defendant must be liable along with the first defendant. He then said this, in a passage which has attracted some discussion:

> "I entirely take Mr Marshall's point that she has been a passenger but really the question is whether she is a free passenger or a fare paying passenger, and she and the first defendant have travelled in the bus together. The application was plainly made on behalf of both of them that the proceedings should be stood over, and I was reminded in forceful terms of the importance since it affected their liberties. That was a valid point and was something that I had very much in mind. I think that an inevitable consequence of the adjournment of the committal applications against both of them was that the claimants will have been put to a good deal of expenditure. As between them on the one side and each of the first and third defendants on the other justice must be that the claimants should be entitled to them on the standard basis."

34. I can well understand that some judges might have reached a different conclusion as between the first and third defendants as to the liability of the third defendant to pay costs. But it appears to me that, on the materials addressed to the judge, those conclusions were in no sense wrong in principle and were well within the wide ambit of his discretion. The true position was that no judge could realistically have proceeded with the application, for example, to commit the third defendant to prison or with the application for permission to cross-examine her, while at the same time adjourning the case against the first defendant. Although the claim against the third defendant is in some respects quite different from the claim against the first defendant, the factual basis of the case was sufficiently close for it to make no sense for the two matters to be heard separately. The judge was right to say that the third defendant potentially benefited by the adjournment and I cannot myself see that the judge was plainly wrong to reach the conclusion on the costs that he did in this regard.

35. The submissions made by Mr Hoyle were well within his authority. I will turn in a moment to the suggestion that competent counsel would have advised the third defendant to take independent advice and that anyone giving her advice would have treated the matter quite differently.

(ii)Costs of applications which did not proceed

36. The second set of costs were in relation to applications not proceeded with because of the undertakings. The claimants submitted that the first and third defendants should pay the costs because the applications had in effect succeeded and were being replaced by the undertakings. It appears to me that, since that submission is correct and that those undertakings were indeed given by both the first and the third defendants, thus making the applications unnecessary because they had in effect succeeded, one would therefore expect in the ordinary way that the court would make an order for costs against the first and third defendants. It may be that it was for that reason that, as I read the transcript, no submissions were made on behalf of either the first or the third defendants on this point. No submissions were advanced on behalf of the third defendant that she should not contribute.

(iii) Costs of issues debated on which the claimants succeeded

37. Thirdly, there were the applications on which the claimants were successful. Again no submissions were made on that topic. I can see that it might have been submitted that the third defendant should not pay the costs, for example, of the application in relation to the privileged documents because they related only to the first defendant. But it was not so submitted; and it is difficult to see how the judge can be criticised for not taking the point on behalf of the third defendant.

38. I turn briefly to the events after the 27th September order. As I understand it, the third defendant entered into a power of attorney in accordance with the order of the court and on the face of it there followed some correspondence between the third defendant and Messrs Ince & Co, the claimants' solicitors. Unfortunately, neither the first nor the third defendant complied with paragraph 12 of the order to pay £40,000 by 4.30pm on Friday 12th October 2001. Before that, both Messrs Sebastians and thus counsel instructed by them ceased to act. It seems clear that the first defendant decided that he no longer wished to have their assistance.

39. There followed some correspondence. On 11th October Ince & Co wrote to the third defendant at her Oxford home, saying:

> "Please note that the Costs Order made by Mr Justice Toulson was made

> against both yourself and your husband. We therefore advise you to liaise with your husband in relation to the payment of the £40,000 that has been ordered."

40. Then on 17th October Ince & Co sent the third defendant a copy of the sealed order of Mr Justice Toulson. On the same day the third defendant herself signed a fax addressed to Mr MacFarlane of Ince & Co, attaching a copy of a letter which Ince & Co sent to:

> "... my bankers at Robert Fleming in which you have said you are awaiting instructions from me."

41. She added:

> "Please accept this as my instructions and authorise Flemings to send the balances of my accounts with them to my account at Barclays Bank, in Summertown ..."

42. Ince & Co replied on 18th October, saying that they would not agree to the proposed movement of funds and saying that they wanted to know how she proposed to pay the £40,000 costs.

43. The third defendant says in her statement that she was unaware of the costs order which had been made because all her mail, including both the post and the faxes, were intercepted by her husband, the first defendant. Whether that is quite right may be doubted because of the fax of 17th October which she wrote, but there is no evidence to contradict her statement that she was not aware of the order of Mr Justice Toulson at that time. It appears that she continued, at that time at least, simply to leave matters to her husband, as she had done both before these proceedings commenced and indeed after they commenced, at least until the hearing on 25th September to which I have referred.

44. Thereafter, on 22nd November the first defendant faxed a defence and on 12th December the third defendant faxed a defence, or at least a defence was faxed on her behalf. The defence simply indicated, in short, that she had no knowledge of anything sinister or of any wrongdoing. She asserted that the first defendant was an honourable man and she denied that any of her assets came from Vitol, the second claimants.

45. There followed a number of orders made by the court, none of which really affects the issues before the court today. In January the claimants' application to commit the third defendant for contempt was adjourned, in the event by consent, although there was a time at that hearing when the third defendant would have liked it to proceed. In fact, the application has never proceeded. Between 20th and 23rd May 2002 Mr Justice Langley heard an application to commit the first defendant for contempt. He gave a detailed judgment on 29th May and made an order for committal against the first defendant, committing him to prison for 12 months.

46. It will be apparent that by now the time for appealing against the order of Mr Justice Toulson had long expired. At the beginning of July the claimants served a statutory demand upon the third defendant demanding the £40,000 which was the subject of Mr Justice Toulson's order. On 26th July a bankruptcy petition was served.

47. On 10th July the third defendant wrote to Mr MacFarlane of Ince & Co saying that she had made various attempts to engage insolvency lawyers in Oxford without success. In that letter she said:

> "5.So my only proposal is the following: When the only asset I have, that is a quarter of the matrimonial home, is made available by the sale of the house, I shall pay your clients the £40,000.
>
> 6.I have no intention to fight."

48. She also said that she never had anything to do with her husband's business. Then on 21st August she wrote again saying that the house was owned fifty/fifty between her and her husband and that the reference to a quarter was a typographical error.

49. The day before, on 20th August, she wrote to the district judge in the Oxford County Court asking for an adjournment of the hearing of the bankruptcy petition which was then fixed for 16th September. She again said that she had had difficulty obtaining advice and that she would have to rely upon legal aid. She said that she had no choice but to apply for legal aid.

50. Then on 3rd September she wrote a detailed letter to the district judge in the Oxford County Court again asking for an adjournment. We were told by Mr Cakebread that some of these letters were written with the assistance of her husband, or at any rate after discussion with her husband, and that may very well be the case. In the letter of 3rd September she says that she had no idea that there was a costs order against her until she received a statutory demand on 1st July. She refers to the fact that she responded, as she put it, "as a goodwill gesture" and told Ince & Co that she would be willing to sell her family home. She then set out the advice that she had apparently received from "various solicitors". In paragraph 2 of that letter she said:

> "The costs order should not have been made against me. This is the second point that some solicitors I have consulted have informed me of. This is because I had made it absolutely clear that I was not party to this litigation. In late September 2001, when my husband had suffered a psychological collapse under the relentless barrage of litigation papers from Ince & Co, he turned to retain counsel to save him from the deluge. His Counsel saw the volume of paper and on the day of the hearing turned up and asked the Court for an adjournment saying he was not ready to deal with the complex issues. For that hearing he asked me to be present as he put it `for cosmetic purposes'. That was my sole involvement in the case. I did not hire counsel and I made it clear to him that I was not involved in the litigation. That is when he informed me that even they do not claim I was involved in the alleged underlying misdeeds. It was explained that they only had a tracing claim, which would come into force only after they were able to prove their case. As I was not involved, I am advised that this costs order should not have been made against me."

51. Then a little later she said that at the hearing before Mr Justice Toulson:

> "... we were asked and readily agreed to give full Power of Attorney over all my assets to the adversaries in return for which they did [not] proceed with their application. The costs order for £40,000 I now know was given as an interim costs order at the time for application that they agreed not to proceed with, with full costs to be assessed later."

52. She added:

> "At the time of the costs order my husband and I had more than enough

funds to pay the costs order. But our funds were frozen by Ince & Co ..."

53. It thus appears that in that letter she was adverting to the point which she is substantially taking before the court today, namely that the costs order should not have been made against her. It is also clear that by that time she was aware that the order for costs of £40,000 was an interim costs order, with full costs to be assessed later.

54. She wrote a further letter on the same day also to the Oxford County Court. We were informed that her present solicitors, who instruct Mr Cakebread today, were instructed after that letter had been written. They instructed Mr Cakebread to represent the third defendant on the hearing in the Oxford County Court on 16th September. On that occasion there was available to counsel and solicitors a bundle of documents which included the bills which the claimants had up to that time produced. They amounted to approximately £150,000. In fact, although perhaps no one on the defendant's side who was there on 16th September knew it, the original costs before Mr Justice Toulson were £90,000, although not, it seems, including all the matters in respect of which they were seeking an order. They sought an interim order of £65,000 and the judge thought it fair that the figure should be £40,000.

55. On 16th September the hearing of the petition was adjourned to enable the third defendant to put her house on the market in order to pay the debt. She says this in paragraph 20 of her statement of 16th December:

> "I then discussed matters further with my solicitors and the question of whether I should appeal the order was raised. In the light of the advice I received and the fact that I have no significant funds available for legal representation I decided that it was not sensible to pursue an appeal about what I believed to be £40,000. Although I considered the costs order to be extremely unjust I decided that I had to accept the fact that in the absence of funding I could not do anything about it."

56. There was in fact no sale of the house. The matter then came before the Bankruptcy Court in November. We are told in a statement from Mr Wright, who is a representative of the third defendant's present solicitors, that he was at that time told that the total costs being put forward by Ince & Co were now £170,000. It is right to note, however, that on the materials available on 12th September it is shown that the amount of costs being sought were very substantially greater than the £40,000 which was the subject of the interim order. The petition was again adjourned on 12th November. Then on 16th December it was adjourned again because this application was being made for permission to appeal.

57. So the position is that this application is made some 14 months out of time. It is quite apparent that the business of the court could not proceed if the court entertained applications so long out of time save in exceptional circumstances. In Sayers v Clarke Walker [2002] 1 WLR 3095 this Court said that the court should systematically consider the matters raised in CPR rule 3.9 in considering applications to appeal out of time. I therefore briefly consider them.

58. The first matter, (a), is the interests of the administration of justice. Here the effect of granting permission to appeal would involve the re-arguing of the matter de novo before the Court of Appeal a long time later. The argument raises matters which were not raised before the judge. The suggestion, as I understand it, is that competent counsel would have advised the third defendant to take independent legal advice and that competent independent counsel would have advised her not to seek an adjournment of the application, for example, that she be cross-examined or indeed that she be committed to prison. It is submitted by Mr

Cakebread that the case against the third defendant is very limited and very thin. He draws our attention to the comparison with the allegations against the first defendant, which are undoubtedly substantial, as appears from the judgments of Mr Justice Laddie and Mr Justice Langley. He submits that the allegations against the third defendant are very different in nature. I entirely accept that that is so. Nevertheless, this consideration, namely the administration of justice, points against granting this application. It would, as I have indicated already, completely undermine the function of the appellate procedure to permit delays of this kind save in exceptional cases.

59. The second matter, (b), is whether the application for relief has been made promptly. It has plainly not been made promptly in the sense that 14 months have elapsed. It is submitted by Mr Cakebread that it was not until July that the third defendant was aware of the costs order. I accept that that is so. However, it is quite clear that the third defendant was aware that an order had been made and indeed that undertakings had been given to the court on her behalf since she entered into a power of attorney in compliance with them. Equally, she simply left her husband to deal with such matters. Although she is plainly an educated lady, she had left her husband to deal with the claim against her, as indeed, on her own case, she had done in relation to her bank accounts earlier. It is difficult to hold that this application was made promptly. In any event, the statutory notice was served in July 2002. It was based upon the debt of £40,000. She decided to sell the house in September. At that time there were available to her and, indeed, to her present advisers both the order of Mr Justice Toulson and the schedules of costs amounting to £150,000. The adjournment was sought then, not with a view to an appeal, on the basis that she would try to sell the house. A further adjournment was also sought on that in November, and it was only in December that this application was launched.

60. Item (c) is whether the failure to comply was intentional. I would not, for my part, hold that the third defendant's failure to comply with the order was intentional.

61. The next matter, (d), is whether there is a good explanation for the failure. The answer, to my mind, is that there is not a good explanation to account for the period of fourteen months, although, subject to the following, I certainly have some sympathy for the third defendant. It was perfectly understandable that she should leave these matters essentially to her husband in the first place, but there is no evidence that her husband deceived her. It appears to me that if she were to pay the £40,000 or any part of this liability she would have a right - probably a restitutionary right - to recover a contribution and perhaps even an indemnity from the first defendant as a person jointly liable on the order of Mr Justice Toulson.

62. Consideration (e) is the extent to which the party in default has complied with the other rules and the like. I would not hold that the third defendant was in default in that connection.

63. The next matter, (f), is whether the failure to comply was caused by the party or his legal representative. I have already sufficiently dealt with that.

64. Matter (g) is whether the trial date can still be met if leave is granted. That is not, I think, relevant. It is not at all clear to me whether there will ever be a trial date against the third defendant.

65. Matter (h) is the effect which the failure to comply had on each party; and (i) is the effect which the granting of relief would have on each party. I do not myself see that those factors will seriously affect the claimant in the long term.

66. The question, however, at the end of the day is whether, having regard to this very long period, it would be right to grant permission to appeal. I have reached the conclusion that it would not. It appears to me that, although there are some points which could be advanced on behalf of the appellant before the Court of Appeal, with the possible exception of the order relating to the privileged documents, it is difficult to see how the case that Mr Justice Toulson was plainly wrong or erred in principle is arguable. The case has to depend upon alleged incompetence of counsel. As to that, it appears to me that it is very easy to be wise after the event. It may be that entirely separately representing counsel would have looked at the matter differently. But it is clear from what Mr Tager told Mr Justice Toulson that independent consideration of the third defendant's position was given at the time and an adjournment of the committal application and the cross-examination applications was undoubtedly substantially to her benefit, or apparently so. It seems to me that she would be likely at the time to have wished to support her husband and that good tactics would suggest that they should at that time deploy a joint petition so far as it was possible to do so. It seems to me that many of the grounds of this application are fuelled by what has happened since: in short, by hindsight.

67. So while I do have some sympathy for the third defendant, I for my part do not think that it would be right to grant permission to appeal out of time.

68. LORD JUSTICE LONGMORE: I agree

69. Mr Cakebread faces at least two major difficulties on this application. First, there can be no doubt on the evidence before us that at the time matters came before Mr Justice Toulson in September 2001 Mrs Moussavi was not merely content that her husband and her husband's lawyers should deal with the case on her behalf, but that she actually authorised him and them to act on her behalf. Mr Tager expressly told Mr Justice Toulson that attention had been given to the question of potential conflict between Mrs Moussavi and her husband and that that question had been resolved. Mr Cakebread submits that Mrs Moussavi should have been advised to instruct separate solicitors and counsel and that the failure so to advise was an obvious disregard of their duty to her. He then submitted that any such separate counsel would have made it clear that, since Mrs Moussavi had nothing to fear from the paltry material in support of the application to commit her to prison, the application to commit her, as opposed to the application to commit Mr Moussavi to prison, should have gone ahead regardless of the fate of Mr Moussavi's application to discharge the freezing order and the order for search and seizure made by Mr Justice Laddie. Mr Cakebread accepts that it was unlikely that the committal application would have gone ahead in fact, but in the light of such application he submits that no question of Mrs Moussavi paying costs for any of the applications could, or would, have arisen.

70. As to that, I would not accept that counsel disregarded his duty to Mrs Moussavi. Other tactical courses could conceivably have been adopted, but the course in fact adopted in front of Mr Justice Toulson was not in any sense obviously contrary to her interests. If a wife gives general authority to her husband to act for her and instruct lawyers for her, the wife has to accept the consequence of orders made by the court at the end of hearings conducted on behalf of herself and her husband. The actual order as to costs made by Mr Justice Toulson was well within the discretion of the judge and could not, in my opinion, be the subject of any successful appeal.

71. Secondly, as to delay, Mr Cakebread submits that Mrs Moussavi did not appreciate until July 2002, at the time of the service of the statutory demand, that any costs order had been made, and not until September that she would be liable for more than the £40,000 which she

had been ordered to pay on account and which formed the basis of that statutory demand. It was then further said that it was only in November that it became clear that the liability for costs might be as much overall as £150,000. Apparently Mrs Moussavi was prepared to take an order for £40,000 on the chin, even if it was in her opinion an unjust order, but the risk of being liable for a sum as large as £150,000 is, apparently, the cause of the decision to seek permission to appeal.

72. It is of course the duty of any solicitor under the Civil Procedure Rules, rule 44.2, to inform a legally represented party who is not present, when an order for costs is made, of that costs order in writing. There is no evidence whether or not Sebastians did perform that duty, but I am not prepared to assume that they did not. But even if they did not, Mrs Moussavi had not only authorised her husband to receive information about the case on her behalf, but in any event had every opportunity to inform herself of the terms of the order if she wished to do so. It is not open to a party to apply for an extension of time for appealing of more than 12 months after the date of the order on the basis that, even though she is a literate and educated woman, she did not take the trouble to inform herself about the terms of an order of the court. It is all too easy for a defendant to bury her head in the sand in respect of orders for costs and only start to do something about appealing them when a petition for bankruptcy is served on her. It is to be noted that there was in any event a substantial delay between the time Mrs Moussavi allegedly realised that the costs order was only an interim order and the filing of the application for permission to appeal.

73. Sayers v Clarke Walker [2002] 1 WLR 3095 enjoins us to have regard to the matters set out in CPR 3.9 in deciding whether to grant an extension of time for appealing. For the reasons I have sought to give, in addition to those of my Lord, the interests of the administration of justice, the lateness of the application, the absence of any satisfactory explanation for the late application and the prejudice to the claimants of staying yet further the bankruptcy proceedings all militate strongly against the extension of time requested.

74. In a case where the merits of the proposed appeal are as dubious as I have indicated, it would be completely inappropriate to grant an extension of time for an appeal which would, in my view, be hopeless.

75. I agree that the application must be dismissed.

Order: application for permission to appeal dismissed; application on behalf of claimants for the costs of this application refused.