Minister for P E v Yates and Regs Skips

Jurisdiction:	Jersey
Judge:	McNeill JA
Judgment Date:	27 November 2008
Neutral Citation:	[2008] JCA 203
Reported In:	[2008] JCA 203
Court:	Court of Appeal
Date:	27 November 2008

Text

[2008] JCA 203

COURT OF APPEAL

Before:

Dame Heather Steel, **President**;

J. W. McNeill, **Esq., Q.C., and**;

Miss C. Montgomery, **Q.C**.

Between
The Minister for Planning and Environment
Appellant/Party Convened
and
Marc Silvanus Dorey Yates
Michaela Yates nee Van Neste
First Respondents/Plaintiffs

and

Reg's Skips Limited
Second Respondent/Defendant

Advocate S. C. K. Pallot **for the Appellant**.

Mrs. R. L. Pinel **in person as a Director of the Second Respondent**.

The First Respondents did not appear and were not represented.

Authorities

Yates v Reg's Skips Limited [2008] JCA 077B .

Drake v Gouveia [2000] JLR 411 .

Aiden Shipping Co Limited v. Interbulk Limited "The Vimeira" [1986] AC 965; 980E – 981B .

Symphony Group plc v. Hodgson [1994] 1 QB 179 .

Forbes-Smith v Forbes-Smith and Chadwick [1901] P 258 .

John Fairfax & Sons Pty. Limited v E.C. de Witt & Co. [1958] 1 QB 323 .

Pritchard v J. H. Cobden Limited [1988] Fam. 22 .

Dolphin Quays Developments Limited v Mills and Others [2008] 1 WLR 1829 .

TGA Chapman Limited v Christopher [1998] 1 WLR 12, 20 .

Globe Equities Limited v Globe Legal Services Limited [1999] BLR 232, 239 .

Hamilton v Al Fayed (No 2) [2003] QB 1175 .

Gore (t/a Clayton Utz) v Justice Corpn Pty Limited (2002) 189 ALR 712 .

Kebaro Pty Ltd v Saunders [2003] FCA 5 .

Dymocks Franchise Systems (NSW) Pty Limited v Todd [2004] 1 WLR 2807 .

Civil Proceedings (Jersey) Law 1956.

Planning and Building (Jersey) Law 2002.

Court of Appeal (Civil) Rules 1964.

Appeal against orders of the Royal Court (Samedi Division) of 20 December 2007 and 3 June 2008 whereby the Appellant was convened to attend proceedings and found liable to

contribute to the Second Respondent in respect of that party's liability to the First Respondents in costs of the proceedings below.

McNeill JA
Background

1 In April 2007, the First Respondents, by Order of Justice in the Royal Court (Samedi Division) sought various orders against the Second Respondent. The principal order sought was that the Second Respondent cease carrying on a skip business and associated activities at Heatherbrae Farm, or within one mile of the residence of the First Respondents, “Les Ormes”, both in the Parish of St. John.

2 One of the grounds set out was that, under the Jersey law doctrine of voisinage, an occupier or possessor of land must use the land in such a way that he does not cause damage to his neighbours. The First Respondents averred that the Second Respondent's activities in operating a skip business in a property adjacent to the First Respondents' home, constituted a breach of those duties in that the operations unreasonably disrupted the First Respondents' rights to quiet and peaceful enjoyment of their property.

3 By Act of Court dated 11 December 2007, the Royal Court (Inferior Number) granted an injunction preventing the Second Respondent from operating a skip business at or in the immediate vicinity of Heatherbrae Farm, the injunction to come into force on 1 May 2008. In the Judgment of the Royal Court dated 11 December 2007, delivered by the Bailiff, the Royal Court found that the activities of the Second Respondent constituted a breach of the duty of voisinage.

4 In expressing the decision of the Royal Court, the learned Bailiff stated:-

> ***“32 It follows that, in our judgement, the activities of the defendant company at Heatherbrae Farm constitute a breach of the duty of voisinage which is owed to the plaintiffs.*** We reached this conclusion not without considerable sympathy for Mr. and Mrs. Pinel. They were permitted, if not encouraged, by the Planning Department, to establish their business at Heatherbrae Farm which they did in good faith. The difficulty is that any skip operating business is inherently noisy .
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> …
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> …
>
> ***35 By way of postscript, we direct that any application for the costs of these proceedings should be pursued only after a directions hearing before the Bailiff at which consideration can be given to the question whether any other party or parties should be convened.”***

5 A Directions Hearing was arranged for 20 December 2007. On that day the Bailiff adjourned further consideration of the First Respondents' application for costs and ordered that the Appellant (hereinafter “the Minister”) be convened to attend before the Court, on a date to be fixed, for hearing the application for costs. There was no application by either of the parties for the making of such an order: rather, the order was made by the Court of its own motion.

6 The application for costs was heard before the Bailiff on 29 April 2008 when those represented were the present Second Respondent and the Minister. At that hearing the Advocate instructed for the Second Respondent submitted that the Minister should be found liable to the present First Respondents to the extent of 50 per cent of the costs of the First Respondents. On behalf of the Minister it was submitted that he should be discharged altogether from the proceedings. The court reserved judgment and on 3 June 2008 ordered that: “The [Second Respondent] will pay the costs of the [First Respondents] on the standard basis, but will be entitled to recover twenty-five per cent of those costs from the Minister”.

The Present Appeal

7 The Minister now appeals against those orders in the following way:-

(i) The Appellant appeals against the order of 3 June 2008 insofar as it requires him to make any contribution at all to the costs of the proceedings instituted by the First Respondents; and

(ii) The Appellant requests this court to quash the order of 20 December 2007 convening him to attend.

The Proceedings Below

8 It is clear from the transcript of the proceedings on 20 December 2007 that the suggestion that the Minister ought to be convened into the litigation on a question of costs came from the court; subject only to any views that either of the advocates for the two principal parties wished to offer. On behalf of the present First Respondents, Advocate O'Connell made clear that he would not be supporting any application, if there was one, for the convening of the Minister. His clients had attempted a public law remedy but failed on the basis of the existence of a private law remedy which, by December 2007, had successfully been pursued. While recognising that the court had power to convene non-parties to proceedings in appropriate circumstances, his clients did not wish to prolong and further complicate matters by having the Minister convened.

9 On behalf of the present Second Respondent, Advocate Clarke specifically sought clarification as to whether the convening of the Minister would be at the behest of the Court,

or whether the Court was inviting the present Second Respondent to make an application for the Minister to attend. He recognised that the convening of the Minister was in his client's interests if all or any of his client's costs' liability could be passed on; but he was concerned that an unsuccessful application against the Minister might lead to a costs order against his clients. After discussion, the Bailiff specifically exercised the power under the Royal Court Rules and convened the Minister in relation to costs arising from the proceedings brought by the First Respondents against the Second Respondent.

10 A hearing took place on 29 April 2008 at which each of the present First Respondents, the Second Respondent and the Minister for Planning and Environment were represented. Judgment was issued on 3 June 2008 (the "June Judgment"); by which time this court had heard and dismissed the present Second Respondent's appeal against the grant of injunction: see *Yates v Reg's Skips Limited* [2008] JCA 077B.

11 In the June Judgment, the learned Bailiff noted that jurisdiction to order a non-party to pay costs was not in dispute, having regard to the provisions of Article 2 of the Civil Proceedings (Jersey) Law 1956 (the "1956 Law"). So far as relevant, that Article provides:-

> ***"the costs of and incidental to all proceedings in the Royal Court shall be in the discretion of the Court, and the Court shall have full power to determine by whom and to what extent the costs are to be paid."*** .

12 Reference was then made to the decision of the Royal Court in *Drake v Gouveia* [2000] JLR 411, where, in delivering the judgment of the court, the learned Bailiff (Bailhache, B) had said (at 418):-

> ***"In our judgment, the principles laid down in*** *Aiden Shipping* ***and*** *Gupta* ***are equally applicable in Jersey.*** The words "by whom" in art. 2(1) of the Civil Procedure (Jersey) Law 1956 are wide enough to embrace any non-party whom the court, in the exercise of its discretion, considers ought justly to be ordered to pay the costs."

13 The Court then noted the submission for the Minister that an order against a non-party was exceptional and that the Minister had no real connection with the action or, at the lowest, no sufficient nexus to justify the making of an order for costs against him and referred to views expressed in the speech of Lord Goff of Chieveley in *Aiden Shipping Co Limited v. Interbulk Limited, "The Vimeira"* [1986] AC 965; 980E – 981B.

14 The learned Bailiff then summarised the relevant planning history and noted that the application eventually granted in May 2005 (and submitted by the owner of Heatherbrae Farm) was granted subject to a condition, among others, that "the use of the site shall operate in the same way as the current site as a skip sorting yard only and for no other purpose".

15 The learned Bailiff then continued:-

> ***"9. It is not in dispute that the phrase "in the same way as the current site [i.e. La Prairie]" is ambiguous and incapable of enforcement in that insufficient evidence exists as to the nature and mode of operation of the business at La Prairie. The Minister attempted to prevent the use of mechanical sorting at Heatherbrae Farm by an enforcement notice but he was eventually obliged to concede that the notice could not be sustained. The Minister, through his Department, has conceded, (in effect) that the business conducted by the defendant at Heatherbrae Farm causes a noise nuisance to neighbouring occupiers. Had this state of affairs been anticipated by the Department, planning permission would not have been granted to the owners of Heatherbrae Farm*** .
>
> ***10. I have been greatly assisted by a candid and very proper assessment of the actions of the Planning Department by Mr. Peter Le Gresley, an Assistant Director of Planning. It is clear that the activities of companies such as the defendant are difficult to place. The business of sorting skips, particularly mechanically, inevitably causes noise and dust. The Planning Department did not anticipate the effects upon the plaintiffs of permitting the defendant to operate at Heatherbrae Farm, but in my judgement, it should have done so. It was aware of the potential damage to neighbours by such operations. The department did not take advice, as it should have done, from the Environmental Health Department, which would have counselled against the granting of planning permission. Although this is only of tangential relevance, the condition attached to the planning permission was so imprecise that it was incapable of enforcement*** .
>
> ***11. It is true that the primary responsibility for the breach of the duty of voisinage lies with the defendant. It seems to me, however, that the Minister must bear some responsibility for encouraging the defendant to move its business to a site where it ought to have been foreseen that such a breach would ensue. …"***

16 The learned Bailiff then went on to make the order now complained of.

Appellant's Contentions

17 Counsel for the Minister began by asking this court to review certain of the findings below as to the conduct of the Minister. The first contention was that the court below erred in finding that the conduct of the Minister had any connection at all with the bringing of the proceedings by the First Respondents for an injunction.

18 Consistent with the position of the Minister below, it was accepted that Article 2(1) of the 1956 Law (set out above at paragraph 11) conferred a wide jurisdiction. Advocate Pallot, for

the Minister, reminded this court of the passage from the speech of Lord Goff in *Aiden Shipping* to which I have referred at paragraph 13 above. In this passage his Lordship said:-

> ***"In the vast majority of cases, it would no doubt be unjust to make an award of costs against a person who is not a party to the relevant proceedings.*** But, as the facts of the present case show, that is not always so .
>
> ***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."

19 *Aiden Shipping* was a case where there had been separate proceedings relating to the same matter, but different parties, and where the second set of proceedings were consequential upon the first. There had been two applications, which had been heard together, but as regards which there had been no order to consolidate or to treat the second matter as third party proceedings. The judge at first instance had held that he had jurisdiction to make an order that the owners of the vessel pay the charterers' costs, such costs to include any costs paid by the charterers to the sub-charterers in the second application. The Court of Appeal had allowed the appeal by the owners on the ground that the owners were strangers to the second application. The charterers' appeal to the House of Lords was successful in respect that Section 51(1) of the Supreme Court Act 1981 was held to confer a very wide discretionary jurisdiction on the court to determine by whom and to what extent the costs of proceedings were to be paid and that the judge had had jurisdiction.

20 For the Minister, Mr. Pallot sought to emphasise Lord Goff's identification of the qualification that there might be *"some person who has no connection with the proceedings"*. Advocate Pallot submitted that the Minister had had no part in causing the First Respondents to institute proceedings. Nor had he had any part in causing the Second Respondent to defend. He had no part in advising either party in connection with the proceedings nor had he had any part in maintaining or financing the proceedings from any standpoint whatsoever. Further, he had played no part in any other proceedings relating to the proceedings brought by the First Respondents. In such circumstances, the Minister had had no real connection at all with the proceedings in question; and, in the absence of any such connection, there was no basis in reason or justice for the Minister's having been convened or having been made the subject of an order in respect of costs of those proceedings.

21 In Mr. Pallot's contentions, the facts salient to his submission under this head were:-

> (i) That the planning permission had been granted to the owner of Heatherbrae Farm, St. Olave's Investments Co. Limited;

(ii) That the permission allowed a “change of use of area to south and part of building to north- east from dry storage to commercial (for Reg's Skips Limited)”;

(iii) That the permission was conditional on the “ *current site*” equivalent operation condition;

(iv) That the permission enured for the benefit of Reg's Skips only and bore on the face of each page the Caution: “This decision is purely permissive and in no way absolves the parties concerned from obtaining, nor does it overrule, any other permission that may be required under any other law. In addition, it does not overrule any private property rights, nor does it absolve an applicant from the need to obtain the permission of the owner of the land to which a permission relates”;

(v) That whilst the Second Respondent had entered upon Heatherbrae Farm in or about late May 2005, its activities did not cause any problem to the First Respondents until the winter of 2005–2006 and that it was not until 12 October 2006 that the First Respondents had written, through their advocate, to the Second Respondent indicating “ *the activity on these premises has intensified considerably since you first occupied the site*”. Advocate Pallot sought also to bring to our attention the continuation of that letter which was:-

> *“It was never envisaged by Planning that you would use this site in the manner in which it presently is – even if the original permit was properly granted, it is clear that you have steadily extended and intensified your activities at the site to a point where what you do there now (or would like to do if your pending application succeeds in any measure) bears no recognisable resemblance to what was originally envisaged for the site.”*.

22 Advocate Pallot's submissions then noted that the letter warned the Second Respondent that, in the absence of a satisfactory response, legal proceedings would issue without further notice.

23 Advocate Pallot submitted that, upon the basis of these matters, the Minister had no real connection at all with the proceedings and there was no basis in reason or justice for his being convened as a party or having an order in respect of costs made against him.

24 The second submission for the Minister was that, even if he did have a connection with the proceedings, the court erred in finding that his conduct had any connection sufficient to justify the court in exercising its discretion under Article 2(1) of the 1956 law and awarding costs against a non-party to the proceedings.

25 Advocate Pallot again relied upon the circumstances which I have just set out and submitted that, at the highest, the only links between the Minister and the proceedings might be said to be (a) the grant of the permission which led to the move to Heatherbrae Farm, (b) the Minister's attempts to enforce the condition and (c) the failure of the condition.

In Advocate Pallot's submission, none of these matters led to a true causal link.

26 As to the grant of permission, it was accepted that, if permission had not been given, the Second Respondent would not have moved to Heatherbrae Farm: so much was obvious. It was submitted, however, that something more in terms of causal link or connection between the actions of the Minister and the institution of the proceedings was required in order to justify an order of costs.

27 In developing this argument, Advocate Pallot submitted that there had to be some form of direct connection. On the contrary, he submitted, the views of this court on the earlier appeal ([2007] JCA 077B) at paragraph 87 emphasised the lack of connection. There, this court noted " ***It can not be said of either consent that it operated to alter the character of the neighbourhood, or that a nuisance would inevitably result therefrom***."

28 As to the attempt to enforce the condition, Advocate Pallot submitted that the enforcement notice could not in itself be causative of the proceedings. At a practical level, it was the refusal of the Second Respondent to negotiate with the First Respondents that forced the parties into litigation. As to the failure of the condition, if the grant of planning permission itself was not sufficient as a causal link, it was difficult to see how the failure of the condition could be a sufficient causal link.

29 In his third submission, Advocate Pallot contended that the court below had erred in finding, in relation to the bringing of the proceedings, that the Appellant had *"encouraged"* the Second Respondent to act as it did.

30 Advocate Pallot observed that whilst (in paragraph 32 of the December decision) the court had found that the Second Respondent had been "permitted, if not encouraged, by the Planning Department to establish their business at Heatherbrae Farm which they did in good faith.", the judgment did not disclose what, beyond the grant of planning permission, might have constituted " *encouragement*". In paragraph 3 of that judgment there was reference to use of the site having been " *sanctioned by the Planning Department*". There was no other reference to encouragement. The rehearsal by the court of the evidence from Mr. Peter Le Gresley, an Assistant Director of Planning (at paragraph 17) and of Mrs. Pinel (at paragraph 25) pointed to an immediate and unexpected intensification of the activities of the Second Respondent.

31 In these circumstances, it was submitted, there was no more " *encouragement*" than arises as a result of any grant of planning permission. Further, the planning permission here, as in every other case, was granted under caution that it did not override any private property rights. There could have been no hint of a potential breach of obligations in voisinage until after the Second Respondent had taken occupation and had intensified their activities some five to six fold.

32 The next submission by Advocate Pallot was that the Royal Court should not have made any relevant finding in the main action without having afforded the Minister an opportunity to be heard.

33 In advancing this submission, Advocate Pallot referred to certain views expressed by Balcombe L.J. in *Symphony Group plc v. Hodgson* [1994] 1 QB 179 (hereinafter "*Symphony*"). He submitted that the Minister could have been joined as a party to the original proceedings, but was not; that he had no inkling of any application for costs against him being a possibility and, therefore, did not have the opportunity to protect himself.

34 Advocate Pallot pointed out that, as the convening of the Minister into the proceedings came not upon the application of either party but, rather, at the instigation of the court, the rationale for seeking to have the Minister convened had to be fathomed from various transcripts prior to the reserved judgment being handed down on 3 June 2008. Having directed us to numerous statements made by the learned Bailiff in exchanges with counsel, as recorded in those transcripts, he submitted that it was difficult not to conclude that the finding of fact of encouragement by the planning department, presumably by the Jurats, had been fixed well before the hearing on 29 April 2008 when the Minister was given the first opportunity to be heard. Such an opportunity was an opportunity in name only, as the finding in fact had already been reached.

35 Finally, Advocate Pallot submitted that the court below had erred in holding, in effect, that a duty of care was owed by the Planning and Environment Committee (as it then was) to applicants for planning permission to exercise its statutory discretion in such a way as to hold anyone to whom planning permission was granted safe from actions for breach of any obligation in voisinage towards neighbouring properties.

36 Advocate Pallot referred to passages in paragraphs 10 and 11 of the June Judgment, which are quoted above at paragraph 15. He characterised those views as, in short, a holding that, through the actions of the Planning Department, the Minister had acted negligently in granting planning permission. The consequences of such negligence were found to be reasonably foreseeable and the Second Respondent, having acted upon the permission, was entitled to some level of indemnification in respect of legal costs.

37 Advocate Pallot pointed out to us that, at the hearing on 29 April 2008, it had been submitted that such an entitlement would, in effect, add a proviso to Article 19(7) of the Planning and Building (Jersey) Law 2002 (the "2002 Law").

38 Article 19 concerns the grant of planning permission, the manner in which the Minister should proceed, and what powers are open to him. In concluding the provisions, Article 19(7) is in the following terms:-

> ***"(7) Action taken by the Minister under this Article does not give any person the right to claim compensation in respect of any loss or damage***

the person may suffer as a result of that action."

39 In Advocate Pallot's submission, if, by evoking Article 2(1) of the 1956 Law, the Minister could be held liable for indemnification of the nature sought here, the public policy considerations underlying Article 19(7) would be subverted. The Planning Department would have to examine every application for planning permission from every conceivable angle as far as private rights of neighbours were concerned. The caution attached to each planning permission would no longer afford protection against a claim by a grantee or any other person acting on the strength of the permission. On any action brought by a neighbour for enforcement of a private right, the planning permission would, to all intents and purposes, amount to an insurance policy against the costs of an unsuccessful defence.

40 The stark consequence would be that the Minister would need to exercise extreme caution before granting planning permission. The obvious anticipation would be that, in any case where the proposed development, even if in accordance with the Island Plan, carried any risk of inducing proceedings to enforce a private right, the Law Officers would advise the Minister to refuse permission.

41 The Minister would therefore be faced with a difficult dilemma. In terms of Article 19(2) of the 2002 Law: "In general, the Minister shall grant planning permission if the proposed development is in accordance with the Island Plan". But by acting in accordance with Article 19(2) the Minister would risk incurring a liability to indemnify the developer should the developer be sued. The June Judgment did not address the public policy considerations.

42 Mrs. Pinel also addressed us. By reference to her written submissions she indicated that the company had long felt it was the victim of litigation circumstances, that Article 2(1) of the 1956 Law gave the court power to award costs against the Appellant and that there was good argument for requesting all costs to be paid by the Appellant. After referring us to various statements in the Appellant's contentions and in her own witness statement dated 4 October 2007, Mrs. Pinel sought to show, with particular reference to accounts, that the company used four active lorries and drivers both before and after the move to Heatherbrae Farm and that, after the move, turnover stayed consistent. She therefore sought to refute the suggestion that there had been an increase of activity of between five and six fold. Mrs. Pinel also contended that the Appellant was out of time in seeking an order quashing the order of 20 December 2007 convening the Appellant as a party. She referred to Rule 3 of the Court of Appeal (Civil) Rules 1964.

Discussion

43 In *Drake v Gouveia* [2000] JLR 411, the Royal Court, having held that the principles laid down in *Aiden Shipping* were equally applicable in Jersey and, accordingly, that Article 2(1) of the 1956 Law empowered the court, in the exercise of its discretion, to order any

non-party to pay costs where that was considered to be the just determination went on to state (at 418):-

> ***"No doubt this is a jurisdiction which ought to be exercised sparingly and with caution.*** Nonetheless, particularly in these days, when the costs of litigation threaten to make the courts inaccessible in practice to sections of the community, it is a power which the court should use in appropriate circumstances in order to ensure that litigants are not unfairly treated."

44 I agree that, given the almost identical wording as between Article 2(1) and Section 51(1) of the Supreme Court Act 1981, the views expressed in *Aiden Shipping* are equally applicable in this jurisdiction. For my own part, however, I am less inclined to support the view that the jurisdiction is one where the qualification as to exercise should be expressed with words such as " *sparingly and with caution*". In my view the proper exercise of the jurisdiction is, simply, fact specific. Further, I am reluctant to view the exercise of the jurisdiction, except in particular circumstances, as involving a concept of ensuring that litigants are not unfairly treated. In exercising the discretion, many factors will require to be taken into account. As Balcombe L.J. stated in *Symphony* (at 194B): " ***The judge should be alert to the possibility that an application against a non-party is motivated by resentment of an inability to obtain an effective order for costs against a legally aided litigant"***. Both parties are entitled to justice.

45 It is appropriate to start discussion of the issues with the views expressed in *Aiden Shipping*. In that decision the only reasoned judgment was set out in the speech of Lord Goff of Chieveley. The case concerned a question of construction of Section 51(1) of the Supreme Court Act 1981 which, as I have indicated, is, in all material respects, in the same wording as Article 2(1) of the 1956 Law. For completeness, I quote Section 51(1):

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

46 The main question at issue in *Aiden Shipping* was whether, despite the broad words of that provision, there was to be implied a limitation upon persons by whom costs might be ordered to be paid, namely that costs might only be ordered to be paid by persons who were parties to the relevant proceedings.

47 Putting the relevant facts in *Aiden Shipping* as succinctly as I can, they were as follows. Ship owners had made a claim against charterers. The charterers, in turn, claimed against the sub charterers and both claims went to arbitration. There were two awards and each was remitted for further consideration, as a result of which disputes arose as to the scope of the remissions. Both remissions were, by agreement, heard together and reached the Court

of Appeal: see [1985] 1 WLR 1222. As indicated by Sir John Donaldson MR, if the claims had started by action rather than arbitration, there would have been a " *third party*" situation and a court would have had power, under the rules of court, to make the owners pay the charterers' costs of the action, including any costs paid by the charterers to the sub charterers in the third party proceedings. Because the initiating proceedings were arbitrations rather than actions, the Court of Appeal, with manifest regret, held that the judge at first instance did not have power to make such an order.

48 In the Court of Appeal the Master of the Rolls, basing his views upon the earlier Court of Appeal decisions of *Forbes-Smith v Forbes-Smith and Chadwick* [1901] P 258 and *John Fairfax & Sons Pty. Limited v E.C. de Witt & Co.* [1958] 1 QB 323 said (at page 1227):-

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

49 Having noted that, quite apart from the fact that there was no consolidation order in that case, it was difficult to see how the proceedings could have been consolidated, his Lordship continued (at page 1228):-

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

50 The other two members of the Court of Appeal delivered concurring judgments and it is, therefore, not surprising that, notwithstanding the firm views expressed in the two earlier Court of Appeal decisions as to there being no power to award costs against a stranger to the action, their Lordships' House was prepared to do so.

51 It is against this background within the *Aiden Shipping* litigation, that it is instructive to note more fully than I have done above certain of the views expressed by Lord Goff in his speech. At page 975E – H he said:-

> ***"It is, I consider, important to remember that section 51(1) of the Act of 1981 is concerned with the jurisdiction of the court to make orders as to***

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

52 In proceeding to his conclusion, Lord Goff stated, and here I repeat for convenience:-

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

jurisdiction .

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

53 These views command the greatest respect for present purposes. Although expressed in another jurisdiction, they come from one of the most highly regarded voices in the House of Lords in the 20th century and are stated in relation to a statutory provision which, in my view, is identical in material respects to that of Article 2(1) of the 1956 Law. In the broadest terms their Lordships, through Lord Goff, indicated that the jurisdiction to award costs was without limit but that the exercise of the jurisdiction must be in accordance with reason and justice; with Rules Committees and Courts of Appeal being able to control or guide.

54 Proceeding chronologically, the next case of importance in England and Wales is that of *Symphony Group plc v Hodgson* [1994] QB 179 (hereinafter " *Symphony*"), where the leading judgment was issued by Balcombe L.J. A close reading of that judgment can give the impression that his Lordship might have been less inclined than Lord Goff of Chieveley to construe the wording of Section 51 of the Act of 1981 so widely: see, for example, 190C-F and 191C. Be that as it may, his Lordship set out a systematic appraisal of the reported decisions after *Aiden Shipping* where the courts had been prepared to order a non-party to pay costs of proceedings and then proceeded to set out guidance.

55 As regards decisions reported between 1986 and 1993, Balcombe L.J. considered (at page 191F) that they might be summarised, conveniently, under the heads:-

"(1) Where a person has some management of the action … .

(2) Where a person has maintained or financed the action…

(3) In *Gupta v Comer* ***… this court approached the power of the court to order a solicitor to pay costs … as an example of the exercise of the jurisdiction under section 51 of the Act of 1981*** .

(4) Where the person has caused the action. In *Pritchard v J. H. Cobden Limited* [1988] Fam. 22 ***the plaintiff had suffered brain damage through the defendant's negligence.*** That resulted in a personality change which precipitated a divorce. This court held that the defendant's agreement to pay the costs of the divorce proceedings could be justified …

(5) Where the person is a party to a closely related action which has been heard at the same time but not consolidated …

(6) Group litigation where one or two actions are selected as test actions …

I accept that these categories are neither rigid nor closed. They indicate the sorts of connection which have so far led the courts to entertain a claim for costs against a non-party."

56 Balcombe L.J. proceeded to indicate that, in his view, the particular circumstances of the Symphony Group case required acceptance of the invitation of Lord Goff to lay down some principles for the guidance of judges of first instance. He then stated (at page 192H):-

"In my judgment the following are material considerations to be taken into account, although I do not suggest that there may not be others which are relevant .

(1) An order for the payment of costs by a non-party will always be exceptional: see per Lord Goff in *Aiden Shipping* ***… The judge should treat any application for such an order with considerable caution*** .

(2) It will be even more exceptional for an order for the payment of costs to be made against a non-party, where the applicant has a cause of action against the non-party and could have joined him as a party to the original proceedings. …

(3) Even if the applicant can provide a good reason for not joining the non-party against whom he has a valid cause of action, he should warn the non-party at the earliest opportunity of the possibility that he may seek to apply for costs against him. …

(4) An application for payment of costs by a non-party should normally be determined by the trial judge …

(5) The fact that the trial judge may in the course of his judgment in the action have expressed views on the conduct of the non-party constitutes neither bias nor the appearance of bias …

(6) The procedure for the determination of costs is a summary procedure, not necessarily subject to all the rules that would apply in an action. Thus, subject to any relevant statutory exceptions, judicial findings are inadmissible as evidence of the facts upon which they were based in proceedings between one of the parties to the original proceedings and a stranger… .

(7) Again, the normal rule is that witnesses in either civil or criminal proceedings enjoy immunity from any form of civil action in respect of the evidence given during those proceedings …

(8) The fact that an employee, or even a director or the managing director, of a company gives evidence in an action does not normally mean that the company is taking part in that action, insofar as that is an allegation relied upon by the party who applies for an order for costs against a non-party company …

(9) The judge should be alert to the possibility that an application against a non-party is motivated by resentment of an inability to obtain an effective order for costs against a legally aided litigant. …". (192H – 194D)

57 This year a decision was issued by the Court of Appeal in England and Wales shortly before the April hearing in this matter, but not reported until September: see *Dolphin Quays Developments Limited v Mills and Others* [2008] 1 WLR 1829. In that case, dismissing an appeal from a judgment of Sir Andrew Morritt C, the leading judgment was given by Lawrence Collins L.J.

58 Lawrence Collins L.J. indicated that, as the court was dealing with an exercise of discretion, he required to deal with each of the factors set out by the learned Chancellor in order to see whether there was any error of principle. He addressed the issue of ' *no "exceptional" circumstance*' as follows:-

"71 The exceptionality test derives from this court's application of Lord Goff of Chieveley's statement in the *Aiden Shipping* ***case*** [1986] AC 965, 980 ***that "in the vast majority of cases, it would no doubt be unjust to make an award of costs against a person who is not party to the relevant proceedings".*** Consequently, "an order for the payment of costs by a non-party will always be exceptional": *Symphony Group plc v Hodgson* [1994] QB 179, 192 . ***See also****TGA Chapman Limited v Christopher* [1998] 1 WLR 12, 20; *Globe Equities Limited v Globe Legal Services Limited* [1999] BLR 232, 239***and****Hamilton v Al Fayed (No 2)* [2003] QB 1175, ***para 22***.

72 In the *Dymocks* ***case*** [2004] 1 WLR 2807 , ***para 25, Lord Brown summarised the authorities in this court: exceptional in this context meant no more than outside the ordinary run of cases where parties pursued or defended claims for their own benefit and at their own expense.*** The ultimate question in any such "exceptional" case was whether in all the circumstances it was just to make the order.

73 Mr. Moss for Mr. Mills accepted that the present case may be an entirely normal case of receivers seeking to enforce a contractual right forming part of the security. But it is outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense (the ***Dymocks case, at para 25) because (a) the claim was brought by the receivers, using the name of the company, in the interests of the bank and using funds charged to and belonging in equity to the bank, and the company did not pursue the claim for its "own benefit" or at its "own***

expense"; (b) if the claim against Mr. Mills had succeeded, all the damages recovered would have been subject to the charge and payable to the bank; (c) the fact that there was nothing speculative about the claim is irrelevant to the question of whether the present case is outside the ordinary run of cases, and it is a feature of many of the cases in which a third party costs order was made but the third party had acted on legal advice; (d) although Sir Andrew Morritt C. said that if an order were made in this case then it should be made in all such cases, the jurisdiction will always remain fact-specific. There would be no injustice in cases such as the present, just as it is where there is also a liquidation .

74. My conclusion on this aspect is that Sir Andrew Morritt C properly applied the "exceptional circumstance" test by considering whether this action was out of the ordinary run of cases, and ultimately (in conjunction with the other factors) whether it was just to make the order. I agree with him that this case was an entirely normal case of receivers seeking to enforce a contractual right forming part of the security."

59 From these passages it can be seen, therefore, that whilst Lawrence Collins L.J. was content to refer to the decision in *Symphony* to identify that an order for the payment of costs by a non-party would always be exceptional, he was at pains to recognise the views expressed in the *Dymocks* case that exceptionality meant no more than outside the ordinary run of cases where parties pursued or defended claims for their own benefit and at their own expense.

60 *Dymocks Franchise Systems (NSW) Pty Limited v Todd* [2004] 1 WLR 2807 (hereinafter "*Dymocks*") was advice of the Privy Council proceeding from a decision of the New Zealand Court of Appeal. The advice of the Board leading to that judgment was delivered by Lord Brown of Eaton-under-Heywood where, among other matters, he expressed the following views:-

"17. Their Lordships are of a clear view that where, as here, the order being sought is one against a non-party (and, indeed, the first such order to be sought in the proceedings), it is in the strictest sense supplemental to the judgment already pronounced and sealed and in no way varies it. The Todds remain liable pursuant to the initial order. Any order made against Associated would be separately enforceable although obviously Dymocks would only be entitled to recover in all up to the total of their (yet to be taxed) costs .

Issue (ii) — Causation

18. The Board was referred to very little authority on this issue, merely dicta from *Hamilton v Al Fayed (No 2)* [2003] QB 1175 ***and*** *Gore (t/a Clayton Utz) v Justice Corpn Pty Limited* (2002) 189 ALR 712 . ***In the****Hamilton****case*** [2003] QB 1175, ***Simon Brown LJ noted at p 1198, para 54 that: "There is***

ample authority" and "no dispute" but that "proof of causation is a necessary precondition to the making of a section 51 order against a non-party" before concluding, as a further ground for rejecting the application made in that case for costs against non-party funders, that some at least of the contributions "plainly did not cause Mr. Al Fayed to incur any costs which he would not otherwise have incurred".

19. In the *Gore* ***case*** 189 ALR 712, 731 , ***para 53, the Federal Court of Australia was clearly adopting the same approach when stating:-***

"Justice Corpn had nothing to do with the decision to institute those proceedings and it had nothing to do with any subsequent decision (prior to 21 April 1999) to prosecute those proceedings. There is no basis upon which *Clayton Utz* ***could claim its cost against*** *Justice Corpn* ***in respect of that period.*** As his Honour said, there was no causal connection between those costs being incurred and the involvement in the case of *Justice Corpn* ."

20. Although the position may well be different when a number of non-parties act in concert, their Lordships are content to assume for the purposes of this application that a non-party could not ordinarily be made liable for costs if those costs would in any event have been incurred even without such non-party's involvement in the proceedings. On the facts of this case, however, their Lordships conclude that, but for Associated's involvement, the Todds would not have pursued their appeal to the Court of Appeal and thus occasioned the costs both in that court and on the further appeal to the Privy Council .

…

…

Issue (iii): Discretion

23. A great number of authorities were put before the Board on this issue, cases decided variously in the United Kingdom, Australia and New Zealand. Although Mr. Gustafson for Dymocks cautioned the Board against too ready assumption that the courts of New Zealand would take the same approach to costs applications against "pure funders" as the English court took in *Hamilton v Al Fayed (No 2)* [2003] QB 1175 ***– contingency fee arrangements not having been legalised in New Zealand – their Lordships are not persuaded that there is in fact any material difference in the approach taken in the various different jurisdictions to the exercise of this discretion. On the contrary, one of the latest and most helpful of the many authorities before the Board, the decision of the full court of the Federal Court of Australia in*** *Kebaro Pty Ltd v Saunders* [2003] FCA 5 ***discusses in detail a number of the leading cases in all three jurisdictions (including*** *Hamilton v Al Fayed (No 2)* ***) without suggesting any difference of approach between them***.

24. What, then, are the principles by which the discretion to order costs to be paid by a non-party is to be exercised and, in the light of these principles, should the Board make the order here sought against Associated?

25. A number of the decided cases have sought to catalogue the main principles governing the proper exercise of this discretion and their Lordships, rather than undertake an exhaustive further survey of the many relevant cases, would seek to summarise the position as follows .

(1) Although costs orders against non-parties are to be regarded as "exceptional", exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such "exceptional" case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against .

(2) Generally speaking the discretion will not be exercised against "pure funders", described in para 40 of *Hamilton v Al Fayed (No 2)* *[2003] QB 1175, 1194* ***as "those with no personal interest in the litigation who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course".*** In their case the court's usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights .

(3) Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is "the real party" to the litigation, a concept repeatedly invoked throughout the jurisprudence …

(4) Perhaps the most difficult cases are those in which non-parties fund receivers or liquidators (or, indeed, financially insecure companies generally) in litigation designed to advance the funder's own financial interests. … .

26. …

27. …

28. …

29. In the light of these authorities their Lordships would hold that,

generally speaking, where a non-party promotes and funds proceedings by an insolvent company solely or substantially for his own financial benefit, he should be liable for the costs if his claim or defence or appeal fails. As explained in the cases, however, that is not to say that orders will invariably be made in cases, particularly, say, where the non-party is himself a director or liquidator who can realistically be regarded as acting rather in the interests of the company (and more especially its shareholders and creditors) than in his own interest."

61 I particularly note from the advice in *Dymocks* that, although the decision in *Symphony* was cited in argument, it did not feature in the citation of authority set out in the advice of the Board.

62 The case of *Gore*, referred to by Lord Brown of Eaton-under-Heywood in *Dymocks*, was the case of *Gore and Others (t/as Clayton Utz) v Justice Corporation Pty Limited* (2001) 189 ALR 712, 731 (hereinafter " *Gore*"). The facts of that case were that, in respect of a professional negligence action, the plaintiff entered into an agreement with Justice Corporation to receive financial assistance in litigating the assessment of damages. Justice Corporation was to receive, effectively, 8% of any award of damages and the agreement also provided that Justice Corporation would pay necessary litigation costs in relation to the claim including the plaintiff's costs and the defendant's costs. The litigation agreement also provided that the plaintiff was to retain control of the litigation. The defendant had sought an order for Justice Corporation to provide security for costs but this was refused. The passage quoted by Lord Brown, in his paragraph 19 (see paragraph 61 above) related to proceedings in respect of liability, as opposed to the later assessment of damages. In respect of the later assessment of damages, Justice Corporation's direct financial interest in the outcome of the case coupled with the security which the litigation agreement gave to the plaintiff to continue resulted in Justice Corporation's liability to the respondent for its costs in respect of other relevant periods.

63 In this rehearsal I consider that I must also refer to the case of *Pritchard v J.H. Cobden* (hereinafter "Pritchard"), referred to briefly by Balcombe LJ in *Symphony*. It will be recollected that the words of Balcombe L.J. (at [1994] QB 192C/D) in respect of *Pritchard* were that ***"The plaintiff had suffered brain damage through the defendant's negligence.*** That resulted in a personality change which precipitated a divorce. This court held that the defendant's agreement to pay the costs of the divorce proceedings could be justified as an application of the Aiden Shipping principle."

64 In *Pritchard* the plaintiff had been severely injured in a road traffic accident caused by the defendant's negligence and had sustained brain damage which resulted in a complete change of personality. His marriage broke down, and in 1984 a divorce was granted on his wife's petition. In an action against the defendants, the plaintiff, who was unable to work because of his injuries, claimed, among other matters, his past and future loss of earnings and the financial loss incurred as a result of his divorce. The defendants admitted liability and did not dispute that the breakdown of the plaintiff's marriage was a result of the injuries

sustained in the accident. The plaintiff's action against the defendants and his wife's application for financial relief in the matrimonial proceedings were tried together in 1985 and, after awarding special damages and general damages, the trial judge also awarded the plaintiff a significant sum as the financial loss arising out of the divorce. In particular, he ordered that the defendants should pay the costs of the plaintiff's divorce and ancillary relief proceedings.

65 As is seen from the latter part of the report (see [1988] Fam. 22, 51) it appears that, by agreement, the parties treated the costs as being a matter of costs rather than damages: see 51C. The issue arose as an ancillary matter but the following view was expressed by O'Connor L.J.:-

> ***"It is quite plain that, by agreement, the parties treated [the claim for costs] as being a matter of costs although at the time the order was made a costs order could only be made against a party to the proceedings as decided in*** *Forbes-Smith v Forbes-Smith and Chadwick* [1901] P 258 .
>
> ***That decision has been overruled by the recent decision of the House of Lords in [Aiden Shipping] which shows that discretion as to costs can be exercised to order a party who is not a party to the proceedings to pay them.*** Lord Goff of Chieveley said, at p. 1061, that he could not imagine the discretion being used against some person who has no connection with the proceedings in question. In the present case they were not so unrelated and it seems to me the order could not be attacked on that ground. I think that there are substantial grounds for saying that in all the circumstances of this case it is not unfair that the defendants should be held to the order to which they agreed after the hearing before the judge."

66 Finally there is *Drake v Gouveia*. In that case an action was struck out on the grounds of inordinate and inexcusable delay. On the respondent's application for costs, the appellant requested that her former advocates be ordered to pay the respondent's costs or be convened so that they could be heard on the matter. The master refused the request and ordered that the appellant pay the respondent's costs. On appeal to the Royal Court, the court having determined to follow the principles laid down in *Aiden Shipping*, the learned Bailiff said (at page 419):-

> ***"No explanation has therefore been given for the inactivity by [the former advocates] between July 18th, 1997 and March 2000, which led to the action being struck out on the ground of inordinate and inexcusable delay*** .
>
> ***It is, of course, true that an action in negligence might lie against [the former advocates] and that the appellant could add the costs incurred in the abortive action against the respondent to her claim in such an action.*** However, no such action has yet been instituted and we cannot assume that it will be instituted. … .

….

> ***Why should she be required to face the uncertain prospect of beginning fresh litigation to recover these costs?*** …. Documentary evidence may have been lost or destroyed. Responsibility for this unhappy state of affairs rests fairly and squarely with [the former advocates], and in my judgment it is just that they should pay the wasted costs of the action. I therefore order that the costs of the respondent up to August 10th, 2000 and the ***costs of the appellant between March 16th and August 10th, 2000 be paid by [the former advocates] on the standard basis."***

Conclusions

67 I have set out the relevant authorities in some detail as this is the first occasion upon which this court has been called upon to address the issue of non-party liability for costs. Although, in the end, I have come to my own conclusion as to the result and appropriate disposal of this appeal without much hesitation, it will, perhaps, be apposite to set out some views as to the principles to be applied in this Jurisdiction.

Jurisdiction

68 Whilst the order below is, in effect, for payment by the non-party to the losing party in the principal litigation, it is restricted to a proportion of the costs which that party pays to the successful party. As such, it is a similar order to that pronounced in *Aiden Shipping*, albeit that *Aiden Shipping* was a case where there were two sets of proceedings in effect treated as one. Accordingly, as regards jurisdiction, the present case falls within the principles set out by Lord Goff.

Causation

69 It seems to me that each of Advocate Pallot's initial submissions can be characterised as raising, in individual ways, the issue of lack of causation, which, consistent with *Gore*, appears to have been a not unimportant element of the approach of the Privy Council in *Dymocks*. I accept, however, as Advocate Pallot presented matters to us, that if there is no real connection, no question of causation arises. As Lord Brown of Eaton-under-Heywood stated at paragraph 20 " ***their Lordships are content to assume for the purposes of this application that a non-party could not ordinarily be made liable for costs if those costs would in any event have been incurred even without such non-party's involvement in the proceedings***."

70 Lord Brown's words import two possible requirements (i) involvement in the proceedings and (ii) costs which would not otherwise have been incurred. Here there was no involvement by the Minister in the proceedings whatsoever. The Second Respondent did

not go to the Minister when the First Respondents raised proceedings, either to bring the Minister into the proceedings or ask for some form of litigation support. As planning authority the position was plain on the face of the permission and the Law. The permission bore the Caution and Article 19(7) removed any doubt as to the Minister's relationship with any other persons after the permission had been granted, so long as the action was lawful and within the Minister's jurisdiction. In my view, Advocate Pallot was correct to identify that whilst the fact of the grant of planning permission and its exercise were at the root of the litigation, nothing connected the Minister with the litigation itself. He had not funded the litigation, not directed the litigation, not stood to benefit from the outcome and not participated in the litigation.

71 As regards *Pritchard*, not only did it proceed upon an agreement between the parties in question, it was also a case where the parties in question were actually parties to a relevant action (a damages action) and the determination of the Court of Appeal was at best protective in that the agreement – for the very particular purposes of that action – was one to which it was not unfair to hold the defendants. It is therefore a case where the Court was not seised with a live issue as to causation.

72 *Drake v Gouveia* was, as indicated above, a very stark case where no explanation was offered by the former advocates which might have raised a real issue as to causation.

Discretion

73 In my view, even if some connection is discerned as between the Minister and the litigation, and assuming for present purposes that connection without actual causation might be sufficient, the circumstances were not such as to bring a finding against the Minister within a reasonable exercise of discretion. There was no encouragement to litigate or to defend. The planning permission was permissive only. It was a decision which had to be taken on planning merits. The Second Respondent had determined to implement it. Even if it were relevant in a question as to liability for the First Respondents' costs, which I very much doubt, there was no evidence before the Royal Court of such action on the part of the Minister which might amount, in law, to such encouragement as would give rise to consideration of liability. There was no evidence that the Minister at any stage put himself or his department in the position of advisor to the Second Respondent. There was no indication that the proceedings were such as to be under the control of or for the benefit of the Minister. Unlike *Pritchard*, the Minister had not accepted any responsibility for what happened to the First or Second Respondents.

Opportunity for a hearing

74 I agree with Advocate Pallot that there should have been a hearing at which the position of the Minister was addressed (a) as to whether someone such as the Minister came within the ambit of the jurisdiction and discretion to award costs, (b) as to whether there was any

'encouragement', (c) as to whether any such encouragement or other circumstance brought the Minister within relevant principles, (d) as to the import of Articles 19(2) and 19(7) of the 2002 Law (e) as to the import of the Caution set out on the face of the planning permission and (f) as to the implications for Ministers generally and the Minister for Planning in particular.

75 The situation in *Drake v Gouveia* perhaps apart, such considerations militate against a summary procedure. The claim against the non-party may be in contract and there might well be an issue as to the terms of the contract and the extent of any indemnity. If, on the other hand the claim is in tort is it, here, a claim for economic loss, where different considerations would apply from those in *Pritchard* where there had been a road traffic accident? In either case there might well be very serious issues to be tried. *Drake v Gouveia* was, I repeat, a remarkably stark case where the former advocates offered no justification, or even explanation, for their non activity. It is therefore understandable why the learned Bailiff would consider it appropriate to proceed upon the basis that the matter spoke for itself

General Principles

76 I turn now to consideration of general principles.

77 As I have said, it seems to me that this jurisdiction should continue to accept the views expressed in *Aiden Shipping*; but, I would add, together with those expressed in *Dymocks*.

78 Following on from these cases I am of the view that the principles which can be stated are the following:

79 Costs orders against non-parties will be exceptional in the sense of having considerations outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The exceptional considerations will be fact specific, and the ultimate consideration will be that of justice as between the litigant seeking the order and the person against whom the order is sought.

80 Generally speaking, the discretion will not be exercised against "pure funders", namely, persons with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course.

81 Ordinarily, a non-party will not be made liable for costs if those costs would in any event have been incurred even without such non-party's involvement in the proceedings.

82 Difficult cases will arise where non-parties fund litigation designed to advance the funder's

own financial interests.

83 Where a non-party promotes and funds proceedings by an insolvent company solely or substantially for his own financial benefit, that non-party should be liable for the costs if the claim or defence or appeal fails. But the position of an individual director who participates in or funds litigation will require careful consideration.

84 The guiding considerations are reason and justice.

85 Ordinarily, a non-party, non-funder, with no personal interest in the litigation, and who does not stand to benefit from it will not be liable for the costs incurred by an unsuccessful party without a full hearing of the merits upon which it is contended that potential liability arises.

Determination

86 In my opinion, the determination by the learned Bailiff below, whilst within the jurisdiction given by Article 2(1) of the 1956 Law, failed to have due regard to causation.

87 Were I wrong in that view, or were causation not an essential element, I consider that the determination was outwith the reasonable range of options open to the court below. In particular it seems to me that the arguments arising in respect of Article 19(2) and (7) are of such importance that failure to indicate how they should be dealt with appears to lead to a view that a relevant consideration has not been taken into account. For my own part, taken with all the other considerations here, the weight of considerations in any balancing exercise leads ineluctably to the view that the determination below was not one which was reasonably open to the Royal Court.

88 Further, unlike *Drake*, the circumstances were far from such as might have been thought to allow the issues to be determined without further formal enquiry. Whilst there will indeed be cases where the liability of a non-party can be dealt with summarily because of his close proximity to, or direction of, the litigation, I cannot discern a persuasive argument in favour of such a summary procedure being appropriate where the potentially liable non-party has not funded the litigation, not directed the litigation, not stood to benefit from the outcome and not participated in the litigation.

89 I would only add that, properly approached, I see no reason why costs issues as regards non-parties should be based upon a consideration that such non-parties should have been made party to the principal litigation. Bi-partite litigation is expensive as it is; tri-partite litigation is at least half as expensive again. In many cases, third party proceedings are properly adopted, with both principal parties understanding the increased litigation costs. I would have thought that a clear distinction emerges between cases where there should be proper third party proceedings and others where there is, merely, a funder whose position is

so clear that an application for costs against that person can, quite simply, await the outcome of the principal litigation.

Decision

90 For all these reasons I would allow the appeal. In my view, for the reasons which I have set out above, the Appellant is entitled to exclusion of that part of the June Judgment which requires him to make any contribution at all to the costs of the proceedings instituted by the First Respondents.

91 Finally I deal with that part of the Appeal to the effect that the Minister should not have been convened to attend, as set out in the order of 20 December 2007. In my view, Mrs Pinel's submission that, as the notice of appeal was not served within one month from the date on which the judgment or order of the court below was pronounced, in accordance with Rule 3 of the Court of Appeal (Civil) Rules 1964, that part of the appeal cannot proceed, is correct. That part of the Appeal should, in my view, therefore be refused. However, nothing will turn on this if I am correct in my principal views.