IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION
2006: No. 20

BETWEEN:

(1) PHOENIX GLOBAL FUND LIMITED
(2) PHOENIX CAPITAL RESERVE FUND LIMITED
Plaintiffs

-and-

(1) CITIGROUP FUND SERVICES (BERMUDA) LIMITED
(3) THE BANK OF BERMUDA LIMITED
Defendants

RULING (SECURITY FOR COSTS)

Date of hearing: September 6-7, 2007
Date of Ruling: September 27, 2007

Mr. Narinder Hargun, Conyers Dill & Pearman, for the 1st Applicant/3rd Defendant
Mr. Andrew Martin, Mello Jones & Martin, for the 2nd Applicant/1st Defendant
Mr. Larry Mussenden, Attride-Stirling & Woloniecki, for the Respondents/Plaintiffs

Introductory

1. The 1st Applicant/3rd Defendant ("the Bank") applies by Summons dated June 27, 2007 for either (a) security for costs in the amount of $700,000 on the grounds that the Plaintiff is a nominal plaintiff within Order 23 rule 1(b) of the Rules of the Supreme Court 1985, or, alternatively, (b) that since the pursuit of the action is abusive, it ought to be stayed unless the third party funding the litigation undertakes to be bound by any order as to costs. The 2nd Applicant/1st Respondent ("Citigroup") applies for similar relief by its July 20, 2007 Summons, although it seeks merely $569,484.50 by way of security.

2. The Respondents/Plaintiffs commenced the present action by a Generally Indorsed Writ issued on January 26, 2006. It appears that they seek in the region of $40 million as against each of the two remaining Defendants, the claim against the Second Defendant having been discontinued on June 21, 2006. Mr. Hargun for the Bank made the primary submissions in support of the case for security for costs, which Mr. Martin substantially adopted on behalf of Citigroup. Unsurprisingly, having regard to the sums at stake, the respective submissions were supported by copious submissions and authorities, with Mr. Mussenden tendering extensive and highly original supplementary submissions on the legislative history of this Court's jurisdiction to award costs against "non-parties".

3. The Respondents are Bermuda companies which at all times material to their claims in the present action were operating as mutual fund companies. The Applicants essentially served as Administrator and Custodian and Administrator, respectively, to the Funds. However, after substantial losses were discovered in or about 2003 prompting the resignation of the 1st Applicant, the Bermuda Monetary Authority ("BMA") refused to approve an overseas Custodian. This resulted in redemption agreements being consummated between the Respondent companies and their shareholders, effective June 15, 2004, under which the shareholders agreed to redeem their shares in return for either (i) shares in a new Caymanian company, Dynagest Investment Funds SPC ("Dynagest") or (ii) cash. Connected to these agreements were Transfer Agreements entered into by each Fund on the same date with Dynagest under which it was agreed that all of their assets would be transferred by the Respondents to Dynagest except for (a) causes of action against, inter alia, their former administrative service providers, (b) the proceeds recovered in respect of such claims, which were assigned to the Respondents' pre-transfer shareholders, and (c) a total of $80,000 to cover litigation costs and the costs of a members voluntary liquidation of the Bermuda companies after the recovery proceedings have been finally determined.

4. The Applicants broadly contend that in these circumstances the Respondents are clearly nominal plaintiffs suing for the benefit of their former shareholders, being all but shell companies manifestly dependent on third party funding for the pursuit of a substantial action in which they are being represented by lawyers in both Bermuda and London. The Respondents broadly contend that they are not nominal plaintiffs because they are suing, in substance if not technically, on behalf of their own shareholders. Nor is their conduct abusive, because (a) Bermuda law simply does not provide for security for costs on the grounds of insolvency, and (b) the Applicants can (despite previous assumptions to the contrary) obtain third party costs orders at the end of the action.

5. The scope of this Court's jurisdiction to order security for costs or to grant similar relief on abuse of process grounds against insolvent companies whose litigation is being funded by third parties is somewhat unclear. This is largely because explicit statutory powers to grant security for costs exist under English law, from which our civil procedure is wholly derived, which have not seemingly been adopted in Bermuda. Not only has it long been obvious in England that the High Court could by statute order costs against third parties (Supreme Court Act 1981(UK), section 51(3), derived from section 5 of the 1890 Supreme Court of Judicature Act). In addition, it has been possible there to order security for costs against an insolvent company for over 20 years (Companies Act 1985 (UK), section 726(1)). Moreover, under the modern English security for costs provisions contained in the Civil Procedure Rules ("CPR") as amended to April 1, 2006[1], express provisions are now made for security for costs orders to be made against non-parties (a) to whom the plaintiff's claim has been assigned to avoid a costs order, or (b) who have contributed to the plaintiff's costs in return for a share of the litigation proceeds.

6. In Bermuda, it has seemingly been accepted wisdom, at least in modern times, that no jurisdiction existed to grant costs orders against persons who were not formally joined as parties to contentious litigation. The concession of this point led me to stay, on abuse of process grounds, an action brought by an insolvent Bermudian company until the parent company (which was funding the action) undertook to be bound by any costs orders that might be made against the plaintiff company: *First Atlantic Commerce Limited-v- Bank of Bermuda Limited* [2007] Bda LR 36.

7. In the present case, the Respondent/Plaintiff has advanced comprehensive written submissions in support of the proposition that this Court does in fact posses the jurisdiction to make costs orders against third parties. This proposition has not

[1] '*Civil Procedure*', Volume 1 (Sweet and Maxwell: London, 2006), Rule 25.14.

been challenged by the Applicants/ Defendants. However, in light of the importance of this issue to the management of civil litigation, and substantial commercial litigation in particular, it seems to me that this Court must seek to bring clarity to this area of the law, and to reach a concluded decision on the scope of jurisdiction question. Extensive argument was also advanced on the hotly contested issue of whether or not the respondent was a "nominal" plaintiff within Order 23 rule 1(b). This issue seems also not to have been considered by the Bermudian courts, certainly not since the insertion of the Overriding Objective into Order 1A of the Rules on January 1, 2006.

8. The principles applicable to the ordering of security for costs in relation to foreign plaintiffs are sufficiently settled to enable such applications to be dealt with in a comparatively summary manner. Hopefully, applications relating to nominal plaintiffs, and cases involving third party funders generally, will in the future be capable of resolution in a similarly economical manner.

Factual findings

9. The facts most directly relevant to the Applicants' application for security for costs are uncontroversial. The Respondents/Plaintiffs are no longer active mutual fund companies, having transferred virtually all their assets to Dynagest in the Cayman Islands. These assets were transferred on the basis that after any litigation recoveries were made, the Bermuda companies would be wound-up. The Transfer Agreements (clause 4.2, "*Net proceeds of claims or proceedings*") provided in material part as follows:

> "*The Transferor acknowledges that it shall hold the net proceeds of any claims or proceedings referred to in paragraph (c) of the definition of 'Relevant assets' in clause 1.1 on trust for all shareholders of the Transferor immediately prior to the Effective Date and such net proceeds will, subject to the requirements of the Companies Act 1981 of Bermuda, be distributed to such shareholders pro rata based upon the value of their shares of the Transferor as at the Effective Date.*"

10. From clause 1.1 of the Transfer Agreements, it is apparent that all shareholders were to be asked to sign one of two forms of Consent Letter. "*Accepting Shareholders*" were defined as those who elected to redeem their shares in return for a subscription for Dynagest shares. "*Redeeming Shareholders*" were defined as those who elected to redeem their shares in the Respondents in return for a cash amount equal to the value of the shares on the Effective Date. The "*Relevant Assets*" transferred excluded the amounts to be paid to Redeeming Shareholders. For the purposes of the present application, I have assumed that the shareholders referred to in clause 4.2 include all of the Respondents' Class A shareholders, or investors.

11. Copies of standard form redemption and subscription agreements which were produced in evidence reveal the following. Accepting Shareholders agreed that as of June 15, 2004 they would "*become a shareholder in Dynagest and cease to be a shareholder in the Company.*" Each Redeeming Shareholder requested "*the redemption of all its shares in the Company for a cash amount equal to the net asset value of such shares as at 15 June 2004…on the understanding that : (a) It will cease to be a shareholder in the Company as at the Effective Date.*" These documents were executed by the shareholders on the explicit basis that they accepted the terms of the relevant Respondent's May 28, 2004 letter. The Respondents themselves stated in this letter that in the case of either Option One or Option Two, the shareholders would "*cease to be a shareholder of the Company.*"

12. Although the Respondents accepted that all of these shareholders have either received their cash or shares in Dynagest, they attempted to argue through the three Moretti Affidavits that the shareholders in question continue to be

shareholders of the Respondent companies. This contention was merely an argument as to the legal effect of the June 15, 2004 transactions, not evidence as to what was agreed. It was an argument which was not supported by any credible contemporaneous evidence. The assertion was clearly raised as a rather inelegant tactical response to the realisation that the unarguably clear way in which the migration of the mutual funds to Cayman had been structured was, for present purposes at least, an inconvenient truth. I am bound to find, therefore, that the shareholders to whom the proceeds of the present claim have been assigned were, from the commencement of the present action, former shareholders of the Respondents/Plaintiffs.

13. In the course of the hearing, what appeared to be the case on the evidence was confirmed by counsel. The Respondents did not complain that the security sought would have the effect of preventing them from pursuing their claim. It was conceded that the Respondents were dependent on funding support for their pursuit of the present litigation, and the funder was identified (in paragraph 8 of the Third Affidavit of Diego Moretti[2]) as DM Special Assets Reserve Fund SPC. This segregated portfolio company was said to be a member of the Dalifax Investment Funds SPC (formerly Dynagest) group of companies. Although Bank's counsel indicated that quick corporate searches had not confirmed the existence of this entity, I will assume for present purposes that what Mr. Moretti has deposed to is true.

14. Accordingly, I find that the present action is being funded by a Cayman company, and that the Respondents' constitutional right of access to the Court will not be substantially impaired if the Applicants are granted the security which they seek. I further find that the Applicants have established that the Respondents/Plaintiffs will more likely than not be unable to pay from their own resources any adverse costs orders which may be made against them at the end of the trial. This point was never seriously in issue.

15. More importantly, however, I am satisfied that there is a real risk that any costs orders the Applicants obtain may not be enforceable against the funding entity. I accept that this factual matrix "*results in an unequal 'playing field' "* (First Affidavit of Sonja M. Salmon, paragraph 39).

16. The amounts claimed were not challenged on the basis that they were inaccurate or unreasonable estimates of the likely costs orders that might be made in the Applicants' favour if the claims advanced in this action were all dismissed. Rather, the legal submission was made that if security was to be ordered, the relevant tariff was in fact not the total costs burden, but merely that element fairly attributable to the additional costs of enforcing a costs order against the third party funder overseas.

Discretionary factors: merits of the claim

17. The Applicants invited the Court to determine not only that the Amended Statement of Claim did not have a high probability of success, but also that the claims were not *bona fide* ones. In my view, it is not possible to reach such a conclusion on the basis of the pleadings alone, and in light of the limited evidence presently before this Court. Nor is it appropriate for the Court, at this advanced stage of the action, to in effect embark upon a quasi-strike-out application under the umbrella of a security for costs application.

18. The claims are novel and, to that extent alone, somewhat surprising. The Applicants seemingly provided largely administrative functions, with operative investment decisions being made by the directors and other entities not before the Court. It is apparently common ground that there are no judicial precedents, in Bermuda or elsewhere in the offshore world, defining the parameters of the legal liability of administrators and custodians of offshore mutual funds for investment

[2] This was presented to the Court in un-sworn form. A sworn version was filed on September 18, 2007.

losses. To this extent, at least, it may fairly be said that the claims do not appear to have a *high* probability of success.

19. However, although it seems probable that the Applicants are to some extent being pursued as "deep-pocket" Defendants, in my judgment there is no proper basis for concluding that the present claims are not brought in good faith. The Applicants do not deny that significant losses have been suffered and that certain breaches of the applicable investment rules did occur during a period when they were contracted to perform functions in relation to the two funds. The dispute turns on whether the losses which did occur are legally attributable to the Applicants in circumstances where (a) they are not complete strangers to the transactions in question, and (b) they can point to no binding authority which clearly establishes that the claims asserted either disclose no reasonable cause of action or are bound to fail.

Discretionary factors: ability of Court to grant a costs order against the third party funder at the end of the trial

20. The Respondents' main discretionary argument was that this Court should decline to order security for costs in the exercise of its discretion because the usual course was to deal with costs at the conclusion of the trial. Since the Court did in fact possess the jurisdiction to make a costs order against the third party funder, there was no need to order security now. Mr. Mussenden also suggested that the modern trend was away from ordering security for costs.

21. Assuming, for present purposes, that this Court is indeed jurisdictionally competent to (a) order security for costs pursuant to Order 23 rule 1(b), and (b) order a third party funder to pay costs at the end of the trial, I would decline to defer the issue of costs to the end of the trial. The Respondents have been extremely coy about the identity of their funder, and only disclosed this on the second day of the hearing. There is no reliable evidence that any costs order made at the end of the trial could effectively be enforced against what appears to be a Caymanian segregated portfolio company whose principal assets may well not be available to its general creditors.

22. The dominant considerations under Order 23 rule 1(b) are (a) whether the nominal plaintiff requirement has been met, and (b) whether the *de facto* plaintiff or funder will be able to comply with any adverse orders for costs which may be made against him. These are not discretionary factors, but the jurisdictional gateways through which the Applicants must pass before inviting the Court to exercise its general discretion. The Court is then required to consider all the circumstances of the case, but in my judgment those circumstances must be weighed having regard for the dominant rationale underlying the procedural rule. Order 23 rule 1 provides as follows (emphasis added) :

> "**23/1 Security for costs of action, etc.**
> *1 (1) Where, on the application of a defendant to an action or other proceedings in the Court, it appears to the Court—*
>
> *(a)that the plaintiff is ordinarily resident out of the jurisdiction, or*
>
> **(b)***that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so, or*
>
> *(c)subject to paragraph (2), that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein, or*

> *(d)that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation,*
>
> **then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just.**"

23. The primary concern of the Court must be whether there is any real risk that the Applicants will be unable to enforce any adverse costs orders which this Court may impose against a Caymanian "segregated portfolio company", DM Special Assets Reserve Fund SPC. Segregated account companies under Bermuda law[3] are typically designed to ensure that third party creditors cannot attack the assets in the segregated account which are intended to be available exclusively to meet the claims of creditors who have entered into transactions linked to that specific account. Only the general assets are available to meet general claims. In the absence of expert evidence as to Caymanian law, I am required to assume that it is the same as Bermudian law. There is no positive evidence as to what funds are held by the litigation funder in a general as opposed to segregated account, nor any undertaking that such funds would be kept in such an account until the conclusion of the present proceedings. In these circumstances, this Court is left in serious doubt about the efficacy of any costs order which might be made against DM Special Assets Reserve Fund SPC at the end of the trial.

24. The evidence disclosed by the Respondents in advance of the hearing revealed that the bulk of their liquid assets were transferred to another company, Dynagest. Dynagest is also apparently a segregated portfolio company. It is true that under clause 2.3 of the Transfer Agreements, it received the Relevant Assets in consideration for assuming "*all of the Transferor's respective obligations and liabilities with respect to the Relevant Assets*". But it was not suggested that this clause could in any way entitle the Applicants, at the end of the trial scheduled for 2008, to contend that Dynagest received the Relevant Assets in June 2004 subject to a prospective liability for the costs of this action. Still less plausible is the prospect of the Applicants being able to enforce any costs orders in their favour against funds held in a segregated account maintained by DM Special Assets Reserve Fund SPC. Mr. Mussenden for the Respondents was keen to emphasis that no impropriety attached to the Transfer Agreements, which were consummated on June 14, 2004, well in advance of the commencement of the present action on January 26, 2006.

25. This is, accordingly, very clearly a case where the Court should exercise its discretion in favour of ordering security for costs based on serious doubts about the ability of the Applicants to enforce any costs orders that may be granted in their favour against a third party about whose practical ability to pay little is really known. No countervailing circumstances which would properly mitigate against such an exercise of the Court's discretion were advanced on behalf of the Respondents. I reject the suggestion that security for costs is an outmoded civil procedural weapon. As Mr. Hargun pointed out in his reply submissions, rule 25.14 of the version of CPR published as recently as April 1, 2006[4] expressly provides for security for costs to be ordered in England against third party funders. This rebuts the notion of a modern drift away from security for costs :

> "*(1) The defendant may seek an order against someone other than the claimant, and the court may make an order for security for costs against that person if-(a) it is satisfied, having regard to all*

[3] See in particular the Segregated Account Companies Act 2000, discussed in O'Neill and Woloniecki, '*The Law of Reinsurance in England and Bermuda*', 2nd edition (Sweet & Maxwell: London, 2004), paragraphs 16-40-16-48.

[4] The 2007 44th and 45th updates do not affect this rule: http://www.justice.gov.uk/civil/procrules_fin/index.htm#index .

the circumstances of the case, that it is just to make such an order; and (b) one or more of the conditions in paragraph (2) applies.

(2) The conditions are that the person-(a) has assigned the right to the claim to the claimant with a view to avoiding the possibility of a costs order being made against him; or (b) has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover in the proceedings; and is a person against whom a costs order may be made.
(Rule 48.2 makes provision for costs orders against non-parties)."

26. So the modern English position appears to be that if a funder has agreed to contribute to litigation costs in return for a share of the recoveries made[5], the funder, not merely the nominal plaintiff, may be ordered to provide security for costs. Indeed, under the modern English CPR, the circumstances under which security for costs can be ordered against a plaintiff are far broader than under the 1999 Supreme Court Practice version of Order 23. Rule 25.13 of CPR provides as follows:

"

25.13 *(1) The court may make an order for security for costs under rule 25.12 if –*

(a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and
(b) *(i) one or more of the conditions in paragraph (2) applies, or*
(ii) an enactment permits the court to require security for costs.

(2) The conditions are –

(a) the claimant is –

(i) resident out of the jurisdiction; but

(ii) not resident in a Brussels Contracting State, a Lugano Contracting State or a Regulation State, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act 1982 ([7]);

(c) the claimant is a company or other body (whether incorporated inside or outside Great Britain) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so;

(d) the claimant has changed his address since the claim was commenced with a view to evading the consequences of the litigation;

(e) the claimant failed to give his address in the claim form, or gave an incorrect address in that form;

(f) the claimant is acting as a nominal claimant, other than as a representative claimant under Part 19, and there is reason to believe that he will be unable to pay the defendant's costs if ordered to do so;

(g) the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him."

[5] But not, perhaps, if the contribution is dependent on some recovery being actually made: *Farmer-v-Moseley (Holdings) Ltd.* [2001]2 BCLC 572.

27. This position seems consistent with the broad principle that a defendant ought not to be compelled to defend proceedings brought by a plaintiff who is not himself amenable to any liability in costs without, in appropriate cases, being protected by secured costs, the implicit governing philosophy of the applicable rule. As Mr. Martin most incisively pointed out, in England and Bermuda, the Court is now obliged by the Overriding Objective to manage cases in a manner which ensures, as far as possible, a "level playing field". Order 1A of this Court's Rules provides:

> "**1A/1 The Overriding Objective**
>
> *1(1) These Rules shall have the overriding objective of enabling the court to deal with cases justly.*
>
> *(2) Dealing with a case justly includes, so far as is practicable —*
>
> *(a) ensuring that the parties are on an equal footing…*"

28. The importance of ensuring that litigants are "*on an equal footing*", derived from European Convention on Human Rights case law on Article 6 of that Convention, only emerged in the United Kingdom when the Human Rights Act 1998 incorporated the Convention into U.K. domestic law. This principle has been an implicit element of civil litigation in Bermuda since 1968 by virtue of section 6(8) of the Bermuda Constitution, which guarantees a fair civil trial to plaintiffs and defendants alike. Order 1A further provides:

> "**1A/2 Application by the Court of the Overriding Objective**
>
> *2. The court must seek to give effect to the overriding objective when it —*
>
> *(a) exercises any power given to it by the Rules; or*
>
> *(b) interprets any rule.*"

29. So in exercising the discretionary power to order security for costs against a nominal plaintiff under Order 23 rule 1(b), I am required to seek to apply the Overriding Objective, which most significantly requires one to attempt to ensure that the parties are on an equal footing. In the circumstances of the present case, this central criterion involves ensuring that both parties are as far as possible equally subject to the discipline of costs, in a factual context where serious doubt attaches to the ability of the Applicants to enforce any costs orders that might be made against the third party funder. All key discretionary factors accordingly point towards the awarding of security for costs.

Legal findings: are the Respondents/Plaintiffs "nominal plaintiffs" for the purposes of Order 23 rule 1(b)

30. The Applicants have established, based on substantially uncontested evidence, that prior to the commencement of the present action, the proceeds of the claims pursued were assigned to the former shareholders of the Respondent companies. Although, somewhat incredibly, the Respondents contested this issue, it is also obvious that prior to the commencement of the present action (a) all Class A shares were redeemed, and (b) all of the shareholders who are beneficially interested in any damages recovered in this action ceased to be shareholders in the Respondent companies.

31. The Applicants have also established, again with little if any dissent, that the Respondent companies are effectively shell companies whose assets have been substantially transferred to a Caymanian company which is carrying on their

former business as a mutual fund company. The only apparent "business" activity currently being pursued by the Respondents is conducting the present litigation, the net proceeds of which will all be payable to their former shareholders. The Respondents in 2004 retained $80,000 towards potential litigation costs, and have since retained both Bermudian and English lawyers who continue to represent them in connection with the present action. In the event that the costs of the action are awarded to the Applicants, they will be ordered to pay an estimated amount in excess of $1 million. Very clearly, the Respondents would be unable to pay these costs.

32. The only legal controversy, then, is whether on these facts it may be said that the Respondents fall within the jurisdictional scope of Order 23 rule 1(b) because they are each "*a nominal plaintiff who is suing for the benefit of some other person*". Mr Hargun submitted that it was obvious that the nominal plaintiff rule applied. This was a contention with which it was difficult to disagree. Mr. Mussenden, however, courageously sought to persuade the Court that its first impression was an erroneous one. Under Order 23 rule 1, security for costs may be ordered where it is shown:

> "*(b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so.*"

33. The English version of this Rule from which our own Order 23 rule 1(b) is derived has been considered in various cases cited in the commentary set out in paragraph 23/3/15 of the Supreme Court Practice 1999. Mr. Hargun placed two authorities, seemingly the most relevant to what constitutes a "nominal plaintiff", before the Court. Counsel relied primarily on the following dictum of Lord Denning in *Semler-v- Murphy* [1967] 1 Ch 183 at 191-192:

> *"A nominal plaintiff is a man who is a plaintiff in name but who in truth sues for the benefit of another. In an early case, Elliot v. Kendrick, a plaintiff assigned his estate to trustees for his creditors with power to sue in his name for his debts. They did sue in his name. Denman C.J. said:*
>
> > *"The trustees choose to proceed in the action in the name of a party who, for their benefit, has divested himself of all means of paying the costs. I think they should give security to the defendant."*
>
> *In Lloyd v. Hathern Station Brick Co. Ltd, the plaintiff, being insolvent and having brought an action against the defendants, executed a deed of assignment to a trustee for the benefit of his creditors. It was held to be the very kind of case where security would be ordered.*
>
> *I agree, of course, that a trustee in bankruptcy cannot be ordered to give security for costs: see Cowell v. Taylor ; nor a man who has had a receiving order against him: see Rhodes v. Dawson; nor a bankrupt who sues for a debt arising since his bankruptcy: see Cook v. Whellock. But those cases are quite distinguishable. Here the plaintiff, at the very time when he started the action, charged the whole fruits of it to his brother. So it was only the brother who stood to gain. The plaintiff was truly a nominal plaintiff.*
>
> *Mr. Beckman argued that the plaintiff was still much interested because if this action should succeed he would probably not be made bankrupt. He said that Mr. Semler was employed now as a cost accountant at £2,000 a year. The affidavit of the solicitor gave that impression. But just before the adjournment we were shown the report of the official receiver made yesterday. It shows that the debtor himself stated that "from April, 1964, to*

December, 1966, he was employed as a cost accountant and his total remuneration during that period was £3,325. He has since been unemployed." That knocks the bottom out of Mr. Beckman's argument.

It comes to this. If the action succeeds, the plaintiff's brother will go off with the whole of the proceeds and let the other creditors "whistle" for their money: whereas if the action fails, the plaintiff will not be able to pay the costs of the defendant. It is the very kind of case in which security for costs should be ordered."

34. This was a case where the plaintiff, after a receiving order had been made against him, borrowed money from his brother to pay off various debts. As security, his brother took charge over all of his assets including the proceeds of the plaintiff's claim against the defendant. It was conceded that if the fruits of the action had been assigned (as opposed to charged), that the plaintiff would have been a nominal plaintiff. The English Court of Appeal unanimously (with Harman LJ expressing some doubts) held that the plaintiff came within the nominal plaintiff rule, implicitly affirming the principle that a plaintiff is a nominal plaintiff where he has assigned the benefit of his cause of action to a third party. This principle was first established in the second case which Mr. Hargun placed before the Court, *Lloyd-v-Hathern Station Brick Company Limited* (1901) 85 LT 158, where the plaintiff's interest in a cause of action had been assigned for the benefit of his creditors. He was held to be a nominal plaintiff. This was another unanimous Court of Appeal decision, in which Stirling LJ observed (at page 160):

> *"Looking at the assignment and the covenants, it is clear that the whole of the beneficial interest in the assigned property is gone, but the deed is constructed as to leave in the plaintiff the right of prosecuting the action.*"

35. Precisely the same scenario exists in the present case where the Transfer Agreement declares that the proceeds of the present action (described in generic terms) are held on trust for the benefit of the Respondents/Plaintiffs' (former) shareholders but retains the right to pursue the claims themselves. The precise legal contours of these transactions are not, according to these authorities, as important as their practical effect. Thus Salmon LJ observed in *Semler-v- Murphy* [1967] 1 Ch 183 at 194:

> "*For myself, I do not think that in the circumstances of this case any real distinction can be drawn between a charge such as this, given contemporaneously with the issue of the writ, and an assignment. The obvious inference is that the charge was given to remove any risk of the fruits of the action falling into the hands of the plaintiff's creditors. I am certainly not weakened in that view by the plaintiff's statement of affairs contained in the official receiver's report which we have now seen. In that statement of affairs the plaintiff sets out his assets and liabilities. He does not include amongst his assets this claim against the defendant, to my mind (which I hope is not too sceptical) for the obvious reason that he is confident that if he succeeds in the action, all its fruits will assuredly go to his brother.* **I have no doubt that the action is for the benefit of the plaintiff's brother and the plaintiff is only a nominal plaintiff. I can see no benefit which the plaintiff can derive from it.**" [emphasis added]

36. The latter passage logically suggests that the crucial consideration is based simply on the plain words of Order 23 rule 1 (b) themselves, namely whether the plaintiff is "*suing for the benefit of some other person*". Why, then, do the Respondents contend that they do not fall within this rule? They very fairly rely on a more recent decision of the English Court of Appeal, albeit one not cited in the 1999 White Book commentary on Order 23, *Envis-v- Thakkar* (1995) The Times 2nd May; [1997] BPIR 189. In this case, the Court of Appeal unanimously held that the plaintiff was not a nominal plaintiff, primarily on the grounds that "*this is not*

a case in which it can be said at this stage that clearly there will be no surpluses for the plaintiff at the end of the day": per Kennedy LJ[6]. However, by way of alternative finding, Kennedy LJ (with whose leading judgment both other panel members concurred) opined:

> "*Indeed, it is my view that before a person can be branded as a nominal plaintiff for the purposes of RSC Ord 23, r 1(b), there must be some element of deliberate duplicity or window-dressing which operates and probably was intended to operate to the detriment of the defendant. Semler's case is merely authority for the proposition that it is not essential to introduce a worthless plaintiff. The same result can be achieved if someone with a real cause of action, in order to cheat the defendant, deliberately divests himself of all rights to retain any benefit from the action, and the ability to meet any order for costs.*"[7]

37. If the law requires "*some element of deliberate duplicity or window-dressing which operates and probably was intended to operate to the detriment of the defendant*" to engage the nominal plaintiff principle, I would hold that the Applicants have failed to establish that Order 23 rule 1(b) applies in the present case. But I would respectfully decline to follow the alternative finding of Kennedy LJ in a somewhat obscure case, which has seemingly not been judicially or academically cited with approval over the last 12 years. It is far from clear that the other panel members in *Envis-v- Thakkar* agreed with these remarks which did not form a necessary part of the primary basis for Kennedy LJ's decision, as neither Nourse LJ nor Evans LJ explicitly endorsed them. Not only is the *dictum* not supported by any other authority, it is inconsistent with the explicit terms of Order 23 rule 1(b) itself. Nevertheless, the reasoning of Kennedy LJ ought properly to be considered more fully. He extracted the controversial principle from the following analysis of the cases which are generally recognised as authoritative on what constitutes a nominal plaintiff:

> "*As to what is a nominal plaintiff, in White v Butt [1909] 1 KB 50, Buckley LJ said at p 55:*
>
> > *'It is a rule that a plaintiff cannot in a court of first instance be called on to give security for costs merely because he is poor, it being deemed right and expedient that a court of justice should be open to every one. An exception, however, from that rule is that, if a plaintiff is what has been called a "nominal plaintiff" or what, by way of alternative expression, I will call a "fictitious plaintiff", and is without means, security for costs will be ordered. An example of the kind of case in which that expression "nominal plaintiff" is applicable is where a person in whom a cause of action was vested, not being minded to bring an action himself, has assigned that cause of action to another, whom he puts forward for the purpose of suing, but who has no beneficial interest in the subject-matter of the litigation. There are obvious reasons why in the case of a person so put forward to sue in respect of a cause of action in which he is not really interested, and who, being a pauper, is substituted for the person really interested, in order to protect the latter from liability for costs, there should be an order for security for costs.'*
>
> *So what the court was there seeking to do was to protect the rights of the impecunious plaintiff, and at the same time to protect defendants from unscrupulous plaintiffs who might use the impecuniosity of others to protect themselves against a potential liability for costs.*
> *White's case was cited in Semler v Murphy [1968] 1 Ch 183 where this court was concerned with a plaintiff who, as Lord Denning MR put it at p 191, 'at the very time when he started the action, charged the whole fruits*

[6] At page 4 of the transcript.
[7] Transcript, page 5.

of it to his brother'. He was said to be a nominal plaintiff. On his behalf, it was argued that he still had an interest because if the action should succeed he would probably not be made bankrupt, but the evidence indicated otherwise. To my mind, the present case is quite different. When this plaintiff began his action he was no doubt in considerable financial difficulties, but no one could even contend that he was only a nominal plaintiff. Since then he has made the voluntary arrangement, but that does not mean that he has ceased to have a genuine personal interest in the action, nor has it increased the exposure of the defendant in relation to costs. The plaintiff pursued his action because if it succeeds he will be able to discharge his liabilities and hopefully have something left over for himself. If he succeeds, others, namely his creditors, will benefit, but so will he, and so I cannot regard him simply as a nominal plaintiff suing for the benefit of some other person."[8]

38. In my judgment it requires an impermissible logical leap to infer, from cases where unscrupulous claimants were held to be nominal plaintiffs, the existence of an essential legal requirement of unscrupulous conduct before Order 23 rule 1(b) is jurisdictionally engaged. Such a requirement must be inferred, because it is nowhere articulated in explicit terms. Lord Denning in *Semler –v-Murphy* [1967] 1 Ch 183 at 191 very pithily stated: "*A nominal plaintiff is a man who is a plaintiff in name but who in truth sues for the benefit of another*." However, in *White-v-Butt* [1909] 1 K.B. 50, the rationale underlying the nominal plaintiff rule is helpfully explained. This case primarily concerned the scope of the exception applicable to persons suing in a representative capacity, but the most illuminating passage is the following extract from Vaughan-Williams LJ's judgment (at 53-54):

> "*It was argued before us that, wherever a plaintiff is not beneficially interested personally in the result of the action, he comes within the meaning of the expression "nominal plaintiff," as used in that passage. That this is not so plainly appears, I think, from the judgment of Bowen L.J. in the same case of Cowell v. Taylor referred to by Collins M.R. in Greener v. E. Kahn & Co. The learned Lord Justice, in dealing with the exceptions from the rule that poverty is no bar to a litigant, there said, after referring to a head of exception which has no relation to the present case: "There is also an exception introduced in order to prevent abuse" - that is abuse of the rule as to poverty being no bar to a litigant - "that, if an insolvent sues as nominal plaintiff for the benefit of somebody else, he must give security. In that case the nominal plaintiff is a mere shadow. The two most familiar classes of cases of this kind are cases where a person has divested himself of his interest and handed it over to some one else that the transferee may sue for him, and cases where a person who has commenced a suit divests himself of his interest during the course of the suit in order that another person may carry it on for his benefit. Those are the common cases. I do not say that there may not be others. In those cases Courts of common law required security for costs to be given." He there indicates the kind of case in which, in order to prevent abuse, the Court will order a plaintiff to give security. It is obvious that the present case is not really analogous to either of the classes of cases which he there described. This is not a case in which the wife, who is here the person beneficially interested in the alleged cause of action, having been the legal owner of it, and capable of suing upon it herself, has, instead of doing so, assigned it to some impecunious person in order that he might sue for her benefit; nor is it like a case in which a person, having commenced an action, has divested himself of his interest during the course of the suit with the same object. After using the expressions which I have cited, the learned Lord Justice*

[8] Transcript, pages 5-6.

> *proceeded to refer to the early cases on the subject, namely, Perkins v. Adcock , Elliot v. Kendrick, and Goatley v. Emmott . I have looked at those cases, and they are all cases in which, there having been an assignment of a debt by a person entitled to payment of it to somebody else, the plaintiff, who was suing, was not suing for his own benefit, and was insolvent. That, I think, is the kind of case in which the expression "nominal plaintiff," as used by Bovill C.J. and Bowen L.J. in the cases to which I have referred, is applicable.*"

39. This passage suggests that the only form of abuse which underpins the nominal plaintiff rule is "*abuse of the rule as to poverty being no bar to a litigant*", and that the central question (assuming insolvency) is whether the plaintiff is indeed suing for his own benefit. If he is suing for his own benefit, he should not be punished for his insolvency, but if he is not, security ought in principle to be capable of being ordered to be given. This analysis is consistent with the plain words of the current Bermudian rule. The following observations of Buckley LJ (at pages 55-56 in the same case) are entirely consistent with Vaughan-Williams LJ's above-cited remarks:

> "*It is a rule that a plaintiff cannot in a Court of first instance be called on to give security for costs merely because he is poor, it being deemed right and expedient that a Court of justice should be open to every one. An exception, however, from that rule is that, if a plaintiff is what has been called a "nominal plaintiff" or what, by way of alternative expression, I will call a "fictitious plaintiff," and is without means, security for costs will be ordered. An example of the kind of case in which that expression "nominal plaintiff" is applicable is where a person in whom a cause of action was vested, not being minded to bring an action himself, has assigned that cause of action to another, whom he puts forward for the purpose of suing, but who has no beneficial interest in the subject-matter of the litigation. There are obvious reasons why in the case of a person so put forward to sue in respect of a cause of action in which he is not really interested, and who, being a pauper, is substituted for the person really interested, in order to protect the latter from liability for costs, there should be an order for security for costs. Cases of this kind are what Bowen L.J. clearly had in his mind when giving judgment in Cowell v. Taylor . He thus describes the kind of case in which an order for security for costs would be made, though not putting that description forward as being absolutely exhaustive: "The two most familiar classes of cases of this kind are cases where a person has divested himself of his interest, and handed it over to some one else that the transferee may sue for him, and cases where a person who has commenced a suit divests himself of his interest during the course of the suit in order that another person may carry it on for his benefit." Then he cited three cases which are all cases of a similar kind to those which he had been describing, namely, cases in which there had been an assignment of a cause of action, and a person was being put forward to sue who was not beneficially interested in the subject-matter of the litigation. That is the class of case in which a plaintiff has been spoken of as a "nominal plaintiff." When a plaintiff is in that sense a nominal plaintiff and is insolvent, no doubt security for costs ought to be ordered.*"

40. It is perfectly clear that Buckley LJ does not regard examples of cases where security has been ordered as comprehensively defining the scope of the nominal plaintiff principle. The mere fact that in some cases it was obvious that the purpose for the assignment of the cause of action (or benefit thereof) was to enable an insolvent plaintiff to avoid paying costs if the claim failed, was not elevated by either of the two quoted judgments in *White-v-Butt* into a condition

precedent for the application of the nominal plaintiff rule. And, somewhat ironically, an early 20th century Kennedy LJ simply noted: "*I agree and have nothing to add.*" It is in reality clear that the mischief which the nominal plaintiff rule seeks to address in the context of security for costs is that of an insolvent plaintiff who is not suing for his own benefit being able to pursue a claim without the discipline of being subject to the costs regime. Or, more accurately, the nominal plaintiff rule seeks to prevent the true beneficiaries of legal claims from pursuing litigation without being subject to the usual discipline of the costs regime.

41. The precise legal and factual circumstances which have led to a plaintiff suing for the benefit of another are far less significant than the practical result. In the present case, the Respondents' former shareholders are in substance pursuing the present action in circumstances where, because of transactions entered into in advance of the commencement of the present proceedings, the Respondents alone have the legal right to sue in their own name. Should the Applicants succeed at trial, they will be put to the additional difficulty of seeking third party costs orders against either (a) a single corporate entity whose assets may well be judgment proof, or (b) multiple individuals and/or entities, about whose resources little or nothing is known. This is the sort of mischief which Order 23 rule 1(b) is designed to avoid. It matters not for this analysis that third party costs orders could potentially be made, because even under the modern CPR regime, the English courts still adopt a practical benefit-focussed analysis of the nominal plaintiff issue. This analysis may become somewhat complicated where the allegedly nominal plaintiff retains the right to share in the fruits of the litigation to a minimal extent, but in the present case the Respondents have unarguably assigned 100% of the financial benefit of the present claims. Neuberger J's analysis in *Farmer-v-Moseley* [2001] BCLC 572, not referred to in argument, is merely supportive of the above conclusions:

> "*On the face of it, therefore, Dr Farmer is and always has been the, or at least an, appropriate claimant, and is a person who, now at any rate, on the face of it, is entitled to all, or in the alternative a substantial proportion, of the fruits of the action. In those circumstances, as a matter of ordinary language it seems to me difficult to describe him as a nominal claimant.*
>
> *I refer to authority with some hesitation, because the extent to which authorities relating to the RSC assist on the construction of the CPR is somewhat moot. In my judgment, however, where the language of the relevant CPR provision differs from that of the relevant RSC provision or where it is otherwise clear, probable, or even possible that the CPR provision was intended to involve a departure in some way from the RSC provision, then it would be dangerous to look at authorities relating to the RSC. However, where one is concerned with a concept such as security for costs, where the draughtsman of the CPR has used the same language -- namely, the description of the claimant or, as it would have been, plaintiff as 'nominal' -- it seems to me that assistance may be gained by looking at the previous authorities, albeit with circumspection. I derive some indirect support for this view from the fact that the most recent, Spring 2001, edition of the Civil Procedure in para 25/13/14 refers to some of the authorities under the RSC on the question of what is meant by 'nominal' in this context.*
>
> *In Ramsey v Hartley [1977] 2 All ER 673, [1977] 1 WLR 686, the plaintiff had bought shares in a company which had caused him financial loss and he brought an action against a firm of accountants, claiming that they had been negligent in preparing the accounts. After issuing the writ, he was adjudicated bankrupt, but he thereafter entered into an agreement with his trustee in bankruptcy whereby the trustee assigned all the rights in the action to him, in return for which he was to pay to the trustee in bankruptcy 35% of the proceeds of the action, retaining the balance for himself. The issues before the Court of Appeal*

included the question of whether the court could order security for costs against him on the basis that the plaintiff fell within RSC Ord 23, r 1(1)(b) which enabled the court to order security for costs against a 'plaintiff not being a plaintiff who is suing in a representative capacity [who] is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so'. Megaw LJ, with whom the other two Lords Justices agreed, said ([1977] 2 All ER 673 at 682, [1977] 1 WLR 686 at 696):

> *'The defendant asks for security for costs. In the High Court, bankruptcy by itself is not a ground for an order for security for costs, any more than the poverty of the plaintiff is a ground. So the defendant had to seek some other ground. The defendant's ground is that the plaintiff is "a nominal plaintiff" under RSC Ord 23, r 1(1)(b). It is said that he is "nominal" because his interest is in no more than 65 per cent of the proceeds if the action succeeds. For the remaining 35 per cent the plaintiff is, as it is put, a "front" for other persons, his creditors. That does not make him a nominal plaintiff.'*

It seems to me that the basis for that conclusion is hard to distinguish from the facts of this case. The only distinction is, as Mr Michael Hicks, who appears on behalf of RTK, points out, that the plaintiff in that case originally had the legal and beneficial cause of action when he issued proceedings because he only became bankrupt after the issue. That, however, does not seem to have been a factor which weighed with the Court of Appeal.

Mr Hicks relies on Semler v Murphy [1967] 2 All ER 185, [1968] Ch 183, where the plaintiff, in whom the cause of action was vested, assigned all the proceeds of the action to his brother. The Court of Appeal, Harman LJ dubitante, held that in those circumstances he was a nominal plaintiff. In characteristic terms Lord Denning MR expressed himself in this way ([1967] 2 All ER 185 at 187, [1968] Ch 183 at 192):

> *'It comes to this. If the action succeeds, the plaintiff's brother will go off with the whole of the proceeds and let the other creditors "whistle" for their money: whereas if the action fails, the plaintiff will not be able to pay the costs of the defendant. It is the very kind of case in which security for costs should be ordered.'*

One only has to contrast Lord Denning's trenchant description of the effect of the assignment in that case with the effect of the assignment in the present case. If the action succeeds, the claimant by virtue of cl 1 will have the whole of the proceeds, or by virtue of cl 2 will have at least half of the proceeds. It seems to me hard to suggest, in light of the way Lord Denning puts it, that he falls within the ambit of a nominal claimant.

Having said that, I must confess that there is force in Mr Hicks' point that the nominal claimant ground for obtaining security for costs in CPR 25.13(2)(f) may be said to be of precious little value if it can be avoided by ensuring that the person who is the claimant is given some interest in the proceeds of the action even if it is only a relatively small one. It may be that, on different facts, the court would be prepared to give a more extended meaning to the concept of nominal claimant than the cases, to which I have referred, appear to indicate in relation to nominal plaintiff. On the facts of this case, however sympathetic I am to the suggestion that there should be an order for security for costs against Dr Farmer, I do not think that he can be said to fall within CPR 25.13(2)(f) if the assignment is not champertous"[9].

[9] Transcript, pages 3-4.

42. So there is no support for what amounts to little more than *obiter dicta* in *Envis-v-Thakkar* (1995) The Times 2nd May; [1997] BPIR 189, to the effect that the nominal plaintiff rule requires an "*element of duplicity or window dressing.*" This dictum has been doubted by the High Court of Hong Kong in *Silver Stone Development-v- Lau Kwong Kwok et al*, Judgment dated June 27, 2002, on which Mr. Hargun relied. The legal requirements for engaging the Court's jurisdiction to order security for costs under Order 23 rule 1(b) must be found in the rule itself. Those elements are twofold: (a) the plaintiff must be shown to be unable to satisfy any order for costs which may be made in the usual way; and (b) the plaintiff must be shown to be pursuing the claim wholly or substantially for the benefit of a third party, and not himself.

43. In his oral submissions Mr. Mussenden alternatively asked the Court to look at the substance rather than the form of the situation. The purpose of the present litigation was to recover monies owed to the Respondent companies for the benefit of their shareholders, present or past. The beneficiaries of the present action acquired their rights in their capacity as shareholders, at a time when their interests and the Respondents' interests were essentially the same. Whatever may have happened since, the shareholders' benefit is for that reason inextricably intertwined with the companies' benefit. This argument also must be rejected, but on grounds of substance as well as form. The central legal issue is whether the plaintiff is suing for his own benefit, quintessentially a question of substance rather than form.

44. The Respondents' counsel was unable to point to any tangible benefit which the Bermuda companies would derive from the present proceedings. The evidence showed that apart from distributing any recoveries to their former shareholders, the Respondents have no intended further corporate purpose, and are likely to be wound-up. It is true that the Respondents will derive the obvious indirect or passive benefit of discharging their contractual obligations under the Transfer Agreements and the share redemption agreements. But they have given up any right to participate in the fruits of the litigation. In this material sense, the litigation was commenced and is being pursued not for the Respondents' own benefit, but for the benefit of their former shareholders. All the cases referred to suggest that "benefit" for Order 23 rule 1(b) purposes refers to the fruits of the litigation, whatever they may be.

45. Accordingly, the Applicants have established that in legal terms, the Respondents/Plaintiffs fall within the relevant rule, and that there are no jurisdictional objections to the Court exercising its discretion in favour of ordering security for costs.

Legal findings: jurisdiction to award costs against "non-parties"

The current statutory regime

46. The Respondents submitted that this Court had jurisdiction to order a third party to pay costs, and Mr. Hargun for the First Applicant agreed. Mr. Martin took no position. It has always been assumed that no such jurisdiction exists because neither the Supreme Court Act 1905 nor the 1985 Rules explicitly confers such a power, nor do they confer an express discretion to determine by whom costs should be paid. By way of contrast, section 5 of the United Kingdom Supreme Court of Judicature Act 1890 provided as follows:

> " *5. Subject to the Supreme Court of Judicature Acts, and the rules of court made thereunder, and to the express provisions of any Statute, whether passed before or after the commencement of this Act, the costs of and incidental to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and to whom and to what extent such costs are to be paid.* "

47. Section 51 of the 1981 U.K. Supreme Court Act makes similar provision. Bermuda's Supreme Court Act 1905, in stark contrast, makes the following express provision in relation to costs:

> "***Rules of Court***
> *62* *(1) Rules of Court may be made by the Chief Justice under this Act for the following purposes—*
>
> …
>
> *(e) for regulating any matters relating to the costs of proceedings in the Court..*"

48. Order 62 rule 2 of the Rules of the Supreme Court 1985 (as amended with effect from January 1, 2006) provides as follows:

> "*(4)The costs of and incidental to proceedings in the Supreme Court (including any criminal proceedings to which this Order applies) shall be in the discretion of the Court, and that discretion shall be exercised subject to and in accordance with this Order.*"

49. Order 62 rule 3 provides in salient part as follows:

> "*(2) No party to any proceedings shall be entitled to recover any of the costs of those proceedings from any other party to those proceedings except under an order of the Court.*"

50. This strongly supports the traditional local view that costs can only be awarded in favour of or against a party to an action, notwithstanding the fact that Order 62 rule 2 (4) appears to confer a general discretion with respect to the award of costs. Without further analysis, one would recall that where persons who are not named parties intercede in an aspect of civil proceedings which affects their interests, the Court has routinely treated them as a party for costs purposes. Order 62 rule 1(2) provides as follows:

> "*"party", in relation to a cause or matter, includes a party who is treated as being a party to that cause or matter by virtue of Order 4, rule 10(2)…*"

51. Order 4 rule 10 deals with the consolidation of proceedings, so this definition does nothing to detract from the strength of the conventional assumption that the Rules do not permit the Court to award costs against a third party who participates in no formal way in a proceeding. However, section 1 of the Supreme Court Act 1905 contains a somewhat broader definition of "*party*":

> "*"party" includes every person served with notice of, or attending, any proceeding, although not named on the record…*"

52. This is hardly the clearest expression of the legislative intention to confer a judicial discretion on the Supreme Court to determine who shall be liable for the costs of an action or application therein. But this provision, read with Order 62, does clearly signify that any person who is directly affected by any proceeding, as signified by their either appearing or having been given an opportunity to appear, may be treated as a party for costs purposes. It is difficult, on the face of these provisions, to infer from this a discretion to order that the entire costs of an action should be paid by a third party who has not appeared, unless (perhaps) at the outset of the proceedings they had been given notice of the possibility of such an application. These statutory provisions fall far short of the explicit unfettered statutory discretion conferred on the English High Court, firstly in 1890 and latterly in 1981, to determine who should pay the costs of any proceeding.

53. Accordingly, the conventional wisdom that this Court had no jurisdiction to order a third party funder of litigation to pay the costs of an unsuccessful action brought

by a party it had maintained is entirely logical on a superficial reading of the Supreme Court Act and Rules. It therefore becomes necessary to consider what further jurisdictional powers were inherited by this Court in 1905 from its predecessor courts.

Historical statutory position and its impact on the court's current jurisdiction in respect of costs

54. The Respondents' counsel placed before the Court an impressive array of materials in support of the submission that this Court presently enjoys a broad statutory discretion to determine who should pay the costs of proceedings. These materials help to explain the scope of the inherent jurisdiction preserved by the following provisions of the Supreme Court Act 1905:

> " **Jurisdiction of Supreme Court**
> *12 (1) The Supreme Court shall be a Superior Court of Record, and, in addition to any other jurisdictions conferred by this or any other Act or Act of the Parliament of the United Kingdom, shall, subject as in this Act mentioned, possess and exercise the jurisdiction which, at the commencement of this Act [6 June 1905], was vested in, or capable of being exercised by, the Governor as Ordinary relative to the grant of probate of wills and letters of administration of the personal estate of persons deceased and by all or any of the following courts, that is to say—*
>
> *(a) the Court of General Assize;*
>
> *(b) the Court of Chancery;*
>
> *(c) the Court of Exchequer;*
>
> *(d) the Court of Probate;*
>
> *(e) the Court of Ordinary;*
>
> *(f) the Court of Bankruptcy.*
>
> *(2) The jurisdiction transferred to the Supreme Court by virtue of this Act shall include the jurisdiction which, at the commencement of this Act [6 June 1905], was vested in, or capable of being exercised by, all or any one or more of the Judges of the aforementioned courts, respectively, sitting in court or chambers, when acting as Judges or a Judge in pursuance of any Act, law or custom, and all powers given to any such court, or to any such Judges or Judge, by any Act or Act of the Parliament of the United Kingdom, and also all ministerial powers, duties and authorities, incident to any and every part of the jurisdictions so transferred….*
>
> ***Concurrent administration of law and equity***
> *18 In every civil cause or matter which is depending in the Supreme Court law and equity shall be administered concurrently; and the Court, in the exercise of the jurisdiction vested in it by virtue of this Act, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as seems just, all such remedies or relief whatsoever, whether interlocutory or final, as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim or defence properly brought forward by them respectively, or which appears in such cause or matter, so that as far as possible all matters in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided; and in all matters in which there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter the rules of equity shall prevail…"*

55. So the new fused Supreme Court of Bermuda inherited the powers, exercisable on a fused basis, of the old common law and equitable courts, being powers conferred by local or United Kingdom statutes, law or custom. These courts were essentially established in the 19th century, although the Courts Act 1814[10] repealed, *inter alia*, an Act for establishing and regulating the Courts of Judicature, 1690[11]. The 1814 Act established a Bermudian Court of General Assize, with section 4 conferring on the Chief Justice and Assistant Justices the same powers enjoyed by the Chief Justice and puisne judges of the Courts of Kings Bench and Common Pleas. It is unclear from the only version of the 1814 Act which can be found whether this Act created the Court of Chancery and, if so, with what powers. The original printing of the 1814 Act is unavailable, and section 29 left in blank, with an indication that it was repealed by the 1876 Court of Chancery Act. One can infer from this that the Court of Chancery was constituted by the 1814 Act, perhaps by way of continuation of the ancient exercise of those judicial powers by the Governor–in-Council. This is not just because in 1876, its jurisdiction was transferred from the Governor-in-Council to the Court of General Assize, as the Respondents' legislative materials establish. But also because the Fee Act 1819[12] makes provision for fees in relation to the Court of Chancery, and refers to the Governor acting as Chancellor. More significantly than all this, however, is the fact that under section 4 of the 1876 Act the same equitable power and authority as the Chancery Division of the High Court of Justice in England is transferred to the Court of General Assize in Chancery. The 1896 Court of Probate Act also transferred from the Governor sitting as a Court in Ordinary to the Court of General Assize the same powers as enjoyed by the Probate Division of the English High Court of Justice.

56. Mr. Mussenden, based on this legislative history, invites the Court to conclude that this court was conferred by its constituting Act a broad statutory discretion to determine what costs in an action are payable by whom. I find this submission to be compelling, primarily with reference to the following statutory provisions. Firstly, it is clear that this Court, under section 12 (2) of the 1905 Act, has "*all powers given to any such court, or to any such Judges or Judge, by any Act or Act of the Parliament of the United Kingdom.*" There might, perhaps, be some doubt as to whether the powers conferred on the various Divisions of the newly constituted English Supreme Court under the Supreme Court of Judicature Act 1890 were acquired by the pre-1905 Bermudian courts constituted prior to 1890. However, the English Probate Division undoubtedly received the power under section 5 of the 1890 English Act, already referred to above:

> "*Subject to the Supreme Court of Judicature Acts, and the rules of court made thereunder, and to the express provisions of any Statute, whether passed before or after the commencement of this Act, the costs of and incidental to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and to whom and to what extent such costs are to be paid.*"

57. The Bermudian Court of Probate under the 1896 local Act was given the following powers:

> "*The said Court shall in all contentious matters relating to wills and administrations, have the like powers as the Probate Division of the High Court of Justice in England.*"

58. The Supreme Court of Bermuda under section 12 as read with section 18 was in 1905 empowered to concurrently exercise all powers previously enjoyed by the various separate courts. This power included the broad discretionary power to

[10] Act No. 7 of 1814.
[11] Act No. 34 of 1690.
[12] Act No. 4.

determine by whom costs should be paid, rendering the statutory position with respect to costs indistinguishable from that in England since 1890.

59. For completeness, however, I should note that I accept Mr. Mussenden's submission that the pre- Judicature Acts 1873-75 English Court of Chancery also had an inherent discretion as to costs: *Andrews-v- Barnes* (1888) 32 Ch. D. 133. This inherent jurisdiction was conferred on the unified English Supreme Court by Order 55 enacted under the Judicature Acts 1873-75, which for the first time in England provided in statutory form that "*the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court.*"[13] However, the precise scope of the traditional inherent jurisdiction was uncertain, as illustrated by the decision in *In re Mills Estate* (1887) LR 34 Ch. D. 24, which seemingly prompted the enactment of section 5 of the Supreme Court of Judicature Act 1890.

60. It remains to consider on what basis it may be contended that a costs order may, under these broad discretionary powers, be made against a third party funder of an unsuccessful plaintiff's claim. The most highly persuasive authority, in my judgment, is the House of Lords decision in *Aiden Shipping Ltd.-v-Interbulk Ltd.* [1986] 2 W.L.R. 1051 where it was unanimously held that the words of section 51(1) of the Supreme Court Act 1981, derived from section 5 of the Supreme Court of Judicature Act 1890 (which applies to Bermuda), were not subject to any limitation which ousted the jurisdiction of the court to order that costs be paid by a non-party. Lord Goff also aptly noted that the definition of the word "party" in the Supreme Court Act 1981 (which is the same definition found in our 1905 Act) was too flexible to support any such limitation:

> *"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 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."*

61. The *Aiden Shipping Ltd.* case did not concern a third party funder, but instead the case of two proceedings heard together, but the judicial reasoning is nevertheless highly relevant. It was indeed followed in a third party funder case, the High Court

[13] The historical position is further discussed in *Garnett-v-Bradley* (1878) 3 App. Cas. 944.

of Australia decision in *Knight-v- FP Special Assets* (1992) 174 CLR 178. A clear majority of the Australian High Court held that a third party could be ordered to pay costs under the following statutory provisions. Firstly, section 58 of the Queensland Supreme Court Act 1867 provided as follows:

> "*The Supreme Court shall have power to award costs in all cases lawfully brought before it and not provided for otherwise than by this section.*"

62. Secondly, the High Court of Australia held that Order 91 of the Rules, which is in substantially similar terms to our Order 62 rule 2(4), in giving an unfettered discretion to the Court to deal with costs, empowered costs to be ordered against non-parties. It is unclear from the report, however, whether the Queensland rules in force in 1992 contained other rules which suggested that only parties could be made subject to costs orders, as does our Order 62 rule 3 (2), which it bears recalling provides as follows:

> "*No party to any proceedings shall be entitled to recover any of the costs of those proceedings from any other party to those proceedings except under an order of the Court.*"

63. I do not find persuasive the Australian High Court majority view that the rule itself (as opposed to the statutory provision conferring primary jurisdiction as to costs) is a statutory source of jurisdiction to order a third party funder to pay costs, and prefer the dissenting reasoning of McHugh J in this regard. The majority's view could, in any event, be justified by reference to the broad statutory discretion conferred in the primary legislation. And it may be a misreading of the majority judgment to infer that they considered the source of the jurisdiction to award costs against non-parties was derived from the rule of court in isolation from the governing primary legislation. But this minor controversy does not matter for present purposes. Because the Supreme Court Act 1905 conferred a broad jurisdiction with respect to costs on this Court, including an explicit power to determine by whom costs should be paid, a jurisdiction which the Rules cannot validly oust.

64. That the jurisdiction to award costs against third parties must be looked for first and foremost in the primary legislation under which the rules of Court are made is supported by the New Zealand High Court decision of *Carborundum Abrasives Ltd. –v- Bank of New Zealand (No.2)* [1992] 3 NZLR 757, on which the Respondents also relied. The decision of Tomkins J in the latter case was approved by the Privy Council in *Dymocks Franchise Systems (NSW) PTY Ltd.-v- Todd* [2004] 1 WLR 2807, along with the *Aiden Shipping Ltd* case and the *Knight –v- FP Special Assets Ltd.* case. However, before the Privy Council, the Respondent did "*not dispute the court's power under New Zealand law to make orders for costs against non-parties.*"[14] The issue in controversy before the Court was how the Privy Council's own power to award costs should be exercised. Nevertheless, this Privy Council decision does provide further support for the Respondents' central thesis that this court does possess the jurisdiction to make costs orders against third parties who maintain actions brought in another's name.

65. For the above reasons, I am satisfied that this Court does possess the jurisdiction, in certain circumstances, to order a third party funder to pay the costs of an unsuccessful plaintiff whose claim he has maintained. The primary source of this jurisdiction is the Supreme Court Act 1905, sections 12 and 18, which import into Bermuda law the following provisions of the English Supreme Court of Judicature Act 1890, previously cited above:

> "*5. Subject to the Supreme Court of Judicature Acts, and the rules of court made thereunder, and to the express provisions of any Statute, whether passed before or after the commencement of this Act, the costs of and incidental to all proceedings in the Supreme Court, including the*

[14] At page 2811.

administration of estates and trusts, shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and to whom and to what extent such costs are to be paid."

66. Had I been required to find this jurisdiction within the four corners of Order 62 of the Rules of this Court as read with section 62 of the Supreme Court Act, I would not have reached the same result. I would have construed Order 62 as (a) conferring a general discretion as to costs on this Court (Order 62 rule 2(4)), but also (b) limiting the entitlement to costs to an application by one party against another (Order 62 rule 3(2)), except where the Rules expressly provided otherwise[15]. The English Court of Appeal in *Fairfax & Sons Pty Ltd.-v- E.C. de Witt & co. (Australia) Pty. Ltd* [1958] 11 Q.B. 323 construed the English equivalent of Bermuda's current Order 62 rule 2(4) as not embodying the power to order costs against a non-party. The House of Lords in *Aiden Shipping Ltd.-v- Interbulk Ltd.* [1986] 2 W.L.R. 1051 at 1058-1059 implicitly approved this analysis of the rule, but disapproved the substantive decision for failing to take into account the statutory jurisdiction (derived from section 5 of the 1890 Act which applies under Bermudian law) with respect to costs, which included "*full power to determine by whom and to what extent costs are to be paid*".

67. It is also noteworthy that the broad discretion as to costs conferred by Order 62 rule 2(4) of the Rules was itself only re-introduced into the Rules with effect from January 1, 2006[16]. Between 1985 and 2005, a perusal of the 1905 Act as read with Order 62 would have given even less cause to suspect that the power to make third-party costs orders, along English lines, existed under Bermuda law. Section 62 of the Act confers a rule-making power on the Chief Justice, but neither section 62 nor any other provision of the 1905 Act expressly defines the scope of the Court's jurisdiction as to costs. This has only been revealed by the extensive researches of the Respondents into the jurisdiction inherited by this Court in 1905 from the old diffused courts of common law and equity. The key provisions in Order 62 between 1985 and December 31, 2005 simply provided as follows:

"**62/2 Application**

2 This Order shall apply to all civil proceedings in the Court except non-contentious or common form probate proceedings and proceedings in matters of prize.

Entitlement to Costs

62/3 When costs to follow the event

3 (1) Subject to the following provisions of this Order, no party shall be entitled to recover any costs of or incidental to any proceedings from any other party to the proceedings except under an order of the Court."

68. This may well explain why experienced Bermudian civil practitioners who have practised their craft under the rubric of the 1985 Rules for 20 years have been seemingly content to assume that costs could only be awarded against parties as defined by the Act and Rules. In *First Atlantic Commerce Limited-v- Bank of Bermuda Limited* [2007] Bda LR 36, I noted in paragraph 8 of my May 15, 2007 Judgment: "*Counsel* [i.e. both counsel]*conceded that Order 62 prescribed the powers of this court as regards costs, and that no statutory power to order costs against third party funders existed.*" To the extent that I accepted that concession and implicitly decided that this Court had no such jurisdiction, I was clearly in error. In light of the extensive written submissions presented by Mr. Mussenden in

[15] For instance Order 62 rule 11 provides that costs may be ordered against attorneys, and rule 11(6) provides that where the Solicitor-General is requested to participate in proceedings, the Court may make provision for his costs.

[16] The broad discretionary power now found in order 62 rule 2(4) existed under Order 65 rule 1 of the 1952 Rules, but was not retained in 1985. The pre-1952 Rules cannot be found.

this case, the results of which were endorsed by Mr. Hargun and not challenged by Mr. Martin, in the present case I have arrived at a contrary conclusion.

Circumstances in which third party costs orders may be made

69. The Respondents in the present case made much of the proposition that the proper remedy for the Applicants was to simply seek a third party costs order at the conclusion of the trial, rather than seeking security for costs. Although this point has in large part been rejected above in the context of considering the various discretionary factors which fall to be taken into account under Order 23 rule 1(b), brief mention should be made of the scope of this newly discovered jurisdiction to award costs.

70. The starting point is to recall that while the Supreme Court Act 1905 defines the scope of the Court's jurisdiction with respect to costs, this jurisdiction is to be exercised in accordance with the procedural principles set out in the Rules. This flows from the fact that section 5 of the 1890 English Act defines the costs jurisdiction as being "subject to" the Act and Rules. The Rules cannot oust the statutory jurisdiction of the Court, but resort need only be had to this jurisdiction where the Rules are silent. Once the Rules deal with a topic, such as security for costs, it is generally accepted that the Rules constitute a comprehensive code governing when security for costs may be granted. Any other view would open the door to procedural anarchy. It flows from this that an applicant for a third party costs order can only invoke the Court's statutory jurisdiction to award costs against a third party when it is not possible to achieve a similar result under the Rules.

71. The 1905 Act and Rules, like the English counterpart provisions, define the term "party" in open-ended fluid terms. As noted above, section 1 of the Supreme Court Act 1905, in terms which are not restricted by the Rules, provides as follows:

> "*"party" includes every person served with notice of, or attending, any proceeding, although not named on the record…*"

72. Thus when Order 62 rule 11 makes provision with respect to attorneys being liable for costs, and the Solicitor-General being able to seek costs where he has appeared in a matter, these provisions may not properly be characterised as authorising costs orders against non-parties. They merely reflect the established practice that any person who participates in a civil proceeding, whether as a named party or not, is practically and technically a "party" for costs purposes. It will therefore be a question of judgment for the legal advisers of parties who hope to rely on a third party costs order at the end of the case as to whether they can safely rely upon the Court's inherent and/or statutory jurisdiction to make such an order. A simple alternative remedy might well be to give notice of the proceedings to, for instance, the third party funder as soon as the maintaining role of such party is known, so that the funder becomes a non-named party under section 1 of the 1905 Act. The way in which the Court's statutory discretion to make non-party costs orders may be exercised will probably have to be determined, absent statutory rules on the topic, on a case by case basis. However, as Lord Goff observed in the *Aiden Shipping Ltd.* case:

> "*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."[17]

73. In the context of the present applications for security for costs, the possibility that costs could be ordered against the third party funder at the end of the action is of limited relevance as a factor weighing against the grant of security in practical terms. This is because of the real uncertainty attaching to the enforceability of any costs orders which might be obtained.

Legal and factual findings: does the pursuit of the present action without an undertaking from the Respondents'/Plaintiffs' funder to meet any costs orders that may be made against them constitute an abuse of process?

74. The Applicants rely primarily on their submission that security for costs may and should be ordered under Order 23 rule 1(b). Their subsidiary and alternative case is that because it is doubtful whether any third party costs order will be enforceable against the third party funder, it is an abuse of process for the Respondents to pursue this action unless the funder undertakes to pay the costs of this action. I consider this alternative argument based on the same factual findings which underpin my finding that order 23 rule 1(b) applies, but in case I am held to be wrong in law in reaching this primary decision.

75. The main controversy surrounding this argument is whether or not the facts complained of by the Applicants, as a matter of law, amount to an abuse of process. The Applicants contend that when one is considering the issue of security for costs, what is abusive is conduct which gives the plaintiff a litigation advantage of being freed from the usual discipline of the regime of costs. The Respondents contend that the only form of abuse which counts, even in the security for costs context, is the same sort of abuse which would potentially support an application to strike-out an entire claim. The salient facts which have been made out at this stage are the following:

> (a) the Respondents' claims are novel, and while arguable, their prospects of success are not clear. Moreover, they are not pursuing the "usual suspects" (the directors and managers), and only "deep-pocket" defendants are before this Court;
>
> (b) if the Respondents' claims fail, they will become liable for costs estimated to be in excess of $1 million which they are unable to pay from their own resources;
>
> (c) the present action is not being funded by the insolvent Respondents, but by a Caymanian segregated portfolio company;
>
> (d) the Respondents have no direct financial interest in the fruits of the present action, which they have assigned to their former shareholders, retaining only the causes of action sued on;
>
> (e) the assignment of the fruits of the present claims was linked to a transfer of nearly all the Respondents' assets to another company at a time when the present litigation was overtly contemplated; and
>
> (f) it is uncertain whether any costs orders which may be made against the funder will be capable of enforcement at the end of the trial.

76. In the *First Atlantic* case, I held that this Court possessed the inherent jurisdiction to stay proceedings brought by an insolvent plaintiff being funded by a solvent third party because it was an abuse of the Court's machinery for such a plaintiff to be free of the discipline of costs. Because the issue of this Court's jurisdiction to grant third party costs orders was not the subject of argument and the true position was never

[17] [1986] 2 W.L.R. 1051 at 1061.

explored, I was also under the mistaken impression that it was only in modern times that the English courts had gained the ability to make third party costs orders. An equally mistaken assumption was made by the English Court of Appeal in *Abraham-v-Thompson* [1997] 4 All E.R. 362, where the House of Lords decision in *Aiden Shipping Co. Ltd.-v-Interbulk Ltd.* [1986] 2 W.L.R 1051, which traces the legislative history of section 51 of the Supreme Court Act 1981, was understandably[18] not cited. In fact, it is now clear that the English courts have had such jurisdiction since at least 1890, and that the availability of this alternative procedural remedy is not in fact of pivotal significance to the English courts granting a stay in the absence of security for costs. The pivotal factor appears to have been the absence of any statutory provisions in the United Kingdom permitting orders for security for costs against either third party funders or insolvent non-corporate plaintiffs (until CPR in or about 2000) or insolvent company plaintiffs (until the Companies Act 1985).

77. The Bermudian position remains the same as it was before these United Kingdom legislative changes, with security for costs not available against either (a) insolvent plaintiffs, corporate or non-corporate, or (b) third party funders. Abuse of process will nevertheless rarely arise unless a defendant can make out a real risk that any third party costs order will not be enforceable. Accordingly, subject to the aforementioned qualifications and those set out below, I see no reason to differ from the following findings I reached in the *First Atlantic Company Ltd.-v-Bank of Bermuda Ltd.*[2007] Bda LR 36 as to what constitutes abuse of process in this peculiar context:

> "19. *But the English courts did not previously view the support of litigation by a third party funder without costs undertakings as abusive because of public policy objections to maintenance itself. Rather, the prejudice suffered by the difficulties the non-maintained party would face in recovering their costs was the main concern. The contrary views in Abraham-v- Thomson [1997] 4 All ER 362 carry little persuasive weight, because they are expressed in an entirely different statutory context.*
>
> *20. Even in the post-1981 UK context, there is persuasive support for the proposition that it is potentially abusive for litigation to be pursued by a plaintiff unrestrained by the usual discipline of having to meet an order for costs if his claim fails. The following passage from the judgment of Kennedy LJ in the Court of Appeal decision of Condliffe-v- Hislop [1996] 1 All ER 431 at 440, on which the Defendant relies, is highly persuasive in this regard:*
>
> > *'Nevertheless, the court is entitled to protect its own procedures, and as Sir Thomas Bingham MR said in Roache v News Group Newspapers Ltd, Times, 23 November 1992, [1992] CA Transcript 1120 the principle that in the ordinary way costs follow the event 'is of fundamental importance in deterring plaintiffs from bringing and defendants from defending actions they are likely to lose'. If that principle is threatened, as for example if an insurer or a trade union were known to be giving financial support to a party without accepting liability for the costs of the other side if the supported party were to lose, then, as it seems to me, the court might, at least in some cases, be prepared to order that the action be stayed (cf Wild v Simpson [1919] 2 KB 544, [1918-19] All ER Rep 682, Broxton v McClelland and Grovewood Holdings plc v James Capel & Co Ltd [1994] 4 All ER 417, [1995] Ch 80, a case concerned with champerty not*

[18] The *Aiden Shipping* case was only cited in the present case in support of an argument relating to the Court's jurisdiction to order third parties to pay costs.

maintenance). Normally the better course will be to let the action proceed to trial and then, if need be, consider the powers of the court under s 51 of the Supreme Court Act 1981 (as in McFarlane's case) but if the circumstances suggest that the litigating party or the maintainer may not be bona fide, or that if that party were to lose, an order for costs would be difficult to enforce against the maintainer then, as it seems to me, a stay could be imposed. Precisely how that would operate if the maintained party were the defendant I leave for consideration on another occasion'

21. The leading judgment in this unanimous decision concluded: "the practice of seeking and giving undertakings is not in any way to be discouraged." This practice of seeking and giving undertakings clearly evolved in a statutory context which still appertains in Bermuda, namely a context within which third parties who cannot be ordered to pay the costs are the real parties in the litigation. When the maintenance of proceedings without any undertaking to meet any adverse costs orders which may be made will constitute an abuse of the process of the Court will obviously depend on the circumstances of the case. But abuse in this context merely means a misuse of the Court's machinery which, having regard to the Overriding Objective and the fundamental goal of the costs regime, would include gaining an unfair strategic advantage in litigation where only one party could reasonably expect to be able to enforce a costs order in a straightforward manner.

22. Other Commonwealth jurisdictions where the statutory framework appears to be similar to Bermuda have interpreted the cases on which Mr. Martin relied in a similar manner. In Capital Webworks Pty Ltd.-v-Adultshop.Com Ltd, 2005 FCA 438, Nicholson J (of the Federal Court of Australia's Western Australian District Registry) held:

> *'85. As noted by Potter LJ in Abraham v Thompson [1997] 4 All ER 362 at 375, Kennedy LJ's reference to the entitlement of the court to protect its own procedures was a reference to the inherent power of the court to prevent abuse of its process. In the same case, Millett LJ found, at 378, that the presence of unlawful maintenance was not of itself an abuse, but that the real mischief was that the proceedings might be financed by a person who was immune from liability for costs. He noted that this was the mischief that concerned Lord Denning MR in Hill v Archbold [1968] 1 QB 686 and that it had also now been remedied by the UK Supreme Court Act 1981 allowing a costs order to be made against a maintainer.*
>
> *86. In the Canadian case 155569 Canada Limited v 248524 Alberta Limited (1999) 176 DLR (4th) 479, Veit J, sitting in the Court of Queen's Bench of Alberta, stated (at para [50]):*
>
> > *'In recent years, however, the courts have not been so concerned about maintenance either as a crime or as a tort: Shah.*

> *However, courts are still concerned about maintenance as an abuse of the court's process:* ***it is an abuse because a person who should be taking the risk of the lawsuit is not explicitly recognising that it is liable for the successful party's costs, and, to the extent that it seeks to avoid that result, it seeks to avoid bringing itself within the framework of the discipline of costs.'*** *(emphasis added)"*
>
> *23. Accordingly, I find that this Court possesses the inherent jurisdiction to stay proceedings maintained by a third party unless that third party gives a satisfactory undertaking as to costs..."*

78. For the reasons expressed in the above-cited passage, I reject the Respondents' submission that a stay of proceedings brought by a third party funder has never been appropriate, a submission based on the old case of *Martell-v-Consett Iron Co.* [1954] 1 Ch. 363. This was a case concerning whether or not an action should be stayed altogether because it was being maintained in an illegal and tortious manner, and the issue of costs did not seemingly arise at all. However, the Respondents very fairly point out that in the *First Atlantic* case I incorrectly rejected the analysis in *Abraham-v-Thompson* "*because they are expressed in an entirely different statutory context.*" This was incorrect because the statutory difference which I assumed to exist, third party costs orders available there but unavailable here, has now been shown to be non-existent. Why, then, should I decline to follow the dicta in *Abraham-v-Thompson* [1997] 4 All E.R. 362 which appear to support the view that abuse of process in a general sense must be proved, and which clearly did approve *Martell-v-Consett Iron Co.* in the costs context?

79. In summary, I do not find the reasoning relied upon by Mr. Mussenden for the Respondents to be persuasive because I consider (a) the conclusion reached by the English Court of Appeal was heavily influenced by a distinguishable factual and legal context, (b) there are *dicta* in the case which support the conclusion that the facts of this case amount to an abuse of process in a relevant sense, and (c) *Abraham-v-Thompson* was decided in the pre-Human Rights Act 1998 and CPR era, and fails to take into account the equality of arms principle embodied in the Overriding Objective and article 6 of the ECHR (on which Order 1A of the Bermuda Rules and section 6 of the Bermuda Constitution, respectively, are based). I accept the submission of Mr. Martin, that the right of both parties to a "level playing field", to use his phrase, is a crucial element of any proper analysis of the parameters of abuse of process in cases where no express power to grant security for costs exists. In essence, this fundamental fair trial right leaves no scope, in the Bermudian statutory context, for the view that Order 23 should be construed as ousting the inherent jurisdiction of the Court to order any form of security for costs, even on abuse of process grounds.

80. All three reasons for my declining to apply *Abraham-v-Thompson* [1997] 4 All E.R. 362, the distinguishable factual and legal context and the existence of support for the approach taken in the present case, and the failure to consider the equality of arms principle, may be demonstrated by reference to short extracts from the judgments delivered in that case. The *Abraham* case was a case brought by an individual, who was subject to the risk of bankruptcy if he lost and failed to pay the costs ordered against him. If the plaintiff in that case had been an insolvent company, it could have been ordered to pay security. At least one member of the English Court of Appeal gave primacy to the plaintiff's common law right of access to the Court, in a legal context in which the need to consider the defendant's countervailing fair trial rights did not arise. This distinctive factual and legal context clearly shaped the reasons why Millett LJ, concurring with the leading judgment of Potter LJ, observed:

> "*If the plaintiff is an individual the court has no jurisdiction to order him to provide security for the defendant's costs and to stay the proceedings if he does not do so. It may be unjust to a successful defendant to be left with unrecovered costs, but the plaintiff's freedom of access to the court has priority. The risk of an adverse order for costs and consequent bankruptcy has always been regarded as the appropriate deterrent to the bringing of proceedings which are likely to fail. Where there is no risk of personal bankruptcy, as in the case of a plaintiff which is a limited company, the court has a statutory jurisdiction to award security for costs; but even in this case it will frequently not do so if this will have the effect of stifling bona fide proceedings.*"[19]

81. One material legal difference between the regime considered in this decision and Bermuda's legal regime is that no security for costs can be ordered against an insolvent company here, so there is no deterrent under express statutory Bermudian rules for the bringing of unmeritorious claims. In terms of factual differences, the Respondents here have voluntarily organised their financial affairs in such a way as to strip themselves of sufficient assets to meet any costs orders, at a time when the present litigation was clearly contemplated. Irrespective of whether they acted in good faith and were forced to move their business to Cayman, the combination of these facts with the assignment of the fruits of the litigation makes the present case starkly different from the facts in *Abraham-v-Thompson* where there was no suggestion that the plaintiff was not the "real" plaintiff with no financial interest in the fruits of the litigation. As Potter LJ observed (at page 372):

> "*…it is not suggested that the plaintiff's limited assets or financial difficulties are the result of arrangements deliberately made with the litigation in mind or in order to put his assets beyond the reach of his creditors. All that is suggested is that it is likely that he will continue to be advanced sums to assist him in respect of his own costs of the action from a trust or trusts prepared to assist him in relation to his own costs, but which may be unready to make money available to meet a costs order in favour of the defendants if they are ultimately unsuccessful.*"

82. Putting aside the impact of the Overriding Objective and section 6(8) of the Constitution, which guarantees all parties to litigation a fair hearing and a level playing field, I find more persuasive the reasoning of Kennedy LJ in *Condliffe-v-Hislop [1996]* 1 All ER 431 at 440, which holds that the fact that Order 23 creates a comprehensive regime for security for costs does not mean that the Court is deprived of the inherent jurisdiction to prevent its process from being abused by a litigant who is taking advantage of a gap in the Rules. What constitutes an abuse of process has never traditionally been viewed as having to fall into narrow pre-defined categories, and fundamentally turns on the specific circumstances of each case. It is noteworthy that courts in Australia and Canada have implicitly preferred the broad formulation of abuse of process in *Condliffe-v-Hislop* to the narrower formulation in *Abraham-v-Thompson* (see cases cited in paragraph 77 above), which has, in any event, effectively been overruled by the introduction (through the modern English CPR) of an explicit power to order a third party funder to furnish security for costs.

83. As of January 1, 2006, the dominant philosophy of Bermuda's civil procedural regime has been codified in Order 1A, the Overriding Objective. In salient part, this provides as follows:

[19] Millett LJ, Transcript, page 17; [1997] 4 All ER 362 at 377. He expressed the same views in *Mettaloy Supplies Ltd. (in liq)-v- MA (UK) Ltd.* [1997] BCC 165 at 170.

> ***"1A/1 The Overriding Objective***
>
> *1 (1) These Rules shall have the overriding objective of enabling the court to deal with cases justly.*
>
> **(2) Dealing with a case justly includes, so far as is practicable —**
>
> **(a) ensuring that the parties are on an equal footing;**
>
> *(b) saving expense;*
>
> *(c) dealing with the case in ways which are proportionate —*
>
> *(i) to the amount of money involved;*
>
> *(ii) to the importance of the case;*
>
> *(iii) to the complexity of the issues; and*
>
> *(iv) to the financial position of each party;*
>
> **(d) ensuring that it is dealt with expeditiously and fairly***; and*
>
> *(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.*
>
> ***1A/2 Application by the Court of the Overriding Objective***
>
> **2 The court must seek to give effect to the overriding objective when it —**
>
> **(a) exercises any power given to it by the Rules; or**
>
> **(b) interprets any rule.**
>
> ***1A/3 Duty of the Parties***
>
> **3 The parties are required to help the court to further the overriding objective.**"[emphasis added]

84. It is noteworthy that the first element of dealing with a case justly is "*ensuring that the parties are on an equal footing*". The Court is also charged with saving expense, and managing cases in a way which is proportionate, having regard to primarily the financial resources of the parties, and is further required to deal with cases "*fairly*". The Court "*must seek to give effect to the overriding objective*" when exercising any power given to it by the Rules or when interpreting any rule. The parties are required to "*help the court to further the overriding objective*", and so cannot conduct their cases unfairly in the pursuit of their own partisan interests. *Conducting litigation in a manner which involves a continuing breach of these Rules is quintessentially a misuse of the Court's machinery or, in other words, an abuse of the process of the Court.*

85. Of course, not every form of abuse will be sufficiently serious to warrant the sanction of staying the proceedings, be it conditionally or unconditionally. The most common forms of abuse of process include, admittedly, (a) pursuing an application or a claim for some collateral or improper purpose, (b) re-litigating claims or issues in breach of the *res judicata* principle, (c) pursuing claims which are bound to fail and (d) inordinate delay. But the principles embodied in Order 1A of the Rules of this Court do not simply represent the guiding principles of our civil procedural code. They are also broadly reflective of the fact that both plaintiff and defendant are entitled under section 6(8) of the Bermuda Constitution to the following fundamental rights in respect of civil litigation before this Court:

> "*Any court or other adjudicated authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are commenced by any person before such court or adjudicating authority,* **the case shall be afforded a fair hearing** *within reasonable time.*"[emphasis added]

86. In the *First Atlantic* case, I made the following observations about the impact of these provisions on the traditional common law view that primacy must be given to the plaintiff's right of access to the Court:

> *"25. However, it is also necessary to remember the two-faceted nature of fair trial rights, particularly in the context of civil litigation. The Court will not give effect to one party's fair trial rights in a way which infringes the corresponding rights of the opposing party: Dyer-v-Watson [2004] 1 A.C. 379 at 402-403 (Lord Bingham).*
>
> *26. In the human rights context where an ordinary citizen is suing the state, achieving an "equality of arms" (the fundamental right to a fair hearing principle now incorporated in the level playing field provisions of the Overriding Objective) may require emphasis to be given to the applicant's right to their day in court: Re Burrows [2004] Bda LR 77. But where an applicant's delay makes a fair trial for the respondent impossible, even in the human rights context, this Court in the latter case held that the applicant's right of access to the court is trumped by the respondent's right to a fair trial.*"

87. Having regard to these principles, it is untenable to contend Order 23 must be construed as depriving the Court of the inherent jurisdiction to ensure a fair trial by, where the facts of a particular case merit it, characterising as abusive the pursuit of a claim in which the Plaintiff is not subject to the usual discipline of the costs regime, in accordance with section 6(8) of the Constitution and Order 1A of its own Rules. Order 1A requires this Court to seek to achieve the overriding objective when interpreting any rule, this Court is required to interpret all legislation, primary and subsidiary, consistently with the Constitution, and parties in the conduct of their cases are obliged to help the court to achieve the overriding objective. In my judgment, the way in which the Respondents are prosecuting the present action, as voluntarily insolvent plaintiffs with no financial interest in the outcome in circumstances where it is unclear how the Applicants will enforce any costs orders they obtain, is a misuse of the Court's processes in that it materially interferes with the Applicants fair trial rights by giving the Respondents an unfair tactical advantage in breach of the equality of arms principle.

88. It is wholly irrelevant in these circumstances that their claims are pursued in good faith and are not liable to be struck- out on the grounds that they are bound to fail. While it seems obvious that the introduction of the Overriding Objective in the English CPR must have been influenced, to some extent at least, by the domestication of article 6 of ECHR through the Human Rights Act 1998 (U.K.), it is often forgotten in Bermuda that the Court's primary case management duty since 1968 has been to ensure a fair trial in civil cases, pursuant to section 6(8) of the Bermuda Constitution. This governing principle accordingly shapes the Court's statutory and/or common law jurisdiction to stay proceedings on abuse of process grounds, and define the parameters of what, in varying contexts, constitutes an abuse. The inherent jurisdiction to restrain abuses of process arises under sections 12 and 18 of the Supreme Court Act 1905, while the power to make rules of Court arises under section 62 of the same Act. This is a statute which was in existence when the Constitution was enacted. Section 5(1) of the Bermuda Constitution Order 1968[20] provides as follows:

[20] U.K. S.I. 1968: No. 182. Section 5(2) provides for a 12 month period within which amendments could be made to existing laws.

> "*Subject to the provisions of this section, the existing laws shall have effect on and after the appointed day [2 June 1968] as if they had been made in pursuance of the Constitution and shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution*".

89. For this additional reason, and by way of fortification of Mr. Martin's concise reliance on Order 1A of this Court's Rules, I find firstly that, since the enactment of the Bermuda Constitution, this Court's primary duty in exercising its civil jurisdiction has been to ensure compliance with litigants' constitutional fair trial rights. Sections 12 and 18 of the 1905 Act must be construed as having been modified by section 6(8) of the Constitution to confer on this Court in its civil jurisdiction the power to manage its processes so as to ensure a constitutionally compliant fair trial. It follows that it has not been competent for the Chief Justice to make rules of Court under section 62 of the 1905 Act which either (a) conflict with section 6(8) of the Constitution or (b) impair the Court's inherent jurisdiction to manage its processes in order to ensure a constitutionally fair trial. Accordingly, Order 23 may not be construed as depriving this Court of the jurisdiction to characterise as an abuse of process a plaintiff's pursuit of a civil claim in breach of the equality of arms principle embedded in section 6(8) of the Bermuda Constitution, merely because it does not permit security for costs to be ordered in particular cases.

90. A gap in the Rules as a matter of broader principle should not be regarded as an impediment to giving effect to applicable constitutional, statutory or international obligations. In *New Skies Satellite BV-v-FG Hemisphere Associates LLC* [2005] Bda LR 59, Evans JA gave the Judgment of the Court of Appeal for Bermuda in a case where a statute conferred a positive right to enforce foreign arbitration rules but there was a "*lacuna*" in the Rules. On one construction, the fact that the Rules were silent as to the applicable procedure interfered with the positive statutory right. The Court of Appeal's primary finding was that the "*lacuna*" was no impediment to enforcement proceedings being commenced. Evans JA observed (at pages 8-9):

> "*If it be a case of ambiguity, we should prefer the construction which enables Bermuda to perform the international treaty obligations undertaken on its behalf.*"

Legal and factual findings: amount of security which should be furnished

91. The Respondents submit that to avoid discrimination on grounds of place of origin, security based on the location of the paying party's foreign residence ought properly to be limited to the additional costs attributable to enforcing the costs order abroad. This point would have merit if the application for security was made under Order 23 rule 1(a), so that it could be contended that a foreign plaintiff was being treated less favourably than a local plaintiff on the grounds of place of origin. This would require consideration of the consistency between Order 23 rule 1 (a), its application to the Respondents and section 12 of the Bermuda Constitution ("*Protection from discrimination on the grounds of race, etc.*"). But no such issues arise in the present case at all.

92. In the present case, the applications for security are made under order 23 rule 1(b) based on the grounds that the Respondents are nominal plaintiffs, so no question of discrimination on the ground of place of origin arises. Even more significantly still, the Respondents are Bermudian companies, so it is not open to them to suggest that the order is being sought formally under Order 23 rule 1(b) but that the real rationale for the applications is that the Respondents are foreign companies with foreign assets. In the present case, the pivotal rationale for the Order being granted is not even that the assets believed to be available to meet any costs order are located overseas. Rather, the crucial factor is the doubt as to whether or not any potential third party costs orders will be enforceable at all.

93. The Applicants' respective assessments of their likely total costs in the present proceedings were not challenged in any of the three Moretti Affidavits. The argument that the motivation of the present applications was to prevent the claims being pursued was not supported by any evidence that the Respondents would be unable to obtain from whoever is funding the litigation the full amount of the security sought. This argument, very sensibly, was abandoned in the course of oral arguments.

94. The Bank seeks $700,000, slightly less than its particularised estimated total of $745,243.75[21]. Citigroup seeks $569,484.50, the full amount of its estimate[22]. In both cases, likely disbursement costs of overseas witnesses travelling to Bermuda have not been included. I order the Respondents/Plaintiffs to secure the Bank's costs in the amount of $700,000 and Citigroup's costs in the amount of $550,000, in such manner as the Applicants may reasonably require or as the Court may determine[23].

Summary

95. The Respondents are nominal plaintiffs and all the key discretionary indicators point in favour of requiring them to post security for costs. This is because they have insufficient assets out of which to meet any costs orders in the event that their somewhat novel claims do not succeed. In addition, the Respondents assigned the proceeds of the present claims to their former shareholders before commencing the present proceedings in which they have no or no sufficient financial interest.

96. Although the Court does possess the jurisdiction to make a costs order at the end of the trial against the Caymanian segregated portfolio company which is said to be funding the Respondents' claims, it is extremely unclear whether any costs orders the Applicants might obtain against the third party funder would in practical terms be enforceable. The Respondents are ordered to secure the Bank's costs in the amount of $700,000 and Citigroup's in the amount of $550,000, to be secured in each case in such manner as the Applicants may reasonably require, or as this Court may determine.

97. In the event that my primary finding that this Court is jurisdictionally competent to order security for costs under Order 23 rule 1(b) is held to be wrong, I would in the alternative order that the present proceedings be stayed unless DM Special Assets Reserve Fund SPC undertakes to meet any costs orders that may be made against the Respondents. This is because the pursuit of the present proceedings constitutes an abuse of the process of the Court. It is contrary to the equality of arms principle embodied in section 6(8) of the Constitution and Order 1A of this Court's Rules for the Respondents to be permitted to pursue substantial and expensive commercial litigation without being subject to the discipline of costs to which the Applicants are themselves subject. The unfair advantage that this gives to the Respondents flows from the combination of their de facto insolvency combined with the doubts surrounding whether or not any costs orders the Applicants may obtain will be enforceable against the third party who is funding the litigation.

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[21] See pages 9-10 of Exhibit "SMS1" to the First Sonja Salmon Affidavit. In light of this voluntary deduction, I see no need for any further adjustment in respect of costs due to the Respondents in respect of an abandoned interlocutory application made by the Bank.

[22] See pages 3-4 of Exhibit "DJA-1" to the First Affidavit of David Addington.

[23] I assume that the most appropriate and convenient currency for the parties is US dollars.

98. In *First Atlantic Commerce Ltd.-v-Bank of Bermuda Ltd.* [2007]Bda LR 36, both counsel agreed that this Court had no jurisdiction to make a costs order against a third party funder. Largely based on this legal premise, now found to be erroneous, I held that the pursuit of those proceedings were abusive. That decision has little or no value as a result of the arguments advanced by Mr. Mussenden on behalf of the Respondents, and not challenged by the Applicants, in the present case. Where there is no reason to doubt that a third party funder will comply with a costs order, no question of abuse of process will likely arise.

99. This appears to be the first occasion on which a Bermudian Court has had to consider both (a) an application under Order 23 rule 1(b), and (b) this Court's jurisdiction under sections 12 and 18 of the Supreme Court Act 1905, as read with Order 62 of the Rules, to make costs orders against third parties. The comprehensive written submissions presented by counsel were of great assistance to the Court. The complicated analysis which these submissions fed suggests that consideration should be given as to whether our current Order 23 ought to be modernised, to explicitly permit security for costs orders against insolvent corporate plaintiffs and third party funders, as is now provided for by Rule 25 of the English CPR.

100. I will hear counsel, if necessary, as to costs.

Dated this 27th day of September, 2007

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KAWALEY J.