No: C/1999/6970

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IN THE SUPREME COURT OF JUDICATURE

IN THE COURT OF APPEAL (CIVIL DIVISION)

APPLICATIONS FOR PERMISSION TO APPEAL

AND TO ISSUE A SUBPOENA APPLICATION FOR

PERMISSION TO APPEAL AND AN EXTENSION OF TIME

Royal Courts of Justice

Strand

London WC2

Thursday, 19th July 2001

B e f o r e:

LORD JUSTICE MUMMERY

SIR MARTIN NOURSE

- - - - - - - - - - - - -

HER MAJESTY'S ATTORNEY GENERAL

- v -

OAKES

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(Computer Aided Transcript of the Palantype Notes of

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Tel: 0171 421 4040

Official Shorthand Writers to the Court)

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MR DAVID ASHTON (Instructed by Worthington Edridge Hume & Co of Folkestone, Kent) appeared on behalf of the Applicant

The Respondent was not represented and id not attend

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J U D G M E N T

1. LORD JUSTICE MUMMERY: I will first give judgment in the case of Attorney General v Oakes. This is an application for permission to appeal coupled with an application for an extension of time in which to appeal. The application is made on behalf of Mr Arthur Oakes. The order which he wishes to appeal is that made by the Divisional Court on the application of Her Majesty's Attorney General. The order was originally made on 15th February 2000 and was amended on 21st February 2000. It was in these terms:

> "It is ordered that the applicant's application herein be granted and that the said Arthur Oakes be and is hereby prohibited whether directly or indirectly, or by his servants or agents including but not limited to Townsend Investments Incorporated (a company incorporated in Liberia)
>
> 1. instituting any civil proceedings in any Court and
>
> 2. continuing any civil proceedings instituted by him in any Court before the making of this Order and
>
> 3. making any application other than an application for permission as required by section 42 of the said Act in any civil proceedings instituted in any Court by any person unless Arthur Oakes obtains the permission of the High Court having satisfied the High Court that the proceedings or application are not an abuse of the process of the Court in question and that there are reasonable grounds for the proceedings or application."

2. Mr Oakes was refused permission to appeal. An application for permission to appeal was made to this court and first came on for hearing on 21st May 2001. At the hearing in the Divisional Court Mr Oakes had appeared in person. At the hearing of the application for permission on 21st May counsel, Mr Ashton, was instructed to appear and to apply for an adjournment of the application in order to give him time, in the circumstances explained in the judgment given on that day, to read the very considerable documentation in this case and to give advice to his client as to whether there were reasonable grounds for pursuing the applications. The matter was therefore adjourned until today.

3. In the meantime, Mr Ashton has clearly done a great deal of good work. He has produced an Advice (No 2), signed by Mr Oakes, waiving privilege in it. That advice has been used as the basis for the submissions made by Mr Ashton on these applications. The court is greatly indebted to Mr Ashton for the very thorough and helpful work which he has done on this case.

4. I turn, first, to the general background against which the civil proceedings order was made against Mr Oakes. Mr Oakes was described in the judgment of Mr Justice Klevan in the Divisional Court as a "prolific litigator". The litigation had been prolific ever since a bankruptcy order had been made against him on 19th May 1990. As a result of the bankruptcy order, Mr Oakes fell into arrears with mortgage repayments in respect of two properties in Putney - Tintern Close and Shelburne Court.

5. The building societies, who were entitled to mortgages on the properties, sought possession of them. In 1993 the properties were transferred by Mr Oakes to a Liberian company set up by him earlier that year and of which he was, on his own account, sole shareholder and sole director. That company is called Townsend Investments Inc, the company referred to in the order of the Divisional Court. In March 1994 Townsend Investments borrowed £150,000 on the security of the properties from Commercial Acceptances Ltd. There were defaults in repayment. Commercial

Acceptances took proceedings against Townsend, Mr Oakes and others for repayment and for possession of the Putney properties.

6. Mr Oakes began a series of actions against the parties involved in the original Townsend/Commercial Acceptances' loan transaction. Those actions included proceedings against firms of solicitors who had acted for Townsend Investments, a firm called Malkins in particular. It later merged into the firm of Howard Kennedy. In June 1999 the claim of Commercial Acceptances v Townsend Investments and Others was tried. Commercial Acceptances won. An order for possession was made. There were unsuccessful attempts to appeal that order to the Court of Appeal and the House of Lords.

7. I return to the bankruptcy order; it was discharged on 18th May 1993. In January 1995 Mr Oakes was requested to attend for examination in relation to his assets. He failed to attend and an order was made for his arrest, which was unsuccessfully contested by Mr Oakes. There were further proceedings in September 1995 by Mr Oakes against the trustee in bankruptcy, Mr Simms, and also against the trustee's solicitors, Edge & Ellison, in particular Mr Charles Derby. In March 1997 the actions were dismissed, Mr Oakes having produced no evidence. He then proceeded, in November 1997, to issue another writ for the same cause of action against Edge & Ellison. That was later dismissed by Mr Justice Rimer. There was also litigation involving Mr Colocotronis, in which Mr Oakes alleged he had an agreement with him under which he was to receive a third share of the proceeds settlement of a claim involving a company called Catu Containers SA. According to Mr Oakes the claims were settled for $3 million, in which he claimed a share of $1 million. As well as claims against Mr Colocotronis, there were also claims against firms of solicitors: Stephen Mitchell & Co and Kingsley Napley, who were alleged by Mr Oakes to have been involved in the frauds of Mr Colocotronis.

8. According to the judgment of Mr Justice Klevan, there were no less than 12 unsuccessful attempts to bring such claims. The claims involved allegations that the firms of solicitors had been concerned in the removal of assets from the jurisdiction in breach of the freezing order. It was in respect of the order for costs in those proceedings that Kingsley Napley sought to bankrupt Mr Oakes. The costs were taxed at £8,076 and a statutory demand was served on Mr Oakes in March 1998. He made an unsuccessful application to have the demand set aside. In retaliation, Mr Oakes served a statutory demand on a member of Kingsley Napley in the sum of £2.5 million. Mr Oakes continued to resist the bankruptcy proceedings, alleging fraud against Kingsley Napley. The bankruptcy order was in due course made against him on 1st July 1998. He has made unsuccessful attempts to appeal against that.

9. Against that background, which I have taken from the judgment of Mr Justice Klevan, I should refer to the provisions of Section 42 of the Supreme Court Act 1981 under which the application was made for a civil proceedings order. Section 42 provides:

> "1. If, on an application made by the Attorney General under this section, the High Court is satisfied that any person has habitually and persistently and without any reasonable ground -
>
> > (a) instituted vexatious civil proceedings. whether in the High Court or any inferior court, and whether against the same person or against different persons; or
> >
> > (b) made vexatious applications in any civil proceedings, whether in the

High Court or any inferior court, and whether instituted by him or another;

.....

the court may, after hearing that person or giving him an opportunity of being heard, make a civil proceedings order, a criminal proceedings order or an all proceedings order."

10. We are only concerned in this case with a civil proceedings order defined in Section 42 (1A) as follows:

"`civil proceedings order' means an order that -

(a) no civil proceedings shall without the leave of the High Court be instituted in any court by the person against whom the order is made;

(b) any civil proceeding instituted by him in any court before the making of the order shall not be continued by him without the leave of the High Court; and

(c) no application (other than one for leave under this section) shall be made by him, in any civil proceedings instituted in any court by any person, without the leave of the High Court ....."

11. Sub-section (2) provides -

"An order under sub-section (1) may provide that it is to cease to have effect at the end of a specified period but shall otherwise remain in force indefinitely."

12. I should also read sub-section (3) which provides:

"Leave for the institution or continuance of, or for the making of an application in, any Civil proceedings by a person who is the subject of an order for the time being in force under sub-section (1) shall not be given unless the High Court is satisfied that the proceedings or application are not an abuse of the process of the court in question and that there are reasonable grounds for the proceedings or application."

13. Those provisions were applied by the Divisional Court to the evidence put before them on behalf of the Attorney General and by Mr Oakes, who appeared in person.

14. The Divisional Court went on to consider four categories of case mentioned in outline in the summary: first, fraudulent mortgages, secondly, the bankruptcy of Mr Oakes, thirdly, Mr Colocotronis' business transactions and, fourthly, the statutory demand. The details under those various headings are set out in the judgment of Mr Justice Klevan. In the light of the more restrictive grounds on which the application for permission is sought now, it is unnecessary to repeat those details.

15. I summarise the conclusions of the Divisional Court reached in applying Section 42 to the evidence. First, no good cause or reasonable grounds had been shown by Mr Oakes for bringing these many actions which he had lost in each and every case. Secondly, no case was made out by him that

there had been fraud or dishonesty. Thirdly, he had not shown that there had been any bias by any court before whom these various proceedings had come. In fact, the court went out of its way to say that the courts had dealt with the matters thoroughly, patiently and in a way that was helpful to him. Fourthly, the court concluded that Mr Oakes persisted in litigation with no merit and refused to acknowledge that decisions had gone against him. He had attempted to re-litigate facts that had already been decided. Fifthly, he was not abiding by rulings of the court. Sixthly, his activities had created anxiety and expense for his opponents in litigation and they had suffered detriment. Seventh, the litigation activities of Mr Oakes reviewed in the evidence were, the court concluded, habitual and persistent.

16. Mr Ashton has refined the grounds on which permission to appeal is sought. First, a criticism is made as to the indefinite duration of the order. It is argued that the Divisional Court failed to consider whether it should make a specified period order instead of an indefinite order. Secondly, the form of the order has been criticised for extending beyond Mr Oakes personally to Townsend Investments Incorporated. Thirdly, a point is taken - faintly, I think - that the proceedings were in some way irregular because of the alleged lack of personal authorisation of the application by the Attorney General.

17. Mr Ashton submits that these three points constitute proper grounds which have a reasonable prospect of success and this court should, accordingly, grant permission. I now deal with each point in turn.

18. First, the specified period point. This is dealt with in Advice No 2 prepared by Mr Ashton under this heading -

> "No consideration was given as to whether the CPO [Civil Proceedings Order] should be for a specified period."

19. Mr Ashton set out the arguments for contending that this ground had a real prospect of success. He referred to the draconian nature of an order under Section 42 and drew specific attention to Section 42 (2) which provides that the order is to cease to have effect at the end of a specified period but shall otherwise remain in force indefinitely. He pointed to what he said was a conflict of authority on whether orders made under Section 42 are capable of being discharged or varied when there is a change of circumstances. He referred to the judgment of Sir John Donaldson MR in Rohrberg v Charkin [1985] TLR, 30th January 1985, and compared that to the more recent decision of the Court of Appeal in Attorney General v Covey TLR, 2nd March 2001, where the Lord Chief Justice is reported as saying the court always had a jurisdiction to vary civil proceedings orders in the light of entirely new circumstances. He referred helpfully to a passage in the judgment of Lord Justice Brooke in Attorney General v Price (19th March 1997, Crown Office List transcript) on the specific question as to the duration of an order under Section 42. Lord Justice Brooke said this:

> "The power of the court to make an order limited in time was first introduced in 1981, and we were told by Mr Jay that until now it has never been exercised. He expressed concern that if a limited order was made a vexatious litigant might seek to revive old causes of grievance by assertions that his or [her] cause of action had been concealed by equitable fraud so as to prevent time running under the Limitation Act.
>
> It appears to us that this in itself is no good reason for not making a time-limited order if we considered that the justice of the case demanded it. If litigation we

> regard as vexatious was revived after a time-limited order expired, the Attorney General could always come back to this court for appropriate relief ..... "

20. Lord Justice Brooke referred to the facts of the case of Mr Price and gave reasons for making an order against him for a specified period of 15 years.

21. Mr Ashton submitted that in this case it did not appear from the judgment of the Divisional Court that it had even considered exercising the power that it had under Section 42 (2) to specify a period. He said it was incumbent on them to do so, particularly as a civil proceedings order affects a fundamental and constitutional right of access to the courts. He submits that when the facts of this case are examined this would be an appropriate case for a specified period order rather than an indefinite one. He says that Mr Oakes has learned some lessons from this litigation, that some of the claims he was pursuing in the litigation were genuine and that there were grounds for making criticisms of some of the people that Mr Oakes was seeking to sue, in particular the solicitor acting for the trustee in bankruptcy.

22. He submitted also, though he did not press the point at this hearing, that a life ban on Mr Oakes in the form ordered by the Divisional Court would be incompatible with Article 3 of the European Convention on Human Rights.

23. I have considered these arguments. The conclusion I havereached is that this point has no real prospect of success. It is not clear from reading the judgments that this point was taken below. I bear in mind that in the hearing below Mr Oakes acted in person and may not have been alive to the point. Even if it had been raised, I can see nothing in the facts of this case to indicate that the Divisional Court would have done other than to make what is undoubtedly the usual order, namely the indefinite order, leaving it open to Mr Oakes to apply to the court at any later stage when he wished to have leave to bring proceedings.

24. I would also refer to the terms in which the then Lord Chief Justice, Lord Bingham, gave a judgment concurring with that of Mr Justice Klevan. I refer to paragraphs 42 and 43 of the transcript. Lord Bingham said at paragraph 42:

> "The court is mindful that any step which restricts an ordinary individual's right of access to the court is a serious step not to be taken lightly. The court is also, however, mindful of the harassment to which others are exposed if they are sued time after time, being put to the burden and expense of dismissing the same or similar claims, compensated only by orders for costs which are not in practice enforceable. A balance has to be struck between a prima facie right which any person has to litigate and the reasonable protection of those who are repeatedly subject to abusive claims. That is the function of Section 42 of the Supreme Court Act 1981, and I am satisfied both that the conditions for making a civil proceedings order under the section are satisfied and that it is appropriate to make an order."

25. It is then important to note the terms in which the Lord Chief Justice proceeded in paragraph 43:

> "Under sub-section (3) of that section leave for the institution or continuance of, or for the making of an application in, any civil proceedings by a person who is the subject of an existing civil proceedings order is not to be given unless the High Court is satisfied because the proceedings or application are not an abuse of the process of the court in question and that there are reasonable grounds for the

> proceedings or application. Mr Oakes objects to an order because he says that in practice leave under sub-section (3) is never given. It may very well be that leave is very rarely given, but if leave is refused it is because the High Court is not satisfied that the proceedings or application in question are not an abuse of the process of the court or that there are reasonable grounds for the proceedings or application. That is not a high threshold to cross. If Mr Oakes can show an arguable and apparently bona fide claim which has not already been the subject directly or indirectly of previous proceedings before the court, there is no reason why he should not obtain leave. As it is I am satisfied that it is right to make the order sought."[My emphasis]

26. The order sought by the Attorney General is the order in the normal indefinite form. It is clear, particularly from those two paragraphs of the judgment of the Lord Chief Justice, that the court had well in mind the implications of the terms of the order which was made and of the circumstances in which Mr Oakes would be able to litigate in the future with the appropriate leave of the court.

27. In my view the wording of Section 42 (2) indicates that the normal order will be an indefinite one. It provides that there is a discretion in the court to direct that an order is to cease to have effect at the end of a specified period, but otherwise the order remains in force indefinitely. That suggets that, unless circumstances persuade the court to exercise the discretion referred to in the opening words of sub-section (2), the normal order will be the one that was made in this case.

28. For those reasons I conclude that there was no error in the decision of the Divisional Court in making the usual indefinite order. There is no real prospect of Mr Oakes being able to satisfy the Court of Appeal that, even if there had been an express discussion of this point in the court below, it would have resulted in a different order.

29. Mr Ashton's second point related to the part of the order which makes express reference to Townsend Investments Incorporated. In order to understand how Townsend Investments Incorporated came to be expressly mentioned in the order, it is necessary to refer to a brief discussion which took place after judgment was given. That discussion took place between Mr Oakes and Lord Bingham. Mr Oakes said, and I quote from page 44 of the transcript:

> "For clarification - this is not a challenge to the order; I am long enough in the tooth to know the facts of life. But there is just one qualification. I think both of your Lordships spoke about vexatious proceedings. But there was some debate yesterday from Mr Carr [counsel for the Attorney General] about whether that should or should not include Townsend Investments Inc, Liberia?
>
> THE LORD CHIEF JUSTICE: The order, Mr Oakes, covers that.
>
> [MR OAKES]: You are in your order including Townsend Investments Inc?
>
> THE LORD CHIEF JUSTICE: Yes, we are. `By his servants or agents, including but not limited to Townsend Investments Incorporated.'"

30. Mr Ashton submitted that the company, Townsend Investments Incorporated, should never have been included in the order because there was no evidence adduced by the Attorney General to justify the lifting of or the piercing of the corporate veil.

31. In my judgment, this criticism is misconceived. It rests on a misunderstanding as to the scope of the order. I have already quoted from the terms of the amended order. It is not an order prohibiting Townsend Investments Incorporated from instituting civil proceedings. It is an order which prohibits Mr Oakes from instituting civil proceedings, and other matters set out in the order, whether directly or indirectly or by his servants or agents. Townsend Investments Incorporated are only included in the order as a named, but not necessarily the only, servant or agent who might be acting on behalf of Mr Oakes in relation to the institution of civil proceedings. The order, therefore, in my view, has a more limited effect than Mr Ashton thought it did. If it was confined to Townsend Investments Inc acting as the servant or agent of Mr Oakes then the question of piercing or lifting the corporate veil does not arise.

32. The third and final ground on which Mr Ashton sought to persuade this court to grant permission was that there had in this case been an apparent disregard of guidelines relating to the need for proceedings of this kind to be authorised by the Attorney General. This point is dealt with in paragraph 11 of Mr Ashton's advice. It is under the heading -

> "There was no proper evidence that the Attorney General authorised the section 42 application."

33. Mr Ashton submitted that it was Mr Oakes' case that the Attorney General had not personally authorised the application against him. There were two cases, both unreported, which laid down what Mr Ashton described as "guidelines" for the way in which the Attorney General should deal with Section 42 applications. He quoted some comments of Lord Justice Pill in Attorney General v Haywood, 10th November 1995, Supreme Court Library transcript:

> "However, in any future applications under Section 42 care should, in my view, be taken that appropriate information is to be provided in the affidavit in support of the application. An application under Section 42 could have serious consequences and the Attorney General's involvement, acquired by statute, should be demonstrated plainly in the evidence submitted to the court with the application."

34. Lord Justice Pill made similar comments in Attorney General v Williams, 22nd April 1996, Crown Office List transcript, where he said at page 2:

> "There is evidence by way of affidavit before the court but a law officer has personally considered the papers in this case and authorised the making of the application. Bearing in mind the fundamental right under consideration, the right to bring proceedings before the courts, it is, in my view, appropriate that personal consideration is given to any proposed application by a law officer and that evidence of such consideration appears in the material before the court."

35. Mr Ashton submitted that in this case neither the Attorney General nor the Solicitor General had complied with these guidelines. He also referred to the fact that a copy of his advice had been sent to the Treasury Solicitor, who acts for the Attorney General and does not appear on the hearing today. Mr Ashton referred to a reply sent on behalf of the Treasury Solicitor on 12th July 2001 acknowledging receipt of the letter and saying:

> "I have read the advices of David Ashen of Counsel in respect of both Mr and Mrs Oakes. Advice No.2 deals with a proposed appeal by your Client Mr Oakes. I do not have any comments on the advice and in particular on paragraph 11 of Advice No.

2."

36. So, says Mr Ashton, his view that there has been non-compliance with the law officer's guidelines has been drawn to the attention of the Treasury Solicitor and there has been no disagreement expressed with that advice.

37. By the time Mr Ashton had finished making his submission I think I can fairly say it was only faintly made. In his advice he had accepted that it was difficult to challenge the validity of the Section 42 application in the light of a certificate dated 29th October 1998 which was exhibited to the affidavit made on behalf of the Attorney General by Mr Lutterodt. The certificate said:

> "I Ross Cranston QC authorise the making of an application for a civil proceedings order against Arthur Oak [misspelt Mr Oakes' name] under Section 42 of the Supreme Court Act 1981."

38. Mr Ross Cranston was at that time the Solicitor General.

39. In my view, that is clear and satisfactory evidence that these proceedings were authorised by the law officer. The fact that they are stated to be authorised, in my view, necessarily implies that they have been considered. I fail to see how an act can be authorised if the person authorising it or stating they have authorised it had no sufficient knowledge of what it is they are authorising. There has therefore been proper consideration by the Solicitor General. I see no reason to doubt that the Solicitor General was acting in place of the Attorney General within the scope of the authority that he has, as his deputy, under Section 1 of the Law Officers' Act 1944. In those circumstances I have reached the conclusion that that ground of appeal has no prospect of success. I would refuse permission to appeal on that ground. I am satisfied that none of the three grounds constitute a reason for granting permission to appeal.

40. I should mention by way of conclusion that there are a number of miscellaneous matters dealt with helpfully in Mr Ashton's advice on which no order is sought from this court. I will just refer to them comprehensively as the attempt which Mr Oakes has made to "re-appeal" orders which, in my view, Mr Ashton has rightly advised would not be entertained by the court.

41. Sir Martin Nourse pointed out during the hearing - and this is absolutely clear from the legislation, that - an appeal against a refusal of permission to appeal is not open. The refusal of permission to appeal given in open court is unappealable.

42. Likewise, Mr Oakes had raised the question of obtaining subpoenas to compel the production of documents and persons to give evidence in this court. I would agree with Mr Ashton that on the material there is no prospect of such orders being obtained. He also rightly rejects the possibility of a review under Section 375 of the Insolvency Act, there being no relevant change of circumstances in this case.

43. Finally, he refers to other proceedings concerning a Norwich Union policy. I say no more about that since there is not before the court today either on appeal or by way of an application.

44. I should mention one other matter. Since this matter was adjourned from 21st May Mr Oakes has bombarded the court with faxes concerning his case. Sometimes they are addressed to the court, sometimes they are copied to the court but addressed to others such as the Attorney General, Master of the Rolls or the Treasury Solicitor. In my judgment, Mr Ashton rightly said at the outset of this hearing that all these documents should be ignored for the purposes of deciding today's

applications. Mr Ashton addressed the court, referring only to his advice without reference to these documents. In future, if Mr Oakes wishes to communicate with the court he should do so through his solicitors and counsel or, if he has no solicitors and counsel acting for him, communication should be with the Civil Appeals Office and not with individual Lords Justices. I say nothing about the allegations made in the documents sent by Mr Oakes to the court.

45. In conclusion, the result therefore is that I would refuse permission to appeal from the order of 15th February 2000, as amended, because it has no real prospects of success. If I had been satisfied that it had real prospects of success I would have regarded this as a suitable case in which to extend time accordingly.

46. SIR MARTIN NOURSE: On each of these three grounds raised by Mr Ashton I agree with the reasoning and conclusion of my Lord, and do not wish to add anything of my own. I, too, would refuse permission to appeal against the order of the Divisional Court.

Order: Application refused