Neutral Citation Number: [2002] EWCA Civ 477
IN THE SUPREME COURT OF JUDICATURE A3/2002/0562
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
(MR JUSTICE TOULSON)

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday 21 March 2002

B e f o r e:

LORD JUSTICE POTTER
LORD JUSTICE MUMMERY
LADY JUSTICE ARDEN

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1. BERRY TRADE LIMITED
(A Company formed in Bermuda)
2. VITOL ENERGY (BERMUDA) LIMITED

Claimants/Respondents

- v -

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

Defendants/Appellants

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

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MR MOUSSAVI appeared in person.

MR A BODNAR appeared at the invitation of the court.

MR IAN CROXFORD QC and MR PHILIP MARSHALL (Instructed by Messrs Ince & Co, London, EC3R 5EN) appeared on behalf of the Respondent

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

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1. LORD JUSTICE POTTER: Lady Justice Arden will give the first judgment.

2. LADY JUSTICE ARDEN: This an appeal with the leave of the judge against the order of Toulson J, dated 13 March 2002, refusing an application by the first defendant in this action to adjourn an application by the claimants for his committal to prison.

3. On 20 July 2001 Laddie J made a world-wide seizure order and a search order against the defendants. The claimants (the respondents to this appeal) allege that there have been many breaches by the first defendant of these orders. However, the appeal is not concerned with those breaches. On 6 March 2002 the appellant, Mr Moussavi, was adjudicated bankrupt on his own petition.

4. Mr Moussavi asked his solicitors, Sebastians, as long ago as December 2001, if they could act for him in the committal application with a public funding certificate. No application was lodged until 15 January 2002.

5. In the course of February 2002 Sebastians told the respondents' solicitors that the funds for the representation of the appellant were exhausted and he could no longer be legally represented. The solicitors came off the record in March 2002. In the light of earlier claims as to his financial position, the respondents had apparently suggested in November 2001 that he should apply for public funding. After the application was made, public funding was refused but a further application was made following his bankruptcy. No affirmative response to this had been received when the trial of the application opened on 10 March 2002. There had been an indication that funding would be refused, although an application could be made to a higher level.

6. The committal application came on for hearing on Tuesday 10 March 2002. Mr Moussavi, by his counsel, Mr Andrew Bodnar, applied for an adjournment in order to obtain legal aid or to pursue the application for public funding which had already been made on his behalf. We are told that this was Mr Moussavi's fourth application to adjourn the committal application.

7. The judge reluctantly agreed to grant the adjournment. In the course of his judgment, he said that this was a case which “cries out for representation”. He referred to the fact that an application for emergency legal aid had been made but failed and that there had been applications for the release of funds subject to the freezing order which had also to a large extent failed. The judge then added this:

> “If I was satisfied that this was a deliberate tactic to force an adjournment, then the right course would be to refuse the application because the right to representation must not be turned into a tool for refusing justice. Highly critical as I am of his past behaviour, I am not drawing the conclusion that this was a grand scheme on his part to try and gain a few weeks' delay.”

8. Following this decision, the respondents offered to fund Mr Moussavi's defence at the same rates as would be permitted by the Legal Services Commission. That offer was followed up in writing and, on the basis of it, the judge indicated that he would continue with the hearing of the committal applications, the opening would take place on 12 March 2002 with evidence starting on Thursday 14 March 2002.

9. However, on 12 March 2002 Mr Moussavi's solicitors invited the judge to hear leading

counsel on their behalf. The judge was told that Mr Moussavi's solicitors could not act because it might be perceived that they were unable to act independently of the claimants as a result of the funding offer. Similar submissions were made by Mr Bodnar. It became clear that the solicitors were prepared to act if Mr Moussavi would give them instructions. Mr Moussavi told the judge that in the circumstances he did not wish his solicitors to act if they were funded by the respondents.

10. The judge treated the application as an application to adjourn the case. He refused an adjournment. He took the view that the solicitors and counsel had received advice from the Law Society and Bar Council respectively that it would be improper for them to act. He took into account that the question of propriety was one for the court. He held that there was no risk of a loss of independence by virtue of the terms offered. He also held that the court was entitled to expect solicitors and counsel to accept the ruling of the court and not to rule that action taken in compliance with what the court regarded as proper for solicitors and counsel was not professional misconduct. In conclusion he refused the adjournment sought. It is his refusal on that occasion which is the subject of this appeal. Subsequent to his judgment, it was suggested that the claimant's offer to fund the case was an obstacle to obtain Legal Services Commission funding and, accordingly, the offer has been temporarily withdrawn.

11. On this appeal Mr Moussavi has appeared in person. He has filed grounds of appeal. He submits that the issues raised on this appeal are:

> (1) Is it appropriate as a matter of principle for representatives of a person facing prison to accept funding by the party seeking that person's imprisonment?
>
> (2) If it may be so appropriate, is it appropriate in the circumstances of this case?

12. In support of the point of principle, Mr Moussavi further submits that, prior to the hearing on 12 March, there had been a number of applications for the release of funds frozen under the freezing injunction against him. They had met with varying degrees of success, but all had been strenuously resisted. He also added that he had repeatedly evidenced a severe distrust of the respondents in evidence and in submissions to the court.

13. Mr Moussavi has also filed a very lengthy statement in support of the appeal. It is sufficient for the issues with which the court is concerned to take up two points that he makes in paragraphs 55 and 58 respectively. In paragraph 55 he says:

> "I am entitled by law to legal aid. I wish to avail myself of that right as a citizen. There is no good reason for me not to be allowed so to do. I am advised that because of a recent decision of the Court of Appeal contempt proceedings are to be treated for purposes of legal aid as tantamount to criminal proceedings. There can be no doubt then that I will eventually get legal aid. There is no good reason why my defence should not be conducted in the proper way via the legal aid route."

14. He then adds:

> "Do I have reason to be suspicious? After the behaviour of the Claimants I think so. Is my suspicion based on reasonable grounds?Does it have to be? When I am entitled under the law to legal aid, why should I be forced into an arrangement conjured up by my mortal enemies? I am entitled to be defended

by properly funded legal aid and I want to avail myself of that right."

15. Mr Ian Croxford QC, for the respondents, vehemently rejects the grounds on which Mr Moussavi states that he has fears.

16. At the court's invitation, Mr Bodnar has appeared before the court to provide assistance as to the factual situation. He has assisted on several points for which the court is most grateful to him.

17. I now turn to the respondents' submissions. Mr Croxford points to the significant delays that have been taking place on this application and, in particular, to the seriousness of the breaches of the order of Laddie J. The court is not concerned with the substance of those breaches on this appeal and I do not therefore consider them.

18. Mr Croxford has explained the nature of the offer. He points out that in some exceptional circumstances the court does indeed require a litigant to fund the other side, for instance in order that a point of public importance may be appealed.

19. Mr Croxford refers to paragraph 307(b) of the Code of Conduct of the Bar of England and Wales which states:

> "...a barrister must not... (b) do anything (for example, accept a present) in such circumstances as may lead to any inference that his independence may be compromised."

20. Mr Croxford states that the funds would be paid into court so that the court could determine what funds should be paid out for the representation of Mr Moussavi. Accordingly he submits that there would be no loss of independence if counsel were to act under the proposed arrangement. Mr Croxford says that Mr Moussavi would have the legal team of his choice, the funding of which is an irrelevance.

21. We have been shown a letter by the Bar Council to Mr Bodnar. This letter supersedes the advice which Mr Bodnar placed before the judge. The letter from the Bar Council states that counsel has no duty to represent a client who does not wish to be represented by him and submits that there is no power in the court to compel counsel to do so. Moreover, it is said that it would be contrary to paragraph 401(a) of the Code of Conduct for a barrister to represent a client without instructions from a solicitor, except in certain circumstances, none of which seem to apply here.

22. The Bar Council did not express a view and reserved its position on the wider issue as to whether it is proper for counsel to represent a client where the fees were paid by the opponent if the client was content with such an arrangement. The Bar Council also drew attention to the fact that the Official Solicitor has a duty to represent those facing proceedings. However this responsibility only arises once a committal order has been made. Thus, that particular route is not available in this case.

23. Mr Croxford submits that, likewise, there is no difficulty in the solicitors acting. He refers to the Guide to the Professional Conduct of Solicitors 1999. He submits that paragraph 15.04 is not in point because it deals with a conflict of interest between a solicitor and his own client. The court has seen a letter dated 20 March 2002 from the Law Society to Mr Moussavi's solicitors in which the Law Society refers to a number of other provisions of the Guide and, in particular, makes the point that it would not be proper for the solicitors to act for Mr Moussavi against his wishes (Rule 1 Basic Principles). The Law Society also refers to

principles 12.01, 12.02 and 14.01 dealing with the acceptance of instructions, termination of a retainer and payments on account.

24. Mr Croxford submits that the test to be applied in this situation is whether there is a real risk of conflict not whether there is a perception of conflict. In support of his submissions he has referred the court to the decision of House of Lords in Prince Jefri Bolkiah v KPMG [1999] 2 AC 222. Mr Croxford also submits that Mr Moussavi has delayed in making an application for legal services funding so as to manoeuvre the parties into an adjournment. That is not the way the judge saw it, as is clear from the passage of his judgment that I have quoted. Mr Croxford accepts that it is too late to release funds from the freezing orders for the purposes of representation of Mr Moussavi because he is now bankrupt.

Conclusions

25. Normally, the refusal by a judge of an application to adjourn a case is not reviewable by the Court of Appeal except on very limited grounds; for example where no reasonable tribunal could have refused to adjourn the case in the circumstances. No-one has sought to contend in this case that that test would need to be met in the circumstances of this case. The question on this appeal is whether the judge was right in law in his view that the offer of funding made by the respondents could not reasonably be refused. If he was incorrect in his view then the judge misdirected himself and his exercise of discretion would be invalid. In that event, the court would have to consider whether to re-exercise the discretion. Mr Moussavi wants his solicitors, Sebastians, and Mr Bodnar, his counsel, to act for him but with the benefit of Legal Service Commission funding, not on the basis of funding offered by the claimants.

26. The question is whether Mr Moussavi can reasonably refuse to instruct lawyers on the basis of the respondents' offer of funding. That question involves a matter of law. I start by examining the nature of the respondents' offer. The respondents' offer is a very generous one. It aims to replicate the position Mr Moussavi would be in if he had Legal Service Commission funding. It is to be extended without recourse to Mr Moussavi. However, there are clearly some restrictions on the respondents' offer. It would not cover incidental applications, such as an application for disclosure. If Mr Moussavi were publicly funded, his solicitors would be able to apply for an extension of the certificate to cover that sort of matter. Furthermore, there is still doubt about whether counsel may act in these circumstances even if Mr Moussavi was content that he should be instructed. This is made plain by the letter from the Bar Council to which I have referred.

27. Mr Moussavi also has fears about the probity of the respondents. It appears that he also fears that, although the funding would be without recourse, there would be implications in the future as a result of this funding. Mr Croxford submits that any such fear would be irrational. However, the justification or otherwise of his fears is not a matter which any court can investigate on this type of investigation. I am also mindful that we have medical evidence that Mr Moussavi has recently suffered from a psychological illness which I am prepared to assume was exacerbated by his position in these proceedings.

28. As I see it, the point is one of principle. Mr Moussavi does not wish to defend himself in person. He wishes to instruct Sebastians and Mr Bodnar. He contends he does not have sufficient means to pay for legal assistance. He has the right to apply for public funding. The question whether to grant him that public funding is a decision which falls to be taken by the Legal Services Commission, although, as I have said, the judge clearly thought that this was a case which cried out for legal representation.

29. In my judgment the court should respect that right. It should not compel Mr Moussavi to forgo a proper opportunity of exercising that right any more than it could compel him to appoint solicitors and counsel. (That, as such, is not suggested). In my judgment a person may thus reasonable refuse an offer of the kind which the respondents have made and apply for, or pursue an application for, public funding.

30. The question which concerned the judge was whether or not it would be proper for the solicitors and counsel to act in these circumstances. As I see it, the question which the judge had to ask was a different question, whether Mr Moussavi had had an effective opportunity for applying for public funding. The weight to be accorded to giving him this opportunity must, in these circumstances, outweigh other considerations, such as the convenience to other parties and the use of court resources. The judge clearly did not consider that Mr Moussavi had had this opportunity since he had been prepared on the previous day to give an adjournment for this purpose and had then found that the application was not a tactic designed to put off the evil day. Accordingly, in my judgment, the judge failed to ask the appropriate question on 13 March 2002 and his exercise of discretion must be set aside.

31. The conclusion which I have reached is consistent with the jurisprudence of the European Court of Human Rights. I proceed on the basis that this application for committal is a "criminal offence" for the purposes of the European Convention on Human Rights. Under Article 6(3)(c) Mr Moussavi has the right to defend himself in person or through legal assistance of his own choosing or, if he does not have sufficient means to pay for legal assistance, to be given it free if the interests of justice so require.

32. Our attention has been drawn to Croissant v Germany (1992) 16 EHHR 135. The case concerned the appointment of lawyers to assist in a criminal case. Under German law this could be done against the wishes of a defendant and also at his own cost. The European Court of Human Rights held that, before the appointment was made, the national court should pay attention to the accused's view. At page 150 the court said:

> "However, before nominating more than one counsel, the court should pay heed to the accused's views as to the number needed, especially where, as in Germany, he will in principle have to bear the consequent costs if he is convicted. An appointment that runs counter to those wishes will be incompatible with the notion of fair trial under Article 6(1) if, even taking into account a proper margin of appreciation, it lacks relevant and sufficient justification."

33. By analogy, it seems to me that to deprive someone of his right to apply for public funding against his wishes would also run counter to the notion of a fair trial under Article 6(1) if it lacked sufficient and relevant justification. However, in the same case, the European Court of Human Rights also made the important point that the rights conferred by Article 6(3)(c) are not absolute. It said at page 151:

> "It is true that Article 6(3)(c) entitles 'everyone charged with a criminal offence' to be defended by counsel of his own choosing. Nevertheless, and notwithstanding the importance of a relationship of confidence between lawyer and client, this right cannot be considered to be absolute. It is necessarily subject to certain limitations where free legal aid is concerned and also where, as in the present case, it is for the courts to decide whether the interests of justice require that the accused by defended by counsel appointed by them."

34. The finding that the right to legal representation is not an absolute right supports my views about what the position would be if there was a further application for an adjournment in this case. I deal with this below.

35. In my judgment it is appropriate for this court to substitute a period of adjournment in place of the judge's order. The next question is how long such an adjournment ought to be. At the court's request Mr Bodnar made enquiries of the Legal Services Commission and informed the court that it is hoped that there would be a reply on a renewed application within the next few days, certainly within the next week. The court should clearly allow a little time after that for the legal advisers to have sufficient time to brief themselves in preparation for this application. In the circumstances, I am satisfied that it should be sufficient for Mr Moussavi if the matter is adjourned to the end of the Easter vacation 2002. Accordingly, I would substitute for the judge's order an order that the matter be adjourned to come back before the court as soon as reasonably practicable, but not before the start of the next sittings. If, on that occasion Mr Moussavi still has not obtained legal representation and does not wish to act in person, the court will have to consider, in the light of all the circumstances then prevailing, whether it is reasonable to continue in the absence of legal representation for Mr Moussavi. In my judgment it is likely that by then he would have had a full and proper opportunity to apply for legal representation.

36. Accordingly, as I see it, his rights would have been respected and other considerations, such as the interests of other involved in these proceedings, including the witnesses, should be given greater weight. In those circumstances, I would allow the appeal on the terms stated.

37. LORD JUSTICE MUMMERY: I agree.

38. LORD JUSTICE POTTER: I agree. In the light of the difficulties which have been faced by the claimants and the delays which have occurred to frustrate their attempts to bring to a hearing these contempt proceedings, I can understand the motives which prompted the claimants to propose the funding solution which they put forward in this case and which has preoccupied us on this appeal. I can also understand the anxiety of the judge not to allow a last minute denial of legal aid to this bankrupt defendant to operate so as to postpone the hearing date.

39. In these circumstances and because of what the judge, no doubt rightly, considered to be the unreality of any compromise to the independence and vigour with which solicitors and counsel would represent the defendant, whatever the source of their remuneration, he no doubt believed that wiser councils would prevail and the claimant's proposal would be accepted if an adjournment was refused. At the same time the judge made clear his own view that no valid objection or professional impropriety would he involved in operating such an arrangement.

40. Nonetheless, the implication of the judge's decision, although not its express purpose, was to oblige the defendant to continue on the basis of an arrangement with which neither he nor his representatives, backed by the advice of their professional bodies, were happy, or to represent himself at the imminent hearing. The position at the time was that, although Legal Services Commission funding had been refused on its first consideration at a relatively low level, as a bankrupt facing committal proceedings, the defendant was, certainly on the face of it, entitled to Legal Services Commission funding and there would be a good prospect of obtaining it if the matter were further pursued to a higher level of decision. For that to be done further time was necessary.

41. The position as it stands before this court is that that is now being done and the outcome

should be known within a week or so.

42. In those circumstances, it seems to me that the proper course is not that proposed by the judge, which I consider objectionable in principle for the reasons stated by Lady Justice Arden, but for the date of the contempt hearing to be adjourned as she proposes. If it cannot be arranged earlier than May, there is apparently a window in that month which the claimants have obtained in the Commercial Court for the hearing of their application for summary judgment. By then, or by such earlier date as may be obtainable, the position should be clear. Either, as seems likely, it will be clear that Legal Services Commission funding is available and the defendant's representatives will appear, funded by the Legal Services Commission, or, if it has not been made available and the defendant has failed to consent to any renewal of the claimants' offer in the light of that refusal, or if he has otherwise failed to procure representation, he will be obliged to appear in person. In that event he should expect no sympathy from the judge in any further attempt to adjourn the hearing.

Order: The appeal is allowed to the extent that the court will vary the order of Toulson J so as to adjourn the hearing of the committal application to 20 - 23 May. There be an estimate of 4 days (one day's prereading) and that the hearing takes place in substitution for the claimants' application for summary judgment presently listed to be heard between those dates, the application for summary judgment to be adjourned generally. First defendant to serve on the claimants by no later than 1 May 2002 a list of those of the claimants' witnesses relied upon in this application whom they require to attend for cross-examination. The claimants serve a skeleton argument and reading list by no later than 11 May 2002 and the first defendant serve a skeleton argument and reading list by no later than 16 May 2002. If the first defendant proposes to rely on evidence at the hearing of the application such evidence to be served by 6 May 2002