[2005–06 Gib LR 95]

LAYCOCK v. JAVA OIL LIMITED and BRIGHTSIDE SERVICES LIMITED

SUPREME COURT (Schofield, C.J.): October 17th, 2005

Civil Procedure—costs—costs against non-party—may award costs against non-party who intervenes in case in bad faith and quantifiable costs expended in consequence—award may be made against attorney who concocts false witness statements in support of claimant's case

The claimant brought proceedings for injury allegedly caused by a blow to the head sustained on premises occupied by the defendants.

The claimant alleged that he suffered severe injuries at the defendants' construction site, leaving him unable to carry on his business activities. He claimed special damages of just under £2m., which included loss of earnings from a recycling business in Mexico. Having failed to comply with various disclosure orders, his claim against the first defendant was struck out. He applied to have this order set aside and the second defendant applied to have the action against it struck out. The first defendant then produced evidence from an investigator indicating that the claim in relation to the Mexican business was fraudulent, and, following his failure to answer these allegations, the claimant's application and his action against the second defendant were dismissed. The defendants were awarded costs on an indemnity basis and obtained a freezing order against the claimant, whereupon he transferred money from his bank account into a friend's and left Gibraltar.

The defendants alleged that Mr. Sullivan, the claimant's US attorney, who appeared from an early stage to have been acting as an instructing attorney and was responsible for all the evidence gathering, had prepared false documents and statements and was therefore guilty of complicity in the fraudulent claim. He was joined as a respondent in their application for costs. They submitted that (a) the Supreme Court Ordinance, s.12, gave the court all the powers of the English High Court, which, by English authority, had complete discretion as to the award of costs; and (b) the exceptional circumstances under which costs could be awarded against a non-party had been shown in the present case, namely that (i) Mr. Sullivan had intervened in the claimant's case; (ii) his intervention had been in bad faith or for an ulterior motive; (iii) the defendants had expended costs as a result of his intervention (in obtaining evidence to refute the false evidence he had supplied); and (iv) those costs could be quantified.

Held, making an order for costs:

(1) Costs would be awarded against Mr. Sullivan since the court had jurisdiction to award costs against a person who was not a party to the litigation and it was appropriate to do so in the present case. There was no doubt that Mr. Sullivan had intervened on behalf of the claimant and there was abundant evidence that he had acted in bad faith in manufacturing false witness statements and documents and lying to the court. The defendants had demonstrated that they had been put to considerable expense in defending the action and proving the falsity of the claimant's evidence (para. 27; para. 62).

(2) Mr. Sullivan would be made liable for the entire costs of the proceedings on an indemnity basis. That he was liable for costs on the same terms as the claimant was justified as he had become involved in the claim within weeks of its inception and had clearly taken a supervisory role (para. 63).

Cases cited:

(1) *Aiden Shipping Co. Ltd.* v. *Interbulk Ltd.*, [1986] A.C. 965; [1986] 2 All E.R. 409, applied.

(2) *Gulf Azov Shipping Co. Ltd.* v. *Idisi*, [2004] EWCA Civ. 292, applied.

(3) *Symphony Group plc* v. *Hodgson*, [1994] Q.B. 179; [1993] 4 All E.R. 143, applied.

Legislation construed:

Supreme Court Ordinance (1984 Edition), s.12: The relevant terms of this section are set out at para. 27.

Supreme Court Act 1981 (1981 c.54), s.51 (as substituted by the Courts and Legal Services Act 1990 (1990 c.41), s.4): The relevant terms of this section are set out at para. 25.

The claimant did not appear and was not represented;
D. Melville, Q.C., R. Pershad and *M. Isola* for the defendants.

1 **SCHOFIELD, C.J.:** This is an unusual case in that the costs of an action have been sought, and awarded, against a person who was not a party to the litigation. On September 6th, 2005, I ordered the costs, on an indemnity basis, to be paid by the respondent, Harold Sullivan II (to whom I shall refer as "Mr. Sullivan"). These are my reasons for so doing.

The original claim

2 On November 1st, 2000, the claimant, Peter Laycock, allegedly suffered a blow to the head as a gate surrounding a construction site was being opened. Mr. Laycock maintained that the site was occupied by the defendants, Java Oil Ltd. and Brightside Services Ltd., whom he held responsible for the injuries. Mr. Laycock claimed in this suit, filed on

October 22nd, 2003, that he had suffered severe injuries which had rendered him unable to carry on his substantial business activities. His schedule of special damages came to just short of £2m.

3 Initially, the two defendants were represented by different solicitors. The solicitors for the first defendant pursued the question of disclosure vigorously and, on Mr. Laycock failing to meet various orders, succeeded in obtaining an order that the claim be struck out as against it. The second defendant then changed solicitors and applied to have the claim against it struck out. I heard that application at the same time as I heard an application of Mr. Laycock to have my order striking out the claim against the first defendant set aside.

4 These applications were heard on July 20th, 2004. Prior to this date, Mr. Nicholas Cruz, of Cruz & Co., had been representing Mr. Laycock. He had sought to come off the record at a case management conference held on June 7th, 2004, but I had prevailed upon him to assist Mr. Laycock to put his documents in order so as to ensure that he had every opportunity to present his case. I could not resist Mr. Cruz's further application to be relieved of his responsibilities towards Mr. Laycock prior to the hearing of July 20th, 2004. I shall return later in this judgment to the relationship between Mr. Cruz and Mr. Sullivan and, fundamentally to the orders I made, to the relationship between Mr. Laycock and Mr. Sullivan. It is sufficient here to note that Mr. Sullivan had been described throughout the proceedings as Mr. Laycock's US attorney and that the correspondence shows that Mr. Cruz was instructed on Mr. Laycock's behalf by Mr. Sullivan, who practises law in California.

5 Some eight days prior to the hearing of July 20th, 2004, Mr. Isola filed a statement with enclosures on behalf of the first defendant which gave the lie to one of Mr. Laycock's heads of claim for loss of earnings in respect of a Mexican recycling business.

6 In a statement dated June 28th, 2004, Mr. Laycock had said that he was unable to produce trading accounts for the Mexican recycling business—

> ". . . given that they do not exist. These documents do not exist because a corporation, Plasti Pet of Mexico S.A., conducted the business. Documents from Plasti Pet have been produced along with a letter from the accountant, C.P. Racquel Rodriguez Sobreyra."

7 This is what the claimant had to say in his statement of June 28th, 2004, under the heading "The Business in Mexico 1998:"

> "I got in contact with Sony Electronics to start again in the recycling business. Sony Electronics was based in Tijuana. I commenced negotiations with Sony Electronics to take their scrap

and sell it to recycling plants. Sony Electronics had a lot of wiring which contained an outer coating of PVC, which is why I contacted Mr. Casas. During this time I contacted Mr. Casas because I needed somebody to represent me in Mexico. I had met Mr. Casas some years before through a friend and I knew he was a business attorney in Mexico with many years of experience. However, I decided not to take the contract on because it was too large. I met with Mr. Casas in Mexico and I decided to set up the recycling business there around November 1998. Not only was it more manageable, but in addition it was cheaper to buy the scrap material from Mexico City. Furthermore, the places we were going to sell the material were close to where we would obtain it from.

The way the recycling business worked was that I would travel to the scrap yards and buy the recycling material or it would be delivered to a rented warehouse where I could inspect and grade it. The materials would then be sold on to recycling plants. Mr. Casas would pay me on a commission basis; essentially, I got a percentage of the profits earned from sales. Transactions were carried out in cash, as is the usual practice in this business. The business was going very well; I was earning approximately $6,100.00 per month on average. Mr. Petrini assisted me during the time that I worked in Mexico, preparing my accounts so I could keep records of the money I earned and my expenses. I refer to exhibit 'PL1.' We would sell to manufacturers, *etc*."

The exhibits he produced are invoices to Mr. Casas from February 1999 to January 2000.

8 Mr. Casas described himself as a Mexican attorney and in his witness statement of June 26th, 2004 he had this to say about the Mexican recycling business:

"I had previously met Mr. Peter Laycock, from Great Britain, when he was attempting to purchase various types of plastics from Pemex, the national oil company of Mexico.

I also met with Mr. Harry Jenkins, a business associate of Mr. Laycock, who came here from England to inspect rejected plastics. They made an offer to Pemex, which it did not accept.

Notwithstanding, I spoke with Mr. Laycock about buying used plastic, PVC, PET and hard plastics from the Mexico City garbage dumps. Mr. Laycock expressed interest and we had further talks.

I then started a new company, Plasti Pet de Mexico S.A. de C.V., in which I was the major shareholder and Peter Laycock was the minority shareholder.

We rented a warehouse at Real Del Monte No. 32, Colonia Valle Gomez, Mexico DF 06200 and made arrangements with various

leaders of the Mexico City trash recyclable, like Mr. Luis Angel Hernandez, to locate and store various types of recyclable plastics. Inasmuch as I know very little about plastics and have other businesses to attend, I depended on Mr. Laycock to identify the correct plastics to sell."

He went on:

"When Mr. Laycock had his accident, he complained to me of headaches and dizziness and forgot appointments and meetings and he did not look well as he walked bent over and limped a great deal. We attempted to train other persons to do the business but they did not have Mr. Laycock's experience and they mixed several plastics (polyprolene with polyethylene) which we sold, which caused spoiling or contamination of the good recyclable plastics. Accordingly, we had to close the business in about February 2001. Inasmuch as I set up Plasti Pet de Mexico S.A., which paid taxes, the monies received by Mr. Laycock and myself were free of taxes pursuant to Mexican tax law. The attached documents are some of the documents from Plasti Pet which show the larger quantities of the company products which were sold."

9 A Mr. Jose Luis Angel Hernandez, who purported to be the General Director of Corporativa Emprasarial, made a witness statement on June 28th, 2004, in which he said this:

"At the end of 1998, attorney Gonzalo Casas and his associate, Peter Laycock, came to my office and proposed that I help them purchase recyclable plastics. I made arrangements with them that I would obtain the recyclables directly from the garbage dump located at the border of Xochiaca on the west side of Nezahualcoyotl, State of Mexico. I sold them the majority of the PET, PVC and hard plastics. I distributed the plastics to them daily at their storeroom in quantities of 1–2 tons daily and I was paid in cash daily. I in turn would pay the workers at the work site. I sold them the plastic PET for 55 cents a kilo; hard plastic, one peso a kilo and PVC at one peso a kilo. I know they also bought the same products from other leads at the dump site.

I sold the recyclables to Mr. Gonzalo Casas and Mr. Laycock for almost two years (to the end of 2000) to the best of my recollection. As I recall, I was told that they could not buy any longer because Mr. Laycock had suffered an injury in Europe. From that time on, I no longer sold recyclables to them."

10 Mr. Cesar Asian made a statement on June 28th, 2004. He said this:

"I, attorney Cesar Asian, with a business address at Catera Federal Mexico, Cuernavaca, KM 60.1 Huizlao, Morelos, make this

statement in connection with the personal injuries claim being brought by the claimant as a result of an accident he sustained on November 1st, 2000. The matters set out below are within my own knowledge, except where I indicate the contrary.

I am the General Director of Recyclable Plastic Products, S.A. de C.V. The business I represent deals in hard plastics and PVC used for recycling. We use the plastic to finish flower pots, vases, *etc*. Mr. Gonzalo Casas and his associate, Mr. Laycock, offered me the hard plastics and the PVC in November 1999 for an appropriate price and effected satisfactory operations until December 2000. The materials were delivered to our plant by Mr. Casas and Mr. Laycock's workers. We received between five to eight tons every eight days. When we were not able to use the full delivery lead, we in turn sold it to other recycling businesses.

Mr. Casas told me his associate that Mr. Laycock had an accident and for that reason, all business transactions had to be suspended from said date and from that time to the present date we have not bought more products from them."

11 In pre-trial correspondence, in a letter to Mr. Isola of October 13th, 2003, Mr. Cruz had this to say:

"Regrettably, due to Mr. Laycock's present condition, it has been difficult to provide the level of information that would ideally be required. Please find enclosed additional proofs which we have obtained in relation to the Mexico recycling business."

Mr. Cruz enclosed letters from Messrs. Hernandez and Asian (on this occasion spelt "Asiain") in terms similar to the witness statements I have referred to, together with a copy of a rental agreement on a property situated at Calle Real del Monte No. 32, Col. Valle Gomez, Mexico, signed by a Mr. Rodriguez as landlord and the claimant as tenant. Also enclosed with Mr. Cruz's letter were a number of copy invoices, purportedly issued by Plasti Pet de Mexico S.A. de C.V. and issued to various companies. These documents had been sent by Mr. Sullivan to Mr. Cruz.

12 Attached to Mr. Isola's witness statement of July 12th, 2004 is the witness statement of a Mexican investigator, Michael Wolf-Dieter Putter, dated July 7th, 2004. The report is detailed and the conclusions were clear. They were, *inter alia*, as follows:

(a) The name "Plasti Pet de Mexico S.A. de C.V." had never been registered with the relevant authorities in Mexico. The name "Plasti Pet de Mexico" is registered but was so registered in 2002 and was not registered before.

(b) The tax code/number on the copy invoices produced by the claimant had never been issued to any company.

(c) It is a requirement of Mexican law that company invoices be printed by an officially licensed printer. The printer named in the invoices produced did not print the invoices, either in the form presented or in blank.

(d) The occupier of the alleged business address of Plasti Pet was a manufacturer of the soles of shoes, as was the previous occupier.

(e) The business telephone number listed in the invoices was of a private residence and had been so for about 20 years.

(f) The building "Calle Real del Monte No. 32, Col. Valle Gomez, CP 1521, Mexico" was and had been owned by a company called Zapaterias Bony S.A. and not Luis Reyes Rodriguez.

(g) There were 14 different customers referred to in the invoices produced by Mr. Laycock. Of these, 9 were researched by Mr. Putter and the results of his research were that the companies and/or the addresses referred to therein did not exist. In short, that the invoices were false.

13 As I say, Mr. Laycock's legal representatives were served with this evidence more than a week before the hearing of July 20th. More was to follow in the shape of a further witness statement of Mr. Putter, signed July 16th, 2004.

14 Mr. Laycock had disclosed a document purported to be the memorandum and articles of association of Plasti Pet de Mexico. Mr. Laycock and Mr. Casas are named therein. The document was purportedly drawn up by a lawyer by the name of Jorge Lara Gomez and registered on April 27th, 1999 in Toluca, Mexico. Mr. Putter revealed that Jorge Lara Gomez resigned as a public notary on August 17th, 1995 and was never reinstated. Indeed, from the Bar it was confidently stated that enquiries revealed that Mr. Lara died in September 1997.

15 Mr. Putter's statement did not stop there. Mr. Laycock had tendered the witness statement of one Raquel Rodriguez Sobreyra in the following form:

> "I, C.P. Raquel Rodriguez Sobreyra, Ced. Prof. No. 2146026, live at Torreon No. 25, Col. Roma Sur, Mexico, DF CP 06760 and I am an accountant. I make this statement in connection with the personal injuries claim being brought by the claimant as a result of an accident he sustained on November 1st, 2000. The matters set out below are within my own knowledge, except where I indicate the contrary.
>
> On behalf of the matter herein, I declare that I am the accountant of Plasti Pet of Mexico. From January 1st, 1999 to February 2001, I presented the declaration and the payment of taxes requested by law, which were presented on time and in the correct form, to the

Tributary Administration. For this reason, attorney Gonzalo Casas Ocejo and Mr. Peter Laycock, shareholders of the business, did not have to make and pay taxes in their names, as the above named business is required to pay the taxes for them in accordance with the business activities.

Also, I reviewed and made a detailed analysis of the invoices corroborating the Federal Register of Contributions which coincided faithfully with the fiscal seal found at the bottom of the invoices.

My examinations were performed in accordance with the generally accepted accounting principles, which require that the audit be planned and performed in such a manner that you obtain reasonable assurance that the financial statements do not contain important errors and that they are prepared in accordance with generally accepted accounting principles which were required and permitted to obtain with reasonable surety that the financial statements had no errors and were prepared by a *bona fide* bookkeeper."

16 Mr. Putter's investigations revealed that the business address shown on her statement is a private residence where her name was unknown and the telephone number she tendered corresponded to a location at empty offices in another building. Furthermore, his enquiries showed that there was no Government record of the payment by the company of any taxes on behalf of Messrs. Laycock and Casas.

17 Mr. Laycock was present at the hearing of July 20th, 2004. He reacted to the above evidence by saying that the documents had not been passed on to him by Mr. Cruz or Mr. Sullivan. Mr. Laycock said he knew nothing about the Plasti Pet invoices and that he had never seen the proofs of evidence tendered on his behalf, that he left the matter to Mr. Casas and that he knew nothing about the documents tendered on his behalf from Mexico.

18 In my judgment on the applications, delivered on September 8th, 2004, I expressed serious doubts about Mr. Laycock's credibility. I also expressed doubt, giving reasons therefor which I need not recite here, about Mr. Laycock's allegations as to the extent of his injuries. I came to the conclusion that the claim had all the hallmarks of fraud, and that whilst it may have been true that Mr. Laycock could have some claim in respect of a knock on the head, the evidence destroying his claim for damages for loss of earnings in relation to the purported Mexican recycling business so undermined his credibility as to warrant the court striking out the claim at that stage. Nonetheless, I felt that he had been given too short a time in which to answer the defendant's allegations and, out of an abundance of caution, I gave Mr. Laycock 30 days from the date of service of my order to respond thereto, and ordered a further case management conference for November 16th, 2004.

19 Mr. Laycock appeared before me on November 16th, 2004, having failed to answer any of the defendant's allegations about his evidence on the Mexican recycling business. His explanation was that he had not received my order of September 8th, 2004. Investigations into this assertion revealed that this was not the case. I was satisfied that Mr. Laycock had had every opportunity to answer the allegations against him and that he had not done so because he had no answer to them. I was by that stage satisfied that what had possibly been a genuine, but small, claim for damages had been turned into a fraudulent claim for a huge amount of money by an unscrupulous claimant. I accordingly dismissed the action as against the second defendant. It will be remembered that the action as against the first defendant had already been dismissed but that the claimant sought to have the order in that regard set aside. On my findings, I dismissed Mr. Laycock's application.

20 In making my orders of November 16th, 2004, I also awarded the defendants their costs against Mr. Laycock on an indemnity basis. The defendants' costs in proving the claim to be fraudulent were substantial and they sought, and obtained, an order freezing Mr. Laycock's assets above an amount which would allow Mr. Laycock to transact his daily life. Mr. Laycock was present when the order freezing his assets was made and made representations thereon. He left Gibraltar on that day, but not before he had been served with a copy of the freezing order. As if to confirm my conclusion as to his unscrupulousness, immediately he left court Mr. Laycock transferred £4,490 from a bank account he held in Jersey to the bank account in Gibraltar belonging to his friend. This was a flagrant breach of my order and a warrant for contempt lies on the file in this jurisdiction, to which I do not anticipate Mr. Laycock will return.

The claim against Mr. Sullivan

21 Mr. Sullivan had a hand in the preparation of the witness statements in respect of the Mexican recycling business and represented Mr. Laycock's interests before and after Mr. Cruz ceased to represent him. The defendants allege that he was guilty of complicity in Mr. Laycock's fraudulent claims and, on November 16th, 2004, sought orders for service of a claim form and notice of application in the existing action and for an order that he be joined as respondent to the existing action for the purposes of the defendants' application for costs against him. I granted those orders, but refused the defendants' application for a freezing order against Mr. Sullivan.

22 Mr. Sullivan then challenged the jurisdiction of the court and further argued that the service of the documents upon him was not properly effected. In those arguments, he was represented by counsel instructed by Messrs. Phillips & Co., who have since ceased to represent him. On February 7th, 2005, I dismissed Mr. Sullivan's challenges.

23 At a case management conference in which Mr. Sullivan was represented by Mr. David Hughes, Gibraltar counsel, instructed by Messrs. Phillips, on February 17th, 2005, the hearing of this claim was fixed for September 5th, 2005 to September 9th, 2005 inclusive, and orders for disclosure were made. At a further case management conference, conducted by telephone on June 16th, 2005, in which he was assisted by English counsel, Mr. Sullivan sought an adjournment of the September hearing on the basis that his partner had recently died, leaving him overburdened with work and unable to give adequate time to the preparation of this case. However, he accepted, after proof was forthcoming from the defendants in this regard, that he was not under litigation pressure and that the pressure he was under related to preparatory work. In refusing the application, I held that the prejudice which would be caused to the defendants by an adjournment of the case outweighed the prejudice to Mr. Sullivan which was caused by my refusal to adjourn. The preparations for trial were well under way and arrangements had been made for witnesses to be available from overseas.

24 In the week preceding the hearing of September 5th, 2005, I received notification that Mr. Sullivan had filed for bankruptcy in the California court and that this had the effect of operating as a stay of all existing actions against him. Furthermore, any proceedings against him without leave of the California court would be regarded as void. I have been shown nothing which suggests that these rules have extraterritorial effect. Furthermore, having considered all the material before me, I concluded that it is probable that Mr. Sullivan filed for bankruptcy to avoid the effects of the proceedings in this claim. Whilst I was unsurprised, given the conduct of this action so far, that there was a twist so close to the September 5th hearing, the nature of the twist did surprise me, given that at the case management conference of June 16th, 2005, Mr. Sullivan said he had had a good previous year in practice, which I understood to mean good in both work and in financial terms. Accordingly, the hearing on September 5th, 2005 went ahead and Mr. Sullivan did not appear to answer the defendants' claims. After a hearing conducted over two days and after a careful review of the evidence, I held that Mr. Sullivan had been guilty of complicity in Mr. Laycock's fraudulent claims and ordered that he pay the defendants' costs on an indemnity basis.

The law

25 Sections 51(1) and (3) of the English Supreme Court Act provide:

> "(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in—
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> (a) the civil division of the Court of Appeal;

(b) the High Court; and

(c) any county court,

shall be in the discretion of the court.

. . .

(3) The court shall have full power to determine by whom and to what extent the costs are to be paid."

Section 51 as set out here is in its amended form, but for our purposes these sub-sections are in the same form as the previous s.51(1).

26 In *Aiden Shipping Co. Ltd.* v. *Interbulk Ltd.* (1), the House of Lords held that s.51(1) conferred jurisdiction on the court to make an award of costs against someone who was not a party to the litigation, acknowledging (*per* Lord Goff of Chievely ([1986] A.C. at 980)) that in the vast majority of cases it would be unjust to do so. Of course, the court has always had the jurisdiction to order a litigant's solicitor who has been guilty of misconduct to pay the costs of an action, but until the decision in *Aiden Shipping*, it was understood that this power was an exercise of the court's inherent jurisdiction over solicitors as its officers. The jurisdiction conferred by s.51(1) may be exercised to order, in an appropriate case, a foreign lawyer to pay the costs of the litigation (see *Gulf Azov Shipping Co. Ltd.* v. *Idisi* (2)).

27 In Gibraltar, we do not have a provision equivalent to s.51(1) of the Supreme Court Act. However, s.12 of the Supreme Court Ordinance provides:

"The court shall in addition to any other jurisdiction conferred by this or any other Ordinance, within Gibraltar and subject as in this Ordinance mentioned, possess and exercise all the jurisdiction, powers and authorities which are from time vested in and capable of being exercised by Her Majesty's High Court of Justice in England."

This court thus has the like jurisdiction of the English High Court to order a person who is not a party to the litigation to pay the costs of it.

28 The jurisdiction is circumscribed and in *Symphony Group plc* v. *Hodgson* (3), the English Court of Appeal sought to lay down some guidance as to the exercise of the court's discretion. Particularly relevant to this case is the repeat of the reservation of Lord Goff of Chievely, expressed in *Aiden Shipping*, that such an order will be exceptional and that any application therefor will be treated with considerable caution. Also to be gleaned from this authority is that the court must be alert to the possibility that an application against a non-party may be motivated by resentment of an inability to obtain an effective order for costs against the unsuccessful litigant. In *Symphony Group plc*, Balcombe L.J. ([1994]

Q.B. at 191–192) summarized the categories of cases in which orders had been considered by the courts. For our purposes, two such categories are relevant, *viz*.: (1) where a person has had some management of the action, and (2) where a person has maintained or financed the action.

29 In *Gulf Azov Shipping Co. Ltd.* (2), a Nigerian defendant, Chief Idisi, was held by the court to have been guilty of disgraceful conduct in the defence of claims against him. An application was made for a Nigerian lawyer, Mr. Egbe, to pay some of the costs of the action on the basis that he had not merely provided funding for the defendant's legal expenses but that he had personally intervened in the conduct of the defence. The judgment of Lord Phillips of Worth Matravers, M.R. is relevant to the current application. The relevant paragraphs read ([2004] EWCA Civ. 292, at paras. 52–54):

> "52. Had the Deputy Judge found that Mr. Egbe had colluded with Chief Idisi, by use of fair means and foul, to play fast and loose with the court, an order for costs against Mr. Egbe might have been justified. No such case was made out before the Deputy Judge, nor advanced before us. Mr. Egbe intervened at a critical stage of the proceedings, but the nature of his intervention was not such as to justify an order that he should bear the costs of the proceedings.
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> 53. The judge was prepared to infer that Mr. Egbe could expect to derive 'substantial benefit' as a result of the assistance that he had provided. This inference did not feature in the reasons given for awarding costs against him that were summarized in paragraph 128. Insofar as the inference was justified the expected benefit would seem to be no more than reward for the service rendered in procuring the vital funding at the critical moment. There is no suggestion that Mr. Egbe had any personal interest in the outcome of the litigation, or that his intervention gave him any such interest. In this respect his position contrasts with that of those who provide legal services on a conditional fee basis, yet even they do not expose themselves to risk of being ordered to pay the costs for proceedings that they support in this way.
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> 54. Mr. Marten submitted that Mr. Egbe's role, insofar as it went beyond that of a 'pure funder' was that of a 'pure assister'. We are not sure that the adjective 'pure' assists in the analysis. It is, we believe, designed to draw a distinction between those who assist a litigant without ulterior motive and those who do so because they have a personal interest in the outcome of the litigation. Public policy now recognises that it is desirable, in order to facilitate access to justice, that third parties should provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation. Intervention to this end will not normally

> render the intervener liable to pay costs. If the intervener has agreed, or anticipates, some reward for his intervention, this will not necessarily expose him to liability for costs. Whether it does will depend upon what is just, having regard to the facts of the individual case. If the intervention is in bad faith, or for some ulterior motive, then the intervener will be at risk in relation to costs occasioned as a consequence of his intervention."

30 I think Mr. Melville correctly summarized the position when he submitted that in order to succeed in his application, he needed to establish—

(a) that Mr. Sullivan intervened in Mr. Laycock's claim;

(b) that his intervention was in bad faith or for some ulterior motive;

(c) that costs were expended in defending the claim as a result of that intervention; and

(d) that such costs must be quantified.

31 I should add here that I have been conscious throughout, not only of the unusual nature of the application I am dealing with, but also of the effect of any finding I may make upon Mr. Sullivan, who was not present at the hearing. I am conscious that an adverse finding could tarnish the reputation of a member of a foreign Bar and would have repercussions upon him, not only of a substantial financial nature, but also of a professional nature. These are, after all, allegations of complicity in fraud made against a member of the California Bar. Whilst the allegations fell to be proved on a balance of probabilities, I considered that the burden of the defendants was to satisfy me to a high standard of probability. In the event, I became convinced of Mr. Sullivan's complicity in Mr. Laycock's fraudulent activities.

The evidence

32 It will be remembered that a Mexican attorney, Mr. Casas, produced a witness statement and referred to documents which were proved to be false. On January 11th, 2005, Mr. Casas provided a further witness statement in which he said:

> "In fact, Mr. Laycock and I did have a business which traded as Plasti Pet de Mexico S.A. de C.V., but it was not a registered corporation and we dealt almost exclusively in cash. However, so as not to appear that the business was not doing everything legally correct, I prepared these documents in order to help Mr. Laycock in his case and I take full responsibility for my actions."

33 The purpose of Mr. Casas' statement seems to have been to deflect responsibility for the fictitious documents from Mr. Sullivan and Mr.

Laycock on to himself. Be that as it may, the statement underlined the fraudulent nature of this part of Mr. Laycock's case.

34 The defendants further underlined my earlier findings at the hearing. I received the evidence of Michael Wolf-Dieter Putter by video link from Mexico City. Mr. Putter had provided witness statements in July 2004, giving the lie to Mr. Laycock's claims in regard to the Mexican recycling business and he confirmed the contents of those statements. Mr. Putter had also tracked down Ms. Raquel Rodriguez Sobreyra, who was purported by Mr. Laycock to be the accountant for Plasti Pet. In a witness statement dated May 27th, 2005, Mr. Sullivan had had this to say:

> "After being sued by the plaintiff, I went to Mexico in January 2005 and met personally with Ms. Raquel Rodriguez Sobreyra, who stated that on November 9th, 2004, four persons contacted her when she was in her office. The four men were Mr. Putter, two other Mexican men and a person who they advised her was from the court in Gibraltar. She was told by one of the Mexican men that they were police investigators and they were investigating a large fraud in Gibraltar. They said that a Mr. Laycock could not leave Gibraltar and that a lawsuit was going to be brought against attorney Harold V. Sullivan II, who had a bad reputation in Gibraltar and the United States for handling fraudulent cases.
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> She further stated that she was shown a letter in English and was asked if she could read it and whether she signed it and she said no.
>
> She further stated that unless she cooperated with them, she would be accused of being involved in a fraud and that she could lose her professional licence. She said she felt frightened and intimidated. Mr. Putter then gave her a disc and told her to print it out and sign it, which she did. She later learned that these men were not police investigators. I asked if she could sign a statement to that effect and also about preparing a letter about Mr. Casas and the letter of May 27th, 2004. At that point, she stated that she did not want to become involved, but, in any event, she would speak to her brother, who was an attorney. I was later informed she would not give me a statement on the advice of her brother, who is an attorney in Mexico City."

35 Mr. Putter testified that he and two other investigators met Ms. Rodriguez on November 9th, 2004 and that at that meeting, no mention was made of an intention or probability that legal proceedings would be taken against Mr. Sullivan. She was indignant that her name had been used on the various false documents and the tone of the meeting was cordial and friendly. Mr. Putter said that they had always maintained a supportive stance towards Ms. Rodriguez, that they never threatened her in any way and that she co-operated with them fully.

36 For good measure, Ms. Rodriguez was called to testify. She was shown the witness statement of June 28th, 2004, which was provided by Mr. Laycock, the contents of which I have recited above. Ms. Rodriguez's evidence was that she was never the accountant for Plasti Pet, Mexico and she never provided that statement for Mr. Laycock or Mr. Sullivan. However, it is noteworthy that her cedula number is 2146026, which is the number given on the false witness statement. Ms. Rodriguez had read to her the passage from Mr. Sullivan's witness statement in which he said that he met her in January 2005. Ms. Rodriguez testified that she had never met Mr. Sullivan and had never spoken to him by telephone. I have to say here that I had no reason to doubt the testimony of Ms. Rodriguez. She appeared a straightforward witness who had no reason to submit herself to examination in my jurisdiction.

37 I should also mention the statements made by Mr. Hernandez and Mr. Asiain, which were tendered by Mr. Laycock. Mr. Hernandez, as General Director of a company called Corporativo Empresarial, provided a witness statement dated June 28th, 2004, in which he said he sold recyclables to Mr. Laycock and Mr. Casas. However, the evidence of Mr. Putter is that Corporativo Empresarial does not exist at the address given on Mr. Hernandez's statement. Mr. Hernandez had produced a letter, in similar terms to his witness statement of June 28th, 2004, on May 1st, 2003. In a further statement of January 11th, 2005, Mr. Hernandez said that this letter was true and that it was prepared at the request of Mr. Casas. However, in that statement he gave the same address for his company as is contained in his statement of June 28th, 2004.

38 Mr. Asiain also provided statements supportive of Mr. Laycock's claim. In the first, a letter dated April 4th, 2003, he spelled his name "Asiain". In a witness statement dated June 28th, 2004, and a further statement of January 11th, 2005, he spelled his name "Asian". In his first statement, Mr. Asiain spelled the name of the town from which he purported to operate his business wrongly. Mr. Putter's evidence was that Mr. Asiain's company did not operate from the address given, which was a private housing estate.

39 I am satisfied beyond doubt that the letters and statements produced by Mr. Laycock from, or allegedly from, Messrs. Casas, Hernandez, Asiain and Ms. Rodriguez were falsely prepared to bolster a false claim for damages for loss of earnings. The question of Mr. Sullivan's involvement in the preparation of those statements is something to which I shall return.

40 I should add that documents tendered in support of Mr. Laycock's false claim were also proved to be false by Mr. Putter. These are the invoices purporting to be those of Plasti Pet and a lease agreement purportedly in respect of premises occupied by Plasti Pet. Again, the

question of Mr. Sullivan's involvement in the presentation of those documents is something to which I shall return.

41 There can be no doubt that Mr. Sullivan intervened on behalf of Mr. Laycock in this action. He has admitted as much. Speaking of a visit by Mr. Laycock to his office in December 2000, in a witness statement dated August 11th, 2005, Mr. Sullivan said:

> "Mr. Laycock asked me to represent him, as I had done previously, as it meant the obtaining of statements in Mexico as all the business was in cash, as was his prior business in England, for which I had represented him, and the proofs needed to be obtained from Mexican businesses. I informed him that I am not an attorney in the United Kingdom and cannot handle a case there and besides, I was not very happy he had sued me as we were friends and I had always made timely payments to him of principal and interest. He then stated that he had helped me when I had a cash flow problem but could I at least help him to get the proofs from Mexico as Mr. Casas, his business partner, did not want to or did not have the time to provide him with the proofs he needed. I agreed to help him so long as it would not take too much time and that he pay all my out-of-pocket expenses. I also told him that he needed to get an attorney in Gibraltar. He told me he had already contacted Mr. Nicholas Cruz's office. He additionally asked me to fly to Gibraltar and meet his attorney and discuss the case with him, as he was not a specialist in injury cases as I was. He stated he would arrange my airfare and would pay my expenses. I did not have any retainer agreement with him."

42 Mr. Sullivan had acted twice before for Mr. Laycock, both times on a contingency fee basis. After the second such action, Mr. Laycock sued Mr. Sullivan for money owed and the final outcome between the two is unclear. However, Mr. Sullivan says that he agreed to act for Mr. Laycock in the instant action out of friendship, although his willingness to do so was tempered somewhat by Mr. Laycock's previous actions.

43 Mr. Sullivan is a personal injury lawyer and the evidence shows that he put a great deal of work into Mr. Laycock's case. This included a trip to Gibraltar to the offices of Cruz & Co., although Mr. Sullivan says that he was paid his expenses for the trip by Mr. Laycock. The solicitor handling the case at the time of the respondent's visit was James Canepa, who subsequently left the employment of Cruz & Co. Mr. Canepa's evidence was that Mr. Sullivan told him he was Mr. Laycock's business attorney and that he would be responsible for obtaining the evidence and providing it to Mr. Canepa. Mr. Sullivan said that the claim was worth millions of pounds. He was surprised at how modest was the English courts' approach to damages for pain, suffering and loss of amenities, but

said that there was a massive claim for loss of earnings and said he would concentrate on that aspect of the case. Mr. Canepa's evidence was that Mr. Sullivan was driving the case and would often call to check that things were done.

44 When Mr. Canepa left his firm, Mr. Cruz took over the file. Mr. Cruz says that from his perspective, there was no doubt that Mr. Sullivan's role was as an instructing attorney in every sense of the word. He would obtain the evidence about the claim and obtain instructions from Mr. Laycock about what action should be taken in relation to the claim. Mr. Cruz characterized the relationship as akin to one of instructing solicitor and counsel. Mr. Sullivan was to do all of the evidence gathering and information gathering from Mr. Laycock and obtain his instructions. Mr. Cruz was to present the information to the court. Mr. Sullivan made it clear to Mr. Cruz that he was responsible for all the evidence gathering and said Mr. Laycock's condition prevented him from carrying out the evidence gathering process. By reason of geography, Mr. Cruz was unable to do so. Mr. Cruz's witness statement, adopted by him on oath, reads:

> "Mr. Sullivan told me that he had been Laycock's lawyer on another claim and also that he was involved in Laycock's recycling business as his lawyer. He said that he knew Gonzalo Casas, and that he (Sullivan) would obtain the proofs of evidence required in Mexico in order to prove the claimant's loss of earnings relating to the recycling business there. Mr. Sullivan told me that he went to Mexico several times in order to obtain evidence. He never gave me the impression that he was going to Mexico for other business on these occasions but rather, solely for obtaining evidence on the Laycock case."

45 Mr. Cruz went further and said that Mr. Sullivan gave him the impression that he was working under a contingency fee arrangement and it did not appear to him that he was merely acting for Mr. Laycock as a friend or associate. His degree of participation made it clear in Mr. Cruz's mind that he was acting for commercial advantage. Mr. Cruz said that Mr. Sullivan's role was so integral that he did not speak to Mr. Laycock until he came to Gibraltar in April 2004. At a meeting on April 1st, 2004, Mr. Laycock confirmed that Mr. Sullivan was acting on a contingency fee arrangement.

46 In his witness statement of August 11th, 2005, Mr. Sullivan says Mr. Canepa's recollection is a little faulty in that he never said Mr. Laycock's claim was worth millions. Nor did he say that he was Mr. Laycock's business attorney as he, Mr. Sullivan, had never been anyone's business attorney. He also said Mr. Cruz's impression that he was on a contingency retainer was wrong. He said he spoke to Mr. Cruz about his frustration

about getting proof of evidence from Mexico and that the case was beginning to take up too much of his staff's time. Mr. Cruz assured him he would be compensated by the defence on an hourly basis for his time at the conclusion of the case. When he went to Mexico, he did so in conjunction with other cases and altogether he spent 10 to 15 hours of his time on the case in Mexico. In all, he calculates his office time on the case was about 40 hours.

47 Having considered all the evidence, I consider it more than likely that Mr. Sullivan was acting on a contingency fee arrangement, despite his assertions that he was merely assisting Mr. Laycock as a friend. It is unlikely that a busy personal injury lawyer would devote so much time and effort to a case, making a special journey to Gibraltar for the purpose, for merely out-of-pocket expenses. Even on Mr. Sullivan's evidence, he spent a considerable amount of time on the case. His evidence is that he expressed his concern about the amount of time his staff was spending on the case to Mr. Cruz. It is most unlikely, in those circumstances, that he would not tell Mr. Cruz that he was not charging other than out-of-pocket expenses for his work. Furthermore, after expressing such concerns, it is unlikely that he would have continued to expend considerable time and energy in pursuit of the Mexican evidence on a mere verbal assurance by Mr. Cruz that he would be recompensed. In the light of all the evidence, and particularly in the light of Mr. Laycock's statement to Mr. Cruz that Mr. Sullivan was acting on a contingency fee arrangement and that he had acted for Mr. Laycock on a similar arrangement on previous occasions, I find it probable that Mr. Sullivan was acting on a contingency fee arrangement.

48 This finding is supportive of the defendants' claim that Mr. Sullivan's involvement in the case was for an ulterior motive. However, I would not have based my decision to award the defendants' costs against Mr. Sullivan on that finding alone. I required proof that Mr. Sullivan was acting in bad faith in being a party to putting false evidence before the court.

49 In this regard, of course, the evidence of Mr. Cruz that Mr. Sullivan made himself responsible for gathering the evidence of the Mexican witnesses is very relevant. Indeed, Mr. Sullivan acknowledges as much in a witness statement dated October 24th, 2004, in which he said the following:

> "For two years, I had been attempting to obtain the necessary proofs from Mexico on Mr. Laycock's behalf and travelled to Mexico where I personally spoke to Mr. Gonzalez Casas, Mr. Cesar Asian, Mr. Luis Reyes Rodriguez and others. I spoke to Ms. Sobreyra over the telephone. I obtained the statements from them and forwarded them to Mr. Cruz. I did not provide copies to Mr. Laycock. It is not

> my standard practice and is not the standard procedure in California for personal injury attorneys to provide copies of proofs to the client until the matter goes to deposition, jury trial or the client requests copies. Corporate law is different."

50 Ms. Rodriguez Sobreyra, of course, denies ever speaking to Mr. Sullivan on the telephone, or indeed personally. The false statement tendered as being hers was dated May 27th, 2004, and the English version thereof is dated June 28th, 2004. In response to a notice to admit facts of February 14th, 2005, Mr. Sullivan denied drafting either of these documents. However, this is in direct contradiction to a letter Mr. Sullivan sent to Mr. Cruz on June 1st, 2004, in which he says:

> "I have just returned from two days in Mexico City, May 26th–27th, 2004. I have met with Mr. Gonzalo Casas and an accountant who has audited the books of Plasti Pet S.A. I will be faxing the statements of Mr. Casas and the accountant, Ms. Rodriguez. I attempted to obtain copies of the fiscal records from the Mexican treasury but it is impossible."

51 Of course, in his witness statement of May 27th, 2005, Mr. Sullivan stated that he met Ms. Rodriguez, or someone who passed as her, in January 2005. Furthermore, in his statement of August 11th, 2005, Mr. Sullivan says that a woman contacted him at his hotel, stating that she was an accountant, and asked him what type of declaration he needed. He explained to her and a declaration arrived. Mr. Sullivan also states that he has now ascertained that Luis Reyes Rodriguez, who is a client of Ms. Rodriguez, prepared and signed the documents on her behalf.

52 On all the material before me, I am driven to the conclusion that Mr. Sullivan has lied to this court and to Mr. Cruz as to his meetings and communications with Ms. Rodriguez, or someone posing as Ms. Rodriguez, and the only explanation for his actions is that he was involved in concocting the false statement of May 27th, 2004. I do not believe that Ms. Rodriguez lied to the court. It is incredible that a person posed as Ms. Rodriguez in the manner that Mr. Sullivan suggests. I am not surprised that he would not submit himself to cross-examination on this part of his evidence.

53 Mr. Casas made three witness statements. The first, dated June 26th, 2004, is the one which contains the false information on the formation of Plasti Pet and which refers to the false invoices. The second, dated October 21st, 2004, and the third, dated January 11th, 2005, were made with a view to recovering Mr. Laycock's situation once the falsity of the first statement was discovered. In the latter two statements, Mr. Casas takes responsibility for the falsity upon himself and seeks to absolve Mr. Laycock and Mr. Sullivan. However, this does not explain Mr. Sullivan's statement of October 24th, 2004, in which he said he spoke to Mr. Casas

and "obtained" his statement. True it is that in response to the notice to admit facts, Mr. Sullivan denied drafting Mr. Casas' first statement, but in the context of his statement of October 24th, 2004, Mr. Sullivan "obtained" that statement after speaking to him.

54 Mr. Asiain made three statements. Mr. Sullivan denies drafting any of them, accepting, however, that the third was drafted by his counsel. In his third statement of January 11th, 2005, Mr. Asiain said that he only spoke to Mr. Casas about the preparation of his first statement, dated April 4th, 2003, and that he never spoke to Mr. Sullivan about it. That is contrary to Mr. Sullivan's own witness statement of 24th October, 2004.

55 Mr. Hernandez produced three statements. Mr. Sullivan did not refer to Mr. Hernandez in his witness statement of October 24th, 2004, and he has denied drafting any of his statements, accepting that the third statement of January 11th, 2005 was drafted by his counsel. However, in this third statement, Mr. Hernandez said that he prepared his first statement of May 1st, 2003 at the request of Mr. Casas, but that he had spoken to Mr. Sullivan, who had asked him to prepare a letter about his business relationship with Mr. Casas and Mr. Laycock.

56 Among the files disclosed to the defendants in the course of this claim is the following note, dated May 5th, 2003, addressed to Mr. Sullivan. It is in Spanish and is signed "Your friend Luis Angel". It is clearly from Mr. Hernandez. It reads:

> "The documents I am sending to you are so that you can authorize them and we can print them on the relevant letterhead sheets.
>
> I have carried out the project in accordance with the written instructions you gave to me personally.
>
> 1. A rental contract for a warehouse near the rubbish dumps entered into between the engineer Javier Alcala Horta, owner of the warehouse, and Mr. Gonzalo Casas Ocejo, as the tenant, dated October 1st, 1998 to October 1st, 2001 (three years, binding on both parties).
>
> 2. A document that covers the number of journeys relevant to the transfer of the material and the costs (from $1,000 to $1,200 for transfer by trailer with platform).
>
> 3. A written document from the company that sells the product to the lawyer Gonzalo Casas.
>
> 4. Two or three written documents from the companies that buy the product from the lawyer Gonzalo Casas.
>
> It is important to note that the written documents or the evidence that you require is prepared as you so requested in writing, with

> respect, any delays or misunderstandings having been caused by yourselves on changing your minds.
>
> I would request from you a list of questions and answers that you consider the opposing party may request from the people who are supporting us with documents/evidence, that is most important so as to prepare the people and not have the opposing party's lawyers surprise them."

This important piece of evidence demonstrates the supervisory role played by Mr. Sullivan in the preparation of the documents for presentation to the court in this case.

57 Another significant piece of evidence was tendered to the court by the defendants. It will be remembered that Mr. Sullivan admitted that he drafted Mr. Casas' second statement of October 21st, 2004. In that statement, Mr. Casas said: "I have requested copies of the investigation performed by the Mexican investigator and upon reviewing them, I will supplement this statement."

58 The Mexican investigator he refers to is Mr. Putter. In the documents disclosed by Mr. Sullivan, the defendants found an unsigned witness statement drafted by Mr. Sullivan which was clearly meant to be in answer to the defendants' application to have the claim dismissed on the back of Mr. Putter's evidence. This statement, drafted between July 16th and 20th, 2004, but never filed with the court, contains the following paragraph, which is in direct contradiction of Mr. Casas' statement of October 21st, 2004:

> "Three boxes of documents were received by my office on Friday, July 16th, 2004. Upon receipt, I tried to contact Mr. Gonzalo Casas in Mexico but could not locate him as he was apparently gone for the weekend. Accordingly, I sent by courier to Mr. Casas in Mexico these documents which should arrive on July 20th, 2004. I have asked him to respond as quickly as possible to these fraud allegations."

59 Instead, Mr. Sullivan filed with the court a statement dated July 25th, 2004, which makes no reference to Mr. Casas. The contradiction between Mr. Sullivan's draft statement and the statement of Mr. Casas, drafted by Mr. Sullivan, is put forward by the defendants as a further demonstration of Mr. Sullivan's lack of credibility.

60 Other issues of credibility have been raised by the defendants, such as an alleged use by Mr. Sullivan of the name Harold Sullivan III, but I do not need to go into those allegations given the findings I make.

61 As will be apparent, before making my decision in the matter, I considered witness statements filed by Mr. Sullivan in which he stated

that his involvement with the suit was merely to assist Mr. Laycock, whose claim he believed to be genuine, and that he took no part in the preparation of false statements and documents. Furthermore, as has been mentioned above, he insisted that he had a meeting with someone who represented herself to be Ms. Rodriguez.

62 Despite Mr. Sullivan's protestations of innocence, from all the evidence, I was satisfied that he was involved in the preparation of the false evidence from, or purportedly from, Ms. Rodriguez, Mr. Casas, Mr. Asiain and Mr. Hernandez. I was satisfied that Mr. Sullivan involved himself in Mr. Laycock's claim and that his intervention was in bad faith in that he was a party to the concoction of false evidence in pursuit of the claim. Mr. Cruz testified that without Mr. Sullivan's involvement he would not have filed suit on behalf of Mr. Laycock and, indeed, it was the fact of Mr. Sullivan's involvement which led him into the agreement to act for Mr. Laycock. The claim had to be answered by the defendants, who have expended considerable sums of money in proving the falsity of the evidence. I concluded that costs should be borne by Mr. Sullivan.

63. I then had to consider the extent to which Mr. Sullivan should be liable in costs. Mr. Sullivan was involved in the matter within weeks of the incident giving rise to the claim. It was clear from the evidence of Messrs. Canepa and Cruz that Mr. Sullivan was running the claim. It is impossible to separate the actions of Mr. Laycock and Mr. Sullivan in their pursuit of the claim. In the event, I determined that Mr. Sullivan should be liable for the costs of the action on the same terms as Mr. Laycock, involving liability for the whole costs of the action and which now include the defendants' costs in pursuing this application. Those costs were awarded on an indemnity basis and will be assessed by the Registrar.

Order accordingly.
